NORTH CAROLINA COURT OF APPEALS REPORTS

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[1]Appointed Chief Judge 2 March 1981 to succeed Ralph Davis who retired 27 February 1981.
[2]Appointed 24 March 1981.
[3]Appointed 29 May 1981 to replace Bill J. Martin.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

PAULINE C. HANSEL, EMPLOYEE-PLAINTIFF v. SHERMAN TEXTILES, EMPLOYER; TRAVELERS INSURANCE COMPANY, CARRIER-DEFENDANTS

No. 8010IC207

(Filed 7 October 1980)

Master and Servant § 68– worker's compensation – byssinosis caused by employment – insufficient evidence

The evidence was insufficient to support a determination by the Industrial Commission that plaintiff contracted byssinosis as a result of her exposure to cotton dust in her employment as a weaver with defendant where plaintiff's medical expert testified that he was unable to make a definitive diagnosis of byssinosis because he had no information about the extent of plaintiff's exposure to cotton dust and because plaintiff suffered from asthma and chronic bronchitis, and where there was no finding with respect to the amount of cotton dust ordinarily present in the area where plaintiff worked.

Judge WELLS dissenting.

APPEAL by defendants from Opinion and Award of the North Carolina Industrial Commission filed 17 December 1979. Heard in the Court of Appeals 28 August 1980.

Plaintiff seeks recovery on the grounds that she contracted byssinosis as a result of exposure to cotton dust in the course of her employment as a textile worker in defendant's plant. At the hearing before the deputy commissioner, the plaintiff's evidence consisted of her own testimony, the testimony of Dr. T. Reginald Harris, a pulmonary specialist who had examined plaintiff, and a medical report made by Dr. Harris following his examination of plaintiff.

Plaintiff is 51 years old and has worked some 31 years in various textile plants in the Gastonia-Bessemer City area. Most of her work assignments have been in the weave room[1] area of the plants in which she has been employed. Plaintiff has a history of respiratory problems which dates from her early childhood. At the age of nine years, she suffered from an inability to breathe properly through her nose while lying in a prone position. When she first started to work in the textile mills, she complained of a dry, hacking cough which bothered her both at home and at work, but was more severe while at work. In 1948, plaintiff was advised by her doctor that she had chronic bronchitis. In 1964 and again in 1974, plaintiff had surgery performed on her vocal cords. Plaintiff began her employment with defendant in 1967. About 1970, plaintiff was advised by a doctor that she had asthma and that she had been suffering from the condition for some period of time theretofore. Plaintiff has smoked cigarettes since age 16 and for the last 25 years, has averaged a pack a day. Sometime during 1971, plaintiff developed a mucous producing cough which was accompanied by tightness in the chest and swelling of the throat. These symptoms became more severe when the plaintiff returned to work at the plant following a weekend or vacation absence. On eight different occasions, these symptoms culminated in blackout spells. In 1975, plaintiff learned that she had emphysema and signs of byssinosis. In 1977, she was hospitalized for three weeks in Black Mountain and was told that she suffered from chronic obstructive lung disease. Plaintiff was advised that she could continue to work only if she did so in a dust-free environment. Upon her return to work, plaintiff was reassigned to the cloth-inspection room of defendant's plant. Her symptoms did not abate, however, and she terminated her employment on 5 May 1977.

On 10 August 1978, plaintiff was examined by Dr. Harris who testified as a medical expert. Dr. Harris noted that there exist three distinct syndromes which probably contribute to the plaintiff's current impairment. These he identified as asthma,

[1]The weave room is that area of a textile plant where the processed yarn is woven into fabric. Before the material reaches this phase of processing, it has been treated with water and a special sizing formula to cut down on flying lint and to make it easier to handle during the weaving process. The weave room is the final phase of processing performed at defendant's textile plant.

chronic bronchitis, and possibly byssinosis. He went on to state, however, that he was unable to make a definitive diagnosis of byssinosis in this case. Here, he noted two distinct reasons as the source of his difficulty.

First, the preexisting chronic bronchitis and asthmatic conditions make a byssinosis diagnosis more difficult because of the tendency of the three syndromes to manifest identical symptoms. In this regard, Dr. Harris noted his inability "to separate out any specific symptoms related to byssinosis that this lady has that cannot be explained by the other two conditions that are present."

The second factor which makes a conclusive diagnosis more difficult is the absence of sufficiently specific information about the density of cotton dust in plaintiff's work environment. Dr. Harris testified that ordinarily the weave room in a textile plant is an area of minimal cotton-dust exposure, and that he had no information as to what plaintiff's history of cotton-dust exposure had been. He noted further that such information "is one factor that would tend to add weight or less weight to consider the diagnosis" and that the less the amount of cotton dust in plaintiff's work environment, the greater the improbability that plaintiff's current impairment is a result of byssinosis.

Defendant's evidence consisted of the testimony of William Michael Jackson, the plant manager at the facility where plaintiff worked. He testified, in pertinent part, that most of the material handled by Sherman Textiles is sixty percent cotton and forty percent rayon, that the weave room where plaintiff worked was ventilated by seven, five-foot by five-foot fans, and that while the operations conducted in the weave room are productive of some dust, the amount of dust produced is very small, particularly in comparison to other plant operations.

Deputy Commissioner Denson concluded that plaintiff had contracted byssinosis as a result of her exposure to cotton dust in her employment with defendant and that plaintiff was due compensation for permanent partial disability. On appeal, the full Commission, with one member dissenting, affirmed and adopted the Opinion and Award of the deputy commissioner. From the adverse ruling of the full Commission, defendant appealed.

Frederick R. Stann, for plaintiff appellee.

Hollowell, Stott & Hollowell, by Grady B. Stott, for defendant appellants.

ERWIN, Judge.

Defendants raise assignments of error to the findings of fact by the full Commission. For the reasons which follow, we conclude that the Commission's findings are not supported by sufficient competent evidence to support the award and, therefore, vacate the award of the full Commission.

For purposes of our review, the pertinent facts as found by the deputy commissioner and adopted by the Commission follow:

"FINDINGS OF FACT

* * *

In 1967 plaintiff began working for defendant-employer as a weaver. Except for a six month's absence in 1971, plaintiff worked continuously until May 5, 1977. The air was very dusty from the cotton that was processed.

Plaintiff in about 1972, began to notice that when she began the work week on Sunday night, she would have chest tightness and some coughing after being there two or three hours. In about 1974 or 1975, plaintiff felt that way all the time at work with no particular time being worse.

EXCEPTION NO. 1

3. Because of shortness of breath and other respiratory problems and some blackout spells, plaintiff moved to the cloth room during the last six months of her employment by defendant. This took her out of dust but her respiratory problems had reached the irreversible stage, and she could hardly exert herself. She quit on May 5, 1977 because of respiratory problems.

EXCEPTION NO. 2

4. Plaintiff has both asthma and byssinosis which are causing her respiratory impairment. Her impairment is severe and irreversible.

EXCEPTION NO. 3

5. Plaintiff has byssinosis as a result of her exposure to cotton dust in her employment with defendant-employer and this is partly responsible for her disability.

EXCEPTION NO. 4

6. Plaintiff has not worked since May 5, 1977."

On the basis of the foregoing findings of fact, the deputy commissioner made the following conclusions of law which were adopted by the Commission:

"1. Plaintiff has contracted the disease byssinosis as a result of exposure to cotton dust in her employment with defendant-employer. This disease is compensable under the provisions of G.S. 97-53 (13).

EXCEPTION NO. 5

2. Defendants owe plaintiff compensation for permanent, partial disability from May 5, 1977 for her period of disability not to exceed 300 weeks. G.S. 97-30.

EXCEPTION NO. 6."

It is well settled in this jurisdiction that the findings of fact of the Industrial Commission are conclusive on appeal when they are supported by any competent evidence, even though there is evidence that would support a contrary finding. *Willis v. Drapery Plant*, 29 N.C. App. 386, 224 S.E. 2d 287 (1976); *Russell v. Yarns, Inc.*, 18 N.C. App. 249, 196 S.E. 2d 571 (1973); 8 Strong's N.C. Index 3d, Master and Servant, § 96. Therefore, while a review in this Court of actions taken by the full Commission does not contemplate a retrial of the facts of the case here, we do have the duty of reviewing questions of law and of legal inference as decided by the full Commission. For this purpose, questions of law include: "(1) Whether or not there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision." *Inscoe v. Industries, Inc.*, 292 N.C. 211, 216, 232 S.E. 2d 449, 452 (1977).

As noted above, the deputy commissioner concluded, *inter alia*, the "[p]laintiff has contracted the disease byssinosis as a result of exposure to cotton dust in her employment with defend-

ant-employer" and that "[t]his disease is compensable under the provisions of G.S. 97-53 (13)." The statutory scheme for occupational diseases set forth in G.S. 97-53 provides in part as follows:

> "§ 97-53. *Occupational diseases enumerated; when due to exposure to chemicals.* — The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this Article:
>
> * * *
>
> (13) Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment."

The clear import of this language is that in order for an illness to be compensable under the Act, it must be fairly traced to the employment as a contributing proximate cause. That there must be established a causal relation between the disabling condition and the performance of some duty of the employment is well settled in the law of this State. In *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979), our Supreme Court expressly held that proof of a causal connection between the disease and the employee's occupation is an essential element in proving the existence of a compensable "occupational disease" within the meaning of G.S. 97-53. There, the Court noted that in addition to the statutory limitations that the disease be "characteristic" of a trade or occupation and that it not be an ordinary disease of life to which the general public is equally exposed outside of the employment, "[t]he final requirement in establishing a compensable claim under subsection (13) is proof of causation. It is this limitation which protects our Workmen's Compensation Act from being converted into a general health and insurance benefit act." 297 N.C. at 475, 256 S.E. 2d at 200. As a guide in determining what evidence would suffice for purposes of proving causation, the Court went on to state as follows:

> "Among the circumstances which may be considered are the following: (1) *the extent of exposure to the disease or disease-causing agents during employment,* (2) the extent of exposure outside employment, and (3) absence of the disease prior to the work-related exposure as shown by the employee's medical history." (Emphasis added.)

297 N.C. at 476, 256 S.E. 2d at 200.

It is apparent upon review of the evidence in the case *sub judice* that the Commission's conclusion that plaintiff had contracted byssinosis during her employment with defendant is based in large part upon the expert medical testimony of Dr. Harris. We are of the view that such evidence, when considered in connection with the other evidence adduced at the hearing, fails to establish the requisite causal relation between plaintiff's disability and her employment and does not support the Commission's findings.

A diagnosis of byssinosis represents a medical conclusion that one's respiratory problems stem from prolonged exposure to high levels of cotton dust. For purposes of our review, the testimony of Dr. Harris is particularly noteworthy because of the conspicuous absence of any such conclusion. Indeed, the doctor admitted that he was unable to repose much confidence in a diagnosis of byssinosis in Mrs. Hansel's case, because he had no information about the extent of her exposure to cotton dust and because of the presence of the asthma and chronic bronchitis conditions, which could account for the symptoms which plaintiff experienced. In response to a hypothetical question propounded by plaintiff as to whether her condition could or might be byssinosis, Dr. Harris gave the following response:

> "Cotton, you said. If she did not work in cotton, I would not have any diagnosis of byssinosis. In her particular case, I don't really have any reliable information as to what the particular fiber was and the extent of exposure to various fibers and exposure, and to what was in the weave room. It is more difficult to answer that question."

When plaintiff repeated her hypothetical question asking the witness to assume the additional fact that plaintiff had been exposed to a significant amount of cotton dust, the witness responded, "There is a possibility that she has byssinosis and

she certainly could have." Dr. Harris went on to explain, however:

> "I have difficulty in this patient for several reasons, to answer so specific a question. One of the difficulties, I'm not really aware of how much cotton dust exposure this lady was involved. Your hypothetical question assumed considerable amounts of cotton dust exposure . . . If there was a lot of other fibers in the cotton in that department, there would be less exposure."

On cross-examination, Dr. Harris noted: "Because asthmatics react to all manners of dust. I said the symptoms of coughing, tightness of the chest could result or could be caused by the asthmatic condition rather than the breathing of dust." The above excerpts are representative of the tenor of the entire testimony offered by Dr. Harris.

Our review of the record reveals that the absence of specific findings with respect to the amount of cotton dust ordinarily present in the area where plaintiff worked leads us to conclude that the Commission's finding that the plaintiff contracted byssinosis as a result of her exposure to cotton dust in her employment with defendant is unsupported by sufficient competent evidence.

The award of the full Commission is

Vacated.

Judge HEDRICK concurs.

Judge WELLS dissents.

Judge WELLS dissenting:

I must respectfully dissent from the majority opinion because I believe there was sufficient competent evidence to support the findings of fact made by the Commission. I will briefly discuss the essential findings of fact and the evidence which I believe supports those findings.

The Commission found: "2. . . . In 1967 plaintiff began working for defendant-employer as a weaver. Except for six months absence in 1971, plaintiff worked continuously until May 5, 1977. The air was very dusty from the cotton that was processed . . . ."

To support this finding, we note the following portions of the evidence. Plaintiff testified in pertinent part as follows:

> I have been weaving for Sherman Textiles. They run cotton, rayon, polyester, acetate. The mill was dusty. They did not have a dust cleaning system. There was a good bit of dust, mostly small and fine dust, with hairlike particles in it . . . .
>
> . . . .
>
> . . . The weavers had to clean and recap, and Sherman, when I first went to work there, they had us clean the harness and recap every Friday night. At the time I was cleaning up, you took a piece of old cloth and wiped the cotton off. It was from ½ to 2 inches thick on the loom and you wiped it off and fanned it out and went to the next one. You could see the dust in the air . . . . If someone behind you were cleaning the loom and you fanned your cloth and they fanned theirs, there was a lot of cotton dust flying around. You could see across the room, but it was dusty.

In addition to plaintiff's testimony, there was evidence for defendant Sherman Textiles which tends to explain and clarify plaintiff's testimony in support of the foregoing finding of fact. William Michael Jackson, Sherman's plant manager, testified in pertinent part as follows:

> I don't think the weave room where Mrs. Hansel worked is as dusty as it has been described. We have 6 or 7 big exhaust fans, 5 feet by 5 feet. They exhaust the air and the humidity adds mist; it has water in it and sprays in the room over all the machines to help keep down the dust . . . .
>
> The filler material is rayon, 100% rayon. The other material is 60% cotton. If we have 60% cotton, I suppose there is some cotton dust in Sherman Textiles, and the process itself gives off dust . . . .
>
> In the type operation in the weave room at Sherman Textiles, there is always some lint, but not any compared to other textile operations . . . .

The Commission further found: "4. Plaintiff has both asthma and byssinosis which are causing her respiratory impairment . . . . 5. Plaintiff has byssinosis as a result of her

exposure to cotton dust in her employment with defendant-employer and this is partly responsible for her disability."

In support of the foregoing findings of fact, plaintiff testified generally as to her breathing problems and that she left her employment at Sherman Textiles because of her breathing problems. She did not have the problem before she went to work at Sherman Textiles.

In further support of the foregoing finding, Dr. Harris, plaintiff's medical witness offered, in pertinent part, testimony as follows:

> She has an illness. In general terms, I thought it fitted the pattern of chronic obstructive lung disease or airway disease .... She has three distinct syndromes that probably contributes to that impairment. These are asthma, byssinosis and chronic bronchitis ....
>
> ... She should not be in an environment where there is dust. If her job requires exposure to dust, she shouldn't do it ....
>
> . . . .
>
> ... There is a possibility that she has byssinosis and she certainly could have ....
>
> . . . .
>
> ... People who have byssinosis for many years, have a lung disease that is indistinguishable from chronic bronchitis.

Additionally, we find the following sequence of questions and answers in the testimony of Dr. Harris:

> A. If I can answer more than a yes or no. As best I can understand the question. There is a possibility that she has byssinosis and she certainly could have. I'd like to clarify a little in this particular situation.
>
> Q. Could I interrupt you just a minute. Can you answer as to could or might?
>
> . . . .
>
> A. The answer is yes, could or might.

Q. I'd like for you to assume the same facts, Doctor. Do you have an opinion satisfactory to yourself to a reasonable degree of medical certainty that the condition suffered by Pauline Hansel could or might by byssinosis?

. . . .

A. I can answer that. Yes.

Q. Yes, you have an opinion?

A. Yes.

. . . .

A. My answer is yes, it could or might be byssinosis.

In addition to Dr. Harris' testimony, his written medical report was introduced into evidence and is a part of the record. That report, in the section entitled *Comment*, contains the following pertinent statements:

> On the basis of the information available to me, this patient may well have three identifiable problems causing lung disease. She has a history compatible with and suggesting asthma. She is believed to have chronic bronchitis and to have byssinosis. The later [*sic*] diagnosis is made on the basis of chronic obstructive lung disease in a patient with a typical work history of byssinosis and presumably has had exposure to cotton textile dust over a long enough time to permit development of this syndrome . . . . It is not possible to quantitate the relative contribution of the various etiological factors in her present respiratory impairment. It is likely that all are involved to some extent. It is this examiners [*sic*] belief that the patient probably has asthma and that she does have chronic bronchitis as well as byssinosis.

Dr. Harris' medical report also contained the following entry:

> Diagnostic Conclusion:
>
> 1) Chronic obstruction [*sic*] air ways disease.
> Asthma, probable.
> Byssinosis syndrome.
> Chronic bronchitis.

The portions of Dr. Harris' testimony and medical report cited or quoted in this dissent are those which appear to be most favorable to plaintiff. It is clear, however, that Dr. Harris gave testimony, as pointed out by the majority, that he could not pinpoint the precise or exact cause of plaintiff's illness; or to characterize his testimony further, it was to the effect that while plaintiff's exposure to cotton dust could have contributed to her illness, he could not eliminate other possible contributing causes. Thus, we come to the basic question of whether an award may be affirmed where the medical testimony supports the probability of compensable disease but does not rule out other possible causes not related to any exposure associated with the employment. *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979) seems to answer that question in the affirmative. In *Booker*, the hypothetical questions as to causation put to the expert witness included a "could or might have" type of hypothesis and the responses of the medical witnesses were to that effect: possible, or probable, but not conclusive. Chief Justice Sharp, writing for a unanimous Court, stated: "In our opinion the hearing commissioner committed no error in allowing the expert witnesses to answer the causation questions with the degree of certainty the witness felt appropriate [citations omitted]." *Id.* at 480, 256 S.E. 2d at 203.

Lockwood v. McCaskill, 262 N.C. 663, 138 S.E. 2d 541 (1964) also supports our position. In *Lockwood*, Justice Moore discussed at length the quality of expert opinion testimony necessary to make out a *prima facie* case for resolution by the jury on the question of causation. We quote in pertinent part:

> With respect to hypothetical questions propounded to expert witnesses, the rule in North Carolina is that "If the opinion asked for is one relating to cause and effect, the witness should be asked whether in his opinion a particular event or condition *could* or *might* have produced the result in question, not whether it did produce such result." Stansbury: North Carolina Evidence (2d Ed.), § 137, p. 332. (Emphasis ours.)
>
> The "could" or "might" as used by Stansbury refers to probability and not mere possibility. It is contemplated that the answer of the expert will be based on scientific knowledge and professional experience. *Moore v. Accident*

Assurance Corporation, 173 N.C. 532, 92 S.E. 362; *Raulf v. Light Co.,* 176 N.C. 691, 97 S.E. 236. The expert witness draws no inferences from the testimony; he merely expresses his professional opinion upon an assumed finding of facts by the jury. *Godfrey v. Power Co.,* 190 N.C. 24, 128 S.E. 485. The expert may testify as to the causes capable of producing the result and whether or not the particular hypothesis was a capable cause. *Patrick v. Treadwell,* 222 N.C. 1, 21 S.E. 2d 818. A medical expert may base his opinion in part upon statements made to him by the patient in the course of professional examination and treatment and in part on the hypothetical facts. *Penland v. Coal Co.,* 246 N.C. 26, 97 S.E. 2d 432. The opinion is based on the reasonable probabilities known to the expert from scientific learning and experience. A result in a particular case may stem from a number of causes. The expert may express the opinion that a particular cause "could" or "might" have produced the result — indicating that the result is capable of proceeding from the particular cause as a scientific fact, *i.e.,* reasonable probability in the particular scientific field. If it is not reasonably probable, as a scientific fact, that a particular effect is capable of production by a given cause, and the witness so indicates, the evidence is not sufficient to establish *prima facie* the causal relation, and if the testimony is offered by the party having the burden of showing the causal relation, the testimony, upon objection, should not be admitted and, if admitted, should be stricken. The trial judge is not, of course, required to make subtle and refined distinctions and he has discretion in passing on the admissibility of expert testimony, and if in the exercise of his discretion it reasonably appears to him that the expert witness, in giving testimony supporting a particular causal relation, is addressing himself to reasonable probabilities according to scientific knowledge and experience, and the testimony *per se* does not show that the causal relation is merely speculative and mere possibility, the admission of the testimony will not be held erroneous.

Id. at 668-69, 138 S.E. 2d at 545-46. *See also, Lee v. Regan,* 47 N.C. App. 544, 267 S.E. 2d 909 (1980). Thus, it appears that while Dr. Harris' testimony and medical report contains contradiction and uncertainties and points out the possibility of other con-

tributing causes, when the evidence shows that it is probable that plaintiff has byssinosis, viewed in the light of the clear evidence of her exposure to cotton dust in her employment, the Commission was clearly justified in making its disputed findings of fact. The resolution of contradictions in the evidence is the function of the Commission, not ours. *Moore v. Stevens & Co.*, 47 N.C. App. 744, 269 S.E. 2d 159 (1980).

In my opinion, the order of the Commission must be affirmed.

STATE OF NORTH CAROLINA v. WAYNE HAYWOOD BROOKS

No. 8029SC67

(Filed 7 October 1980)

1. **Constitutional Law § 45– defendant appearing pro se – refusal to appoint standby counsel**

The trial court did not err in allowing the indigent defendant to represent himself and in refusing to appoint standby counsel for him, since defendant knowingly and intelligently waived his right to appointed counsel; his motion to represent himself was granted only after defendant had been informed of the nature of the charges against him and of his right to appointed counsel; and defendant had no right to standby counsel, and the court did not abuse its discretion in denying such counsel where defendant requested it, the motion was granted, defendant changed his mind and elected not to use standby counsel, defendant later requested such counsel again, and the court refused. Furthermore, defendant could not complain that his imperfect understanding of the rules of evidence resulted in his failure to get certain evidence in the record, since the evidence he wished to get in was either irrelevant and immaterial or repetitive, and, having chosen to represent himself, he could not complain of the quality of his own defense.

2. **Criminal Law § 161– defendant representing self – necessity for exceptions**

Failure of defendant, who represented himself, to note exceptions to rulings of the trial court constituted waiver of the right to assert the alleged errors on appeal. G.S. 15A-1446(b).

3. **Criminal Law § 128– motion for appropriate relief – failure to rule on as denial**

There was no merit to defendant's contention that the trial judge erred in failing to rule upon his motion for appropriate relief, since defendant did receive a ruling on his motion under G.S. 15A-1448(a)(4) which provides that, if no ruling has been made by the trial judge on a motion for appropriate relief within 10 days, the motion is deemed denied.

4. **Criminal Law § 169– failure of record to show excluded testimony**

Defendant failed to show prejudice in the exclusion of certain testimony where the record did not show what the witness would have testified.

5. **Criminal Law § 106.5– uncorroborated testimony of accomplice – sufficiency of evidence**

The uncorroborated testimony of an accomplice is sufficient to sustain a conviction.

6. **Criminal Law § 87.3– reading from police records – no prejudice**

There was no merit to defendant's assignment of error to the trial court's allowing a police dispatcher to read from the official police records concerning the sounding of a burglar alarm in a grocery store, since defendant did not dispute the fact that the store was broken into on the night in question; the testimony was not inconsistent with defendant's defense; and defendant failed even to cross-examine the witness regarding this testimony.

7. **Criminal Law § 67– voice identification of defendant – independent origin**

The trial court in an armed robbery case did not err in determining that the victim's voice identification of defendant was of independent origin and was admissible; moreover, any lack of certainty in the victim's testimony that defendant's voice was "very familiar to" that of the robber went to the credibility of the testimony and not to its admissibility.

8. **Constitutional Law § 50– Speedy Trial Act inapplicable – delay in retrial for defendant's benefit**

There was no merit to defendant's contention that the six month delay between issuance of the mandate from the Court of Appeals to retry defendant and the actual retrial was in excess of the 120 day limit imposed on the courts by the Speedy Trial Act, since that Act did not take effect until 1 October 1978 and therefore was not applicable to defendant's case; moreover, his Sixth Amendment right to a speedy trial was not violated, since the delay was for the purpose of allowing defendant to locate his alibi witness, and since defendant made no showing of prejudice by the delay in his retrial.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 23 May 1979 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals in Waynesville on 26 August 1980.

Defendant was charged in separate bills of indictment with armed robbery and with breaking and entering and larceny. He was convicted on all counts in a trial held in 1978, won a new trial in an appeal before this Court reported at 38 N.C. App. 445, 248 S.E. 2d 369 (1978), and was again convicted on retrial. He appeals from a consolidated judgment imposing a sentence of not less than nor more than thirty years, to begin at the expiration of sentences he is now serving for other offenses.

STATE'S EVIDENCE

The State's evidence tended to show that on 31 January 1977, Dean Burgess, owner and operator of Dean's Grocery in Spindale, closed his store about 8:00 p.m. and drove to his home several blocks away. At approximately 10:30 p.m. Burgess received a call from the police advising him that the burglar alarm in his store had been activated. Burgess drove to his store and entered through the front door, at which time a voice said, "God damn you, if you move I'll kill you." A large man wearing goggles and something covering his nose and mouth stuck a gun against Burgess's chest and forced him to lie down on the floor in the back of the store. For several minutes Burgess heard his assailant and another man talking. While Burgess was lying on the floor, the larger man, later identified as Marlon Edwards, took a billfold containing $1,200 from Burgess's pants pocket. Thereafter, the second person walked over to Edwards and told him to shoot Burgess and "let's get out of here." Edwards fired a shot which hit the floor next to Burgess's head, and then the two men fled.

Burgess never saw the face of either man. However, Burgess later identified Edwards by hearing and recognizing his voice and observing his build. After *voir dire* hearing in which the trial judge made findings of fact and conclusions of law, Burgess was allowed to testify that he could identify the defendant's voice as being "very much familiar to" the voice of Edwards' accomplice.

The State also presented the testimony of Rodney Wiggins, an accomplice in the breaking and entering and larceny of Dean's Grocery on 31 January. Wiggins stated that on the evening of 31 January 1977, he, the defendant, and Edwards drove to the grocery store. Wiggins stood watch outside the building while the defendant and Edwards broke into the store. When Wiggins heard a shot several minutes later, he ran away from the scene leaving the defendant and Edwards still in the store. Wiggins told the police about the defendant's involvement several days later, after he was arrested for operating a vehicle under the influence of drugs. Wiggins denied that he was a drug addict, although he admitted that he abused drugs at the time. Wiggins denied that his reason for giving his statement to the police implicating the defendant was that he had been offered a

deal. He pled guilty to charges of armed robbery and breaking and entering with the intent to commit larceny. At the close of State's evidence the defendant's motion to dismiss was denied.

DEFENDANT'S EVIDENCE

Defendant's brothers testified that prior to 1976 defendant spent twenty years in jail in North Carolina and Florida. After his parole he worked diligently in a print shop owned by his brothers. Defendant's parole officer testified that defendant was gainfully employed until his arrest. Both he and defendant's brothers and sister-in-law testified that the defendant had a good reputation in the community.

Deborah Mailman, an attorney, testified that she met the defendant in 1973 while he was in prison; that he became involved in projects for prisoners' rights; that he had a good reputation. Jean Edwards testified that in the past defendant had urged her husband, Marlon Edwards, to "go straight."

Defendant also presented evidence that on 30 January 1977, he spent the night with Ann McKeon at the Oakden Motel in Charlotte; and that on 31 January 1977, at about 7:00 p.m., the defendant checked into the Twins Motel in Gastonia; that the desk clerk observed defendant's car parked in front of his room until midnight; that she did not see the defendant leave his room between 9:00 p.m. and midnight; and that she saw the defendant on 1 February 1977 at 9:00 a.m. Finally, Clark Self testified for the defendant that Wiggins admitted to him that he had lied about the defendant's participation in the robbery to avoid a drug charge.

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

C. Frank Goldsmith, Jr., for the defendant appellant.

CLARK, Judge.

[1] The indigent defendant moved "to represent himself as a jailhouse lawyer." He was advised of his right to have counsel trained in the law to represent him but he filed a written waiver and insisted on proceeding *pro se*. He thereupon filed numerous, voluminous and repetitious pretrial motions, which account for about half of the 511-page record on appeal.

Defendant now assigns as error the trial court's allowing him to represent himself and refusing to appoint standby counsel for him. This assignment of error is without merit. Defendant waived his right to appointed counsel and the record makes it clear that the waiver was knowingly and intelligently made, and that it was granted only after defendant had been informed of the nature of the charges against him and of his right to appointed counsel. Defendant's decision may not have been wise, but it is clear that he had every right to represent himself. *Faretta v. California*, 422 U.S. 806, 45 L.Ed.2d 562, 95 S. Ct. 2525 (1975); *State v. Mems*, 281 N.C. 658, 190 S.E. 2d 164 (1972); N.C. Gen. Stat. 15A-1242. *See* Note, *Self-Representation in Criminal Trials — The Pro Se Defendant*, 9 Wake Forest L. Rev. 265 (1973).

The trial court, although not required to make any special effort to accommodate a defendant proceeding *pro se*, *State v. Lashley*, 21 N.C. App. 83, 203 S.E. 2d 71 (1974), showed unlimited patience with the defendant throughout the trial. On one occasion defendant requested standby counsel, and the judge agreed to grant the request, but defendant changed his mind and elected not to use standby counsel. When, a few pages further into the record the defendant again requested standby counsel, it is not surprising that the judge refused. If defendant was not confident of his ability to represent himself, he was entitled to counsel appointed for his defense; but he had no right to standby counsel. The appointment of standby counsel is in the sound discretion of the trial court. G.S. 15A-1243; *State v. Brincefield*, 43 N.C. App. 49, 258 S.E. 2d 81, *disc. rev. denied*, 298 N.C. 807, 262 S.E. 2d 2 (1979). We find no abuse of discretion in the case *sub judice*.

Defendant claims that his imperfect understanding of the rules of evidence resulted in his failure to get certain evidence in the record. We would note first that the evidence defendant wished to get in was either irrelevant and immaterial or repetitive. We must also point out that "[w]hatever else the defendant may raise on appeal, when he elects to represent himself he cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel." *State v. Brincefield*, 43 N.C. App. at 52, 258 S.E. 2d at 84. While we must concede that defendant in his representation of himself left much to be desired, the issue here is not whether defendant had

the skill and training to represent himself adequately but whether "'he knows what he is doing [when he chooses to represent himself] and his choice is made with his eyes open.' *Adams v. United States ex rel McCann*, 317 U.S. at 279, 87 L. Ed. 268, 63 S. Ct. 236, 143 A.L.R. 435." *Faretta v. California*, 422 U.S. at 835, 45 L. Ed. 2d at 582, 95 S. Ct. at 2541. In defendant's motion to proceed *pro se* he cites fifteen years as a jailhouse lawyer drafting legal papers and a previous successful *pro se* defense of a felony charge in Cleveland County Superior Court. There can be little doubt that the defendant had the utmost confidence in himself and made a conscious choice.

Ten of defendant's assignments of error relate to pretrial motions. All are overruled. Defendant made numerous novel motions, including a "Motion for Trial by Videotape"; a "Motion to Question Prospective Jurors Individually With the Simultaneous Use of Hypnosis, Polygraph, and Truth Serum"; a Motion for Attorney's Fees "for Self-Litigant in his Capacity as a Jailhouse Lawyer" (wherein defendant notes that the State ought to pay him $45,000 for his services to himself, although he will settle for $7,000); and a motion to declare North Carolina "Evidential Rules" unconstitutional.

[2] Though the trial court denied many of defendant's motions, the rulings are not issues on appeal because defendant failed to except to them. An attorney presumably would have known of the necessity to note an exception to the ruling in order to give the trial judge an opportunity to correct the alleged error. G.S. 15A-1446. Though defendant may have been ignorant of this need, his failure to do so constitutes a waiver of the right to assert the alleged error on appeal. G.S. 15A-1446(b).

[3] Defendant assigns as error the failure of the trial judge to rule upon his motion for appropriate relief. G.S. 15A-1448(a)(4) provides: "If there has been no ruling by the trial judge on a motion for appropriate relief within 10 days after motion for such relief has been made, the motion shall be deemed denied." Under this statute defendant did receive a ruling on his motion. We shall not review the trial judge's denial of the defendant's motion because any error could not possibly prejudice defendant since he is entitled to assert those same errors on this appeal. G.S. 15A-1422(e).

[4] Defendant makes several assignments of error to the trial court's sustaining the prosecutor's objections to certain of defendant's questions on both direct and cross examinations. We note that defendant failed to make an offer of proof, leaving the record void of any indication of what the witness would have answered, so that it is impossible for this Court to determine what evidence was kept out and thus whether the defendant was prejudiced by the court's sustaining of the objection. *See State v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342 (1955); 1 Stansbury's N.C. Evidence § 26 (Brandis rev. 1973). The defendant, thus, has not met his burden of showing that the alleged error was prejudicial. *State v. Robinson*, 280 N.C. 718, 187 S.E. 2d 20 (1972) (per curiam).

[5] Defendant seeks to challenge the long-standing rule in this jurisdiction that the uncorroborated testimony of an accomplice is sufficient to sustain a conviction. *State v. Carey*, 285 N.C. 497, 206 S.E. 2d 213 (1974); *State v. Haney*, 19 N.C. (2 Dev. & Bat.) 390 (1837). That this Court is not disposed to disturb that rule of evidence should be clear to defendant from our ruling against him in his appeal of a related case in which he assigned the same error. *State v. Brooks*, 38 N.C. App. 48, 247 S.E. 2d 38, *appeal dismissed*, 295 N.C. 735, 249 S.E. 2d 804 (1978). Not only would we uphold the rule, but we note also that, in this case, the accomplice's testimony was *not* the only testimony placing defendant at Dean's Grocery. Dean Burgess's testimony that defendant was one of the two men who broke into his store on 31 January 1977 served to corroborate the accomplice's testimony.

[6] Defendant assigns as error the trial court's allowing the police dispatcher to read from the official police records. The dispatcher's testimony was confined to when the alarm system went off in Dean's Grocery and to whom he sent to Dean's Grocery on the night of the robbery. The defendant does not dispute the fact that Dean's Grocery was robbed on the night in question, the testimony was not inconsistent with the defendant's defense, and the defendant failed even to cross-examine the witness regarding his testimony. We can see no possible prejudice arising from the admission of this evidence.

[7] Defendant contends that the identification of the defendant's voice by the witness Burgess was not based upon the witness's recollection of the night of the crime in question but

was based upon his recollection of having heard the defendant's voice when the defendant appeared without counsel involuntarily in Rutherford County Superior Court on a previous occasion to inquire about the appointment of counsel for his defense. The Supreme Court of North Carolina in *State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973) stated:

> "Unless barred by constitutional grounds identification by voice is admissible. *State v. Coleman*, 270 N.C. 357, 154 S.E. 2d 485; *State v. Hicks*, 233 N.C. 511, 64 S.E. 2d 871; 1 Stansbury's North Carolina Evidence (Brandis Revision) § 96 (1973). When identification testimony is offered and defendant objects and requests a *voir dire* hearing, the trial judge should hear evidence from both the State and the defendant, make findings of fact, and thereupon rule on the admissibility of the evidence. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174; *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844. If the trial judge's findings are supported by the evidence they are conclusive upon appellate courts. *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677; *State v. Harris*, 279 N.C. 177, 181 S.E. 2d 420."

Id., at 327, 200 S.E. 2d at 630.

The able trial judge in this case held a *voir dire* hearing, made findings of fact, and concluded that Burgess's voice identification was of independent origin and properly admissible. We have carefully examined the record and find ample evidence to support the judge's findings.

There remain the constitutional grounds alluded to in the above quote from *State v. Jackson, supra.* In that case our Supreme Court held that the requirements of due process in the case of voice identification were the same as for identification by sight, *i.e.*, that circumstances surrounding a pretrial confrontation not be "unnecessarily suggestive and conducive to irreparable mistaken identification." *Stovall v. Denno*, 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967 (1967). We note, however, that the issue of whether the pretrial confrontation at the preliminary hearing was unconstitutionally suggestive is not properly before this Court since we hold that the trial judge's conclusion that Burgess's in-court identification was based solely upon the events he heard and saw on the night of the crime was properly supported by the evidence. The identification was therefore not

susceptible to the taint of any possible constitutional impropriety in the pretrial confrontation. *Gilbert v. California*, 388 U.S. 263, 18 L. Ed. 2d 1178, 87 S. Ct. 1951 (1967). Moreover, both this Court and our Supreme Court have held that the viewing of a defendant at a preliminary hearing is not, of itself, sufficient to taint a witness's subsequent in-court identification absent other circumstances which are so unnecessarily suggestive and conducive to irreparable mistaken identification as to deprive defendant of due process. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Thomas*, 35 N.C. App. 198, 241 S.E. 2d 128 (1978).

One final comment upon Burgess's voice identification is in order. Burgess stated that defendant's voice was "very familiar to" that of the robber who had told Marlon Edwards to shoot him. From the context of this testimony and his explanation of the term, we believe Burgess used "familiar" for "similar" and that he was suggesting to the jury that defendant's voice was "very *similar* to" that of one of the robbers. Although he refused to identify the defendant positively, he was unshakable in his assessment of defendant's voice as being "very familiar to" the one he had heard at the robbery. We hold that any lack of certainty in defendant's identification went to the credibility of his testimony and not to its admissibility. *See State v. Hicks*, 233 N.C. 511, 518, 64 S.E. 2d 871, 876 (1951), citing Stansbury's N.C. Evidence § 96.

[8] Defendant assigns as error the denial of his speedy trial right. We note that there are two bases for defendant's claim that he was entitled to speedy trial. The first is statutory; the second, constitutional.

Defendant alleges that the six-month delay between issuance of the mandate from this Court to retry the defendant and the actual retrial was in excess of the 120-day limit imposed on the courts by the North Carolina Speedy Trial Act, G.S. 15A-701(al)(5). In relying upon the Speedy Trial Act, defendant overlooks the plain language of G.S. 15A-701(al) that its time limit does not apply to a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment, or is indicted before 1 October 1978. All the applicable operable events in this case occurred prior to that time; thus defendant may not rely upon the 120-day time limit of G.S. 15A-701(al)(5) which did not take effect until 1 October 1978.

Defendant does not address the issue of whether his Sixth Amendment right to a speedy trial was violated. We note that even had defendant properly brought that issue before us, under the test of *State v. Hill*, 287 N.C. 207, 214 S.E. 2d 67 (1975), we would find no violation. Not only does the delay appear from the record to be for the purpose of allowing defendant to locate his alibi witness, Tonya Huffman, but defendant makes no showing of prejudice and the record reveals none, due to the delay in his retrial.

We have carefully examined the oppressive record on appeal and considered all 53 assignments of error and find that the defendant had a fair trial free from prejudicial error.

No error.

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

IN THE MATTER OF: HOWARD LEWIS MONROE A/K/A MUHAMMED ABDUL

No. 8012DC236

(Filed 7 October 1980)

Insane Persons § 1.2– involuntary commitment – dangerous to self – dangerous to others

Neither the facts recorded by the trial court nor the record in an involuntary commitment proceeding supported the court's conclusion that respondent was "dangerous to himself" where the findings and record showed that respondent was irregular in his sleeping habits and was up from three to six times per night; respondent disregarded his nutritional needs by fasting for some periods and then eating a whole chicken or a whole loaf of bread; respondent ate about five pounds of sugar every two days, sometimes consuming five or six glasses of sweet water per day; and respondent often stood outside his home and made comments to persons passing by the home. However, the court's conclusion that respondent was "dangerous to others" was supported by findings that respondent had become uncontrollable at all times and frequently made threats to his aged and nervous mother that he would "get you all yet;" respondent was suspicious of his family and believed that his familly had sexually seduced him; respondent believed all his relatives were against him; and respondent was "ready to fight" if someone pointed out that he had done something out of order.

In re Monroe

APPEAL by respondent from *Bason, Judge.* Order entered 20 November 1979 in District Court, WAKE County. Heard in the Court of Appeals 11 September 1980.

This is a proceeding pursuant to G.S. Chapter 122, Art. 5A, for involuntary commitment of the respondent, Howard Lewis Monroe, to a mental health facility.

On 12 November 1979 Dennis E. Monroe, brother of respondent, petitioned for the involuntary commitment of respondent pursuant to N.C. Gen. Stat. § 122-58.3 *et seq.* He alleged respondent was a mentally ill person who was dangerous to himself or others.

The magistrate found reasonable grounds to believe that the facts alleged in the affidavit were true and ordered that respondent be taken into custody for examination by a qualified physician. Pursuant to this order, respondent was taken into custody on 13 November 1979 and on the same day was examined by a qualified physician who found respondent to be mentally ill or an inebriate and imminently dangerous to himself or others. Respondent was taken to Dorothea Dix Hospital in Raleigh for temporary custody, examination, and treatment pending a hearing in the district court.

The matter was heard at Dorothea Dix Hospital, Wake County, on 20 November 1979, respondent being present and being represented by counsel. At the hearing Patrick Monroe, another brother of respondent, testified that in his opinion respondent was dangerous to himself and to others. Patrick Monroe stated that respondent was "uncontrollable at all times." Respondent often disturbed people in the neighborhood by standing outside the house and making inappropriate comments such as telling them "to hold up their head." Respondent had refused to take medication prescribed for his mental illness. Furthermore, when respondent had taken the medication he was "under control of himself," but when he quit taking it respondent began to "go down" even though the family had encouraged him to continue taking the medication.

Mr. Monroe also testified to respondent's irregular sleeping habits. Respondent was getting up as many as six times during the night which disturbed respondent's elderly mother so she could not sleep. Respondent cooked food at night, often burning

it. In addition, respondent's eating habits were irregular. He "fasted" on some occasions and then would eat as much as a whole chicken or a whole loaf of bread. Respondent would eat five pounds of sugar every two days.

Finally Mr. Monroe related that respondent had made threats to other family members. He had heard respondent say to his mother, "I'm gonna get you all yet." Respondent made further threats to his mother like "Well, I'll get you yet." Respondent would do the opposite of anything his mother told him. Respondent became "upset" and "ready to fight" any time a family member mentioned to respondent that he had done something inappropriate. Respondent's condition had deteriorated gradually but the threats had been increasing over the last three to four weeks.

Petitioner's next witness was Dr. Kent Kalina, respondent's treating physician. Dr. Kalina testified that in his opinion respondent was suffering from a mental illness characterized by changes in attitude and in behavior. Another symptom was the fact that respondent was suspicious of his family and had related to Dr. Kalina that he believed his family had seduced him sexually. While in the hospital, respondent remained suspicious towards his relatives. Dr. Kalina had seen examples of behavior showing that respondent had not exercised proper self-control and judgment. Moreover, respondent was refusing any medication, even though respondent had responded to medication in the past.

Respondent testified in his own behalf as follows:

> My name is Muhammad Abdul. I have looked at the commitment papers in this case. I have seen that the name of the petitioner is Dennis Monroe. That person is my brother. That person is not here today. I live with my brother, Dennis Monroe and my mother. I have not lived with my brother Patrick Monroe. I never stayed there. I have lived with my mother a long time. It's been about five or six years.
>
> I usually do drink sugar with water, just like any drink really.
>
> As to what Mr. Patrick Monroe testified to about molesting the neighbors, I told him not to scare the neigh-

bors. He seemed to be in a rush to get to his car. That is the neighbor was in a rush to get to his car. I told him not to scare them.

As to what Mr. Patrick Monroe said about me cooking. He has never seen me cook. He has never been to the house and seen me walking the floor. He lives in a different house on Rufus Street.

At the conclusion of the hearing, the Court made the following findings of fact:

1. The Respondent has been hospitalized at Dorothea Dix Hospital two times since 1975 prior to his current admission.

2. At the time of his last discharge from the hospital the Respondent's physician prescribed medicine for him to take, and his brother purchased the medicine for him. The Respondent took the medicine for only three weeks. The Respondent then refused to take any more of his medicine and stated to his brother, "You might as well give me the money because I will not take that. I don't need it."

3. As long as Respondent was taking his medicine he was in control of himself; but, once he stopped taking his medicine he started going down.

4. He has become uncontrollable at times.

a. During the night he is irregular in his sleeping. He is up from three to six times a night.

b. At other times he is in his front yard or on his porch making all kinds of loud noises or calling inappropriately to anyone passing by and telling them to hold their head up or telling them how they should do.

c. He disturbs the neighborhood at any time.

d. He is frequently making threats to his aged and nervous mother, saying "Well, I'll get you yet." "I'm gonna get you all yet."

e. He gets upset if he is told he is doing something out of order. This makes him "ready to fight." His family must avoid these situations as much as they can.

f. Respondent will do the opposite of what he is asked to do.

5. Respondent disregards his nutritional needs by fasting for some periods and then eating a whole chicken or a whole loaf of bread.

Respondent eats about five pounds of sugar every two days. He will sometimes consume five or six glasses of sweet water.

6. Respondent often cooks late at night and burns the food.

7. On admission to the hospital Respondent was found to be extremely suspicious about his family.

8. Respondent has the paranoid and delusional belief that his family is sexually seducing him and he has accused them of that. He believes that all of his relatives are against him.

9. On a previous hospital admission, Respondent was noted to be lying in bed all day staring up at the ceiling. He wouldn't move. This same type of behavior has been exhibited on his present admission.

10. Respondent has refused medication on this admission.

From the foregoing findings the court concluded as a matter of law that respondent was mentally ill and dangerous to himself and to others and ordered that respondent be committed to Dorothea Dix Hospital for a period not to exceed ninety (90) days.

Respondent appealed to this Court from the foregoing order.

Attorney General Edmisten, by Associate Attorney Steven F. Bryant, for the State.

Dorothy E. Thompson, for the respondent.

MARTIN (Robert M.), Judge.

N.C. Gen. Stat. § 122-58.7(i) requires as a condition to a valid commitment order that the district court find two distinct facts

by clear, cogent, and convincing evidence: first, that the respondent is mentally ill or inebriate and second, that the respondent is dangerous to himself or others. Prior to 1 October 1979 the statute required a finding that respondent is *imminently* dangerous to himself or others.

It is for the trier of fact to determine whether evidence offered in a particular case is clear, cogent, and convincing. Our function on appeal is simply to determine whether there was any competent evidence to support the factual findings made. *In re Underwood,* 38 N.C. App. 344, 247 S.E. 2d 778 (1978).

Respondent concedes in his brief that there is sufficient evidence to support the court's finding on the issue of mental illness. He contends, however, that there is no competent evidence to support a finding or conclusion of dangerousness to self or to others, either in the facts recorded in the court's order or in the record.

The phrase "dangerous to himself" when used in Article 5A is defined in G.S. 122-58.2(1) as follows:

a. "Dangerous to himself" shall mean that within the recent past:

1. The person has acted in such manner as to evidence:

I. That he would be unable without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and

II. That there is a reasonable probability of serious physical debilitation to him within the near future unless adequate treatment is afforded pursuant to this Article. A showing of behavior that is grossly irrational or of actions which the person is unable to control or of behavior that is grossly inappropriate to the situation or other evidence of severely impaired insight and judg-

> ment shall create a prima facie inference that the person is unable to care for himself ....

The statutory language establishes a two prong test for dangerousness to self. The first prong addresses self-care ability regarding one's daily affairs. The second prong, which also must be satisfied for involuntary commitment to result, mandates a specific finding of a probability of serious physical debilitation resulting from the more general finding of lack of self-caring ability. We have held that pursuant to G.S. 122-58.7(i) the facts supporting danger must be recorded by the trial court. *In re Jacobs*, 38 N.C. App. 573, 248 S.E. 2d 448 (1978); *In re Neatherly*, 28 N.C. App. 659, 222 S.E. 2d 486 (1976); *In re Crouch*, 28 N.C. App. 354, 221 S.E. 2d 74 (1976).

We must agree with respondent that neither the facts recorded by the trial court nor the record supports a conclusion or ultimate finding of dangerousness to self. Alternatively, even if indicative of some danger, the facts do not support the finding that "[t]here is a reasonable probability of serious physical debilitation to the Respondent within the near future ...."

The court found that respondent is irregular in his sleeping habits and is up from three to six times per night; that he disregards his nutritional needs by fasting for some periods and then eating a whole chicken or a whole loaf of bread; that respondent eats about five pounds of sugar every two days, sometimes consuming five or six glasses of "sweet water" in a day. These facts may be evidence of mental illness, or, under the broad language of § 122-58.2(1) a. 1. I., danger characterized by inability to "exercise self-control, judgment, and discretion in the conduct of his daily responsibilities ...." However, these facts do not meet the second prong of the test, a reasonable probability of serious physical debilitation to him within the near future. The State presented no evidence showing the present or future effect of these irregular dietary habits on respondent. No testimony was presented as to how long or consistently respondent had been eating in this manner. Unusual eating habits alone do not amount to danger as contemplated in the controlling statute.

Respondent's conduct as described by Patrick Monroe relative to speaking to persons passing by his home evinces no danger to himself. The chance that someone will harm respon-

dent in response to this action cannot be found to be evidence of danger to self in accord with *In re Hogan*, 32 N.C. App. 429, 232 S.E. 2d 492 (1977).

This Court has addressed the issue of danger to self on numerous occasions. In *In re Benton*, 26 N.C. App. 294, 215 S.E. 2d 792 (1975), where the trial court had found the respondent to be "dangerous to herself only in that her illness negates her ability to meet her personal needs," we reversed the order of commitment because inability to meet personal needs is not a finding that respondent is imminently dangerous to herself.

When *Benton* was decided the statute required a finding that respondent was *imminently* dangerous. In the present case there is no clear, cogent, and convincing evidence of danger to self regardless of whether one is evaluating "imminence" or "nearness."

Having determined that the evidence is insufficient to support a finding of danger to self, we now consider whether the evidence will support a finding that respondent is dangerous to others.

Prior to 1979, the phrase "dangerous to others" was not defined by statute. G.S. 122-58.2(1) b. now defines "dangerous to others" as follows:

> "Dangerous to others" shall mean that within the recent past, the person has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another or has acted in such a manner as to create a substantial risk of serious bodily harm to another and that there is a reasonable probability that such conduct will be repeated.

Thus, the trial court must find three elements present in order to find that respondent is dangerous to others:

(1) Within the recent past

(2) Respondent has

  (a) inflicted serious bodily harm on another, *or*

  (b) attempted to inflict serious bodily harm on another, *or*

(c) threatened to inflict serious bodily harm on another, *or*

(d) has acted in such a manner as to create a substantial risk of serious bodily harm to another, and

(3) There is a reasonable probability that such conduct will be repeated.

This Court has not required "overt acts" under the former standard of "imminent" danger and the present statutory definition of "dangerous to others" does not require a finding of "overt acts." *In re Ballard*, 34 N.C. App. 228, 237 S.E. 2d 541 (1977); *In re Salem*, 31 N.C. App. 57, 228 S.E. 2d 649 (1976).

Respondent argues that the threats by respondent to his mother do not amount to threats of "serious bodily harm" as required by the statute. We need not decide, however, whether respondent's words, "I'm gonna get you all yet" are sufficient alone to support the finding of dangerousness to others. We must consider respondent's statements in conjunction with all of the other evidence and determine whether the trial court's finding was supported by any competent evidence. *In re Underwood, supra.*

The trial court found as facts that respondent had become uncontrollable at all times and that he frequently had made threats to his aged and nervous mother. This finding was supported by Mr. Patrick Monroe's testimony that he had heard respondent state to his mother "I'm gonna get you all yet" and that the number of threats made by respondent had increased over the last three to four weeks. The court found as fact, based on Dr. Kalina's testimony, that respondent was suspicious of his family, that respondent believed that his family had sexually seduced him, and that respondent believed that all of his relatives were against him. The court also found as fact, based on Patrick Monroe's testimony, that respondent was "ready to fight" if someone pointed out that he had done something out of order.

These findings, supported by the evidence, support the trial court's conclusion that respondent was dangerous to others by acting "in such a manner as to create a substantial risk of

serious bodily harm to another." Therefore, we conclude the judge did not err in signing the order of involuntary commitment.

Affirmed.

Judges VAUGHN and WEBB concur.

ALLSTATE INSURANCE COMPANY v. OLD REPUBLIC INSURANCE COMPANY

No. 8026SC235

(Filed 7 October 1980)

Insurance §§ 4.1, 127, 135– other insurance clause in fire insurance policy – inclusion in binder – no subrogation of insurer who paid in full

A clause in defendant's standard fire insurance policy which prohibited other insurance coverage on any item covered by its policy could be given effect in a binder when no policy was ever issued and even though the binder was deemed to include all of the provisions of G.S. 58-176; therefore, the insured, who repudiated defendant's policy and obtained a policy through plaintiff, thereby violated the other insurance clause of defendant's policy and had no coverage through defendant so that plaintiff could not recover on a right of subrogation based on its full payment to the insured.

APPEAL by plaintiff from *Griffin, Judge.* Judgment entered 18 October 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 September 1980.

Plaintiff paid $74,953.00 to the insureds for damages to their dwelling because of fire. Plaintiff brought a claim against defendant for its pro rata share of liability for the loss. Defendant moved for summary judgment, and plaintiff later made the same motion. The court granted summary judgment to defendant from which plaintiff now appeals.

The essential undisputed facts are found in the affidavits, depositions and exhibits submitted in the case. Dewey A. Watkins built a home near Midland, North Carolina, in 1974. The Federal Land Bank Association provided more than half of the financing through its Farm Credit Service and held a substan-

tial mortgage on the house. As required by the terms of the loan, Watkins obtained homeowners' insurance from plaintiff, Allstate Insurance Company. Sometime prior to 15 August 1975, he allowed the home insurance with plaintiff to lapse due to nonpayment of premiums.

On 15 August 1975, J. Lynn Greene, assistant vice-president of the Farm Credit Service, sent the following letter to Watkins:

> We have today secured fire insurance with Old Republic Insurance Company, since Allstate has cancelled your policy effective today. If you should re-instate your coverage, please have them to send us a re-instatement notice and the above insurance will be canceled .... You will receive a billing shortly for this coverage.

Greene is the bank officer who made the loan on Watkins' house on 12 April 1974.

Watkins later received a formal notice from the land bank on 22 August 1975 again stating that a binder had been obtained to protect the bank up to the amount of $43,800.00. The notice contained information about the insurance that had been procured and reminded the insured "[i]f you plan to provide your own policy of insurance it must be received in this office within twenty (20) days."

Watkins had dealt with defendant, Old Republic Insurance Company, with respect to a disability policy which he believed it had "reneged on." For that reason, he requested Donald Zimmerman, plaintiff's agent, to come to his home so he could reapply for insurance with plaintiff. A written binder for immediate and full coverage up to $75,000.00 was completed that same day on 20 August 1975. Watkins paid a $145.00 premium. According to his deposition, while plaintiff's agent was still at the house he called Clifford Thomas, manager of the Farm Credit Service, and told him that he had gotten his own insurance. Watkins further testified that Thomas told him that the policy with Old Republic would be in effect until the bank received a copy of the policy. Plaintiff's agent testified by affidavit, on information and belief, that no policy or other written evidence of insurance coverage was ever sent to the bank.

Thomas testified in his deposition that he believed his office received letters of cancellation from Allstate concerning the Watkins' dwelling sometime in August 1975. He stated that it was standard procedure for the bank to procure insurance in such situations and charge it to the mortgagor's account. He also said that there were no written procedures to his knowledge requiring him to have a copy of another policy before he could cancel any insurance obtained by the bank. Nevertheless, he admitted he "would require something more than his [insured's] word ... I would at least like to have written documentation, a call from the insurance company he's getting it with other than just the member himself." Thomas said he had never personally talked with or received written notice from Allstate concerning reinstatement of its former coverage. Yet there was a notation in ink on a copy of the letter from Greene to Watkins that "Allstate called. Has received premium for seventy-five thousand, 8-20-75." Apparently, Phyllis Campbell, an employee at the bank, made and initialed this notation.

The Watkins' house was damaged by fire on 26 August 1975. Plaintiff paid the total amount for the loss. Plaintiff thereafter made demands upon defendant for payment of its pro rata share.

Defendant refused to make any such payments to plaintiff. J.E. Sebela, claims manager for defendant, wrote the following letter to plaintiff on 24 November 1975 explaining why:

> We believe that the notice to procure insurance dated August 15, 1975, forwarded by the Federal Land Bank Association, and received by the Federal Land Bank of Columbia on August 22, served as a valid insurance binder between the Old Republic and Watkins subject to defeasance within a 30 day period thereafter. That is to say, the Old Republic would have been responsible for any loss during that period provided Watkins did not obtain insurance from another source. In other words, that event; namely, the procurement of other insurance, nullifies the Old Republic binder and is known as a condition subsequent.

Gary Helton, underwriting manager for defendant, stated in his affidavit that defendant included a standard provision prohibiting other insurance on the insured property in all of its fire

insurance policies. He also said that permission by written endorsement for other insurance was not given in this case.

Walker, Palmer and Miller, by James E. Walker and Robert P. Johnston, for plaintiff appellant.

Golding, Crews, Meekins, Gordon and Gray, by John G. Golding, for defendant appellee.

VAUGHN, Judge.

The substantive issue is whether an insurance company may invalidate its binder coverage because the insured procured other insurance, as prohibited by the company's standard insurance policy, when no actual policy was ever issued. Plaintiff argues that termination of binder coverage in this manner violates G.S. 58-176, and therefore defendant's motion for summary judgment was erroneously granted. We do not agree.

First, it is necessary to understand the position plaintiff is taking here. Plaintiff does not deny its own coverage of the Watkins' house on the date of the fire, 26 August 1975. Rather, it contends that certain statutory provisions prevented defendant's imposition of an "other insurance" clause upon its binder, and thus defendant is liable for its pro rata share of the fire loss. In sum (and we quote), "[a]t the root of Plaintiff's theory of the case is its view that both Plaintiff and Defendant had bound coverage on the same Watkins' dwelling, and that, consequently, both parties to the lawsuit were bound by the terms of the policy provided by statute, as neither had issued policies." On the other hand, defendant denies that its coverage was in effect beyond 20 August 1975, the date plaintiff bound coverage on the property and relies exclusively on its standard policy provision:

> Unless otherwise provided in writing added hereto, other insurance covering on any item of this policy is prohibited. If, during the term of this policy, the Insured shall have any such other insurance, whether collectible or not, and unless permitted by written endorsement added hereto, the insurance under this policy, insofar as it applies to such item(s) on which other insurance exists, shall be suspended and of no effect.

Plaintiff does not dispute that this "other insurance" clause is included in all of defendant's fire insurance policies or that defendant did not allow other insurance on the house by its written endorsement. It also admits that if defendant had issued its standard policy with an endorsement prohibiting other insurance before 20 August 1975, defendant's coverage would have been invalidated.

Second, it is necessary to consider insurance binders generally. A binder is a temporary contract of insurance, consisting of the insurer's bare acknowledgment of its contract to protect the insured against a specified casualty until a formal policy can be issued. A binder does not have to be in a specific form or set forth all the terms of the contemplated policy. *Sloan v. Wells*, 296 N.C. 570, 251 S.E. 2d 449 (1979); *Wiles v. Mullinax*, 270 N.C. 661, 155 S.E. 2d 246 (1967). The statutory fire insurance provisions, however, are read into all binders whether oral or written. G.S. 58-177(4); *Mayo v. Casualty Co.*, 282 N.C. 346, 192 S.E. 2d 828 (1972). The provisions of G.S. 58-176 at lines 25-27 and 86-89, respectively, are pertinent to the instant case:

> Other Insurance. Other insurance may be prohibitied or the amount of insurance may be limited by endorsement attached hereto.
>
> Pro-rata liability. This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

At the outset, we must note that G.S. 58-176 does not prohibit the inclusion of other insurance clauses in policies written in this State. The statute clearly permits such a clause to be included in a policy by endorsement. It merely declines to make the clause a *standard* policy provision as it was formerly. *See Johnson v. Insurance Co.*, 201 N.C. 362, 160 S.E. 454 (1931); *Black v. Insurance Co.*, 148 N.C. 169, 61 S.E. 672 (1908). Thus, G.S. 58-176 does not change prior law that if a valid other insurance clause is breached, the insurer may void the entire policy. *Hiatt v. Insurance Co.*, 250 N.C. 553, 109 S.E. 2d 185 (1959); *Insurance Co. v. Indemnity Corp.*, 24 N.C. App. 538, 211 S.E. 2d 463 (1975).

What we have before us then is not a case like *Insurance Co. v. Casualty Co.*, 283 NC. 87, 194 S.E. 2d 834 (1973), where the

terms of an insurance policy conflicted with the statutory provisions deemed to be included therein. The question here is whether the clause in defendant's standard policy may be given effect in a binder when no policy was ever issued, and even though the binder is deemed to include all of the provisions of G.S. 58-176. We conclude that it may.

A binder is subject to the conditions of the policy contemplated, and generally when one accepts a binder, he accepts all the terms of the underlying insurance contract. 12 Appleman, Insurance Law and Practice § 7225 (1943 & Supp. 1980). This is true even though the policy is never issued.

> By intendment, it is subject to all the conditions in the policy to be issued. These informal writings are but incomplete and temporary contracts — memoranda given in aid of parol agreements. Such memoranda usually fix all the essential provisions that are available, but they are not ordinarily intended to include all the terms of the agreement, and always look to the formal policy that is expected subsequently to issue for a complete statement of the contract made. Hence, as heretofore stated, the contract evidenced by the binding slip is subject to all the conditions of the contemplated policy, even though it may never issue, and the same is true of other informal written contracts.

Gardner v. Insurance Co., 163 N.C. 367, 371-72, 79 S.E. 806, 808 (1913) (citations omitted). There can be no question in the present case that the binder was expressly controlled by the policy. The Federal Land Bank notified Mr. Watkins by letter that it had obtained the binder from defendant on his behalf because of a lapse in insurance coverage. That letter dated 22 August 1975 included the following attached announcement:

> IMPORTANT
>
> (1) Your rights, duties and responsibilities under the insurance contract which the bank has procured are controlled generally by the standard policy provisions and the provisions of standard forms attached thereto. It is suggested that you acquaint yourself with these provisions ....

Since defendant included a provision against additional insurance in all of its policies, its binders were also governed by the

provision. Watkins breached this condition when he obtained insurance with plaintiff, and the breach prevents any recovery from defendant under G.S. 58-176 (lines 86-89). *Sugg v. Ins. Co.*, 98 N.C. 143, 3 S.E. 732 (1887); *Burgess v. Insurance Co.*, 44 N.C. App. 441, 261 S.E. 2d 234 (1980).

It would be incongruous to say that G.S. 58-176 compelled a different conclusion. Otherwise, an insurance company would be exposed to a higher and different risk by its temporary coverage than its formal policy coverage. Sound public policy dictates that insurance companies be encouraged to provide temporary coverage through the use of binders.

> This preliminary contract is of the greatest importance, for if the applicant could not be made secure until all the formal documents were executed and delivered, the beneficial effect of the insurance system would be greatly impaired; and a clause in the State insurance law or in the charter of an insurance company providing that policies shall be executed in a certain manner does not affect the power of the insurer to make these preliminary arrangements.

Lea v. Insurance Co., 168 N.C. 478, 484, 84 S.E. 813, 816 (1915) (citations omitted).

In addition, plaintiff's cause of action against defendant is based on a right of subrogation derived from its full payment to the insured. It is axiomatic that an insurance company may not be subrogated to greater rights than the insured had. The case at bar is similar to *Insurance Co. v. Insurance Association* where the Court stated: "[t]he insured can assert no right thereunder [the policy] for the reason that he abandoned the policy and procured other insurance contrary to a valid clause therein contained. It follows, therefore, that the plaintiff cannot acquire by assignment or subrogation a right from a party who had no enforceable right." 206 N.C. 95, 97, 172 S.E. 875, 877 (1934). In his deposition, Mr. Watkins makes it clear that he repudiated defendant's policy almost immediately upon learning that the bank had obtained it for him.

> I did not wish to have insurance with Old Republic and did not intend to have insurance with Old Republic. I called my Allstate agent and he came to my house. We completed the application for the policy at my house. At that time I paid

him a premium or a portion of a premium. I applied for the insurance because I wanted to be insured by Allstate and not Old Republic.

He further testified that his policy with plaintiff was reinstated on 20 August 1975 and that while plaintiff's agent was still at his house, he called the bank to notify them of his substitute coverage. Because Watkins repudiated defendant's policy and breached the prohibition against other insurance, plaintiff simply had no right to be subrogated to, which could be asserted against defendant. Therefore, defendant may not be held liable for any part of the loss occurring on 26 August 1975.

Summary judgment is a proper procedure for deciding matters of law when no material issue of fact exists. G.S. 1A-1, Rule 56. There was no genuine dispute concerning the material facts in this case. Defendant bound coverage on the Watkins' house on 15 August 1975. Defendant's standard policy prohibited other insurance on the dwelling. Watkins immediately took the necessary steps to reinstate his lapsed coverage with plaintiff on 20 August 1975. The bank was notified in some manner on the same day that he had obtained his own insurance. Defendant had no reason to issue a policy thereafter since it was clear to all parties that coverage by defendant had been intended as a temporary measure to protect the bank's interest in the house. Defendant would have issued a policy only if Watkins failed to provide acceptable insurance within 20 days. As defendant explained to plaintiff in its letter of 4 November 1975: "a policy was *not* issued in this case because it is usual practice to schedule insurance coverage only when it is apparent that the borrower is not going to provide insurance through his own insurance agent." In light of our ruling on the legal effect of a policy's other insurance provision upon its preliminary binder, *supra*, it was not error to grant defendant summary judgment. The judgment appealed from is

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

MICHAEL D. BIGELOW, BY GUARDIAN AD LITEM, JOHN JOSEPH BIGELOW v. JEFFREY D. JOHNSON, JAMES MARION MILLICAN AND MILLICAN CONSTRUCTION COMPANY; JEFFREY D. JOHNSON v. JAMES MARION MILLICAN AND MILLICAN CONSTRUCTION COMPANY

No. 8018SC53

(Filed 7 October 1980)

1. **Automobiles §§ 13, 73–flashlight on motorcycle – no lighted headlamp – contributory negligence as a matter of law**

A five-cell flashlight taped to the handlebars of plaintiffs' motorcycle did not meet the qualifications implicit in the definition of the term headlamp; therefore, in an action to recover for injuries sustained in an accident between an automobile and plaintiffs' motorcycle, the trial court properly directed verdicts in favor of defendants because plaintiffs' failure to have a lighted headlamp as required by law constituted contributory negligence as a matter of law.

2. **Automobiles § 13– headlamp on motor vehicle – specific design and position required**

The requirement of G.S. 20-131 that a motor vehicle headlamp be "so constructed, arranged, and adjusted" to produce visibility of a person 200 feet ahead indicates that the General Assembly intended that a headlamp be a certain type of specifically designed and positioned light, not merely any object which would illuminate the road for a minimum distance.

Judge WEBB dissenting.

APPEAL by plaintiffs from *Lupton, Judge.* Judgments entered 21 September 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 4 June 1980.

These actions arose out of a collision between a motorcycle driven by Jeffrey D. Johnson and an automobile operated by James Marion Millican and registered to Millican Construction Company. Michael D. Bigelow was a passenger on the motorcycle.

Bigelow, through his guardian ad litem, brought a claim for personal injuries against Johnson,[1] Millican, and Millican Construction Company. Johnson crossclaimed against Millican and Millican Construction Company for contribution, personal injury, and property damage. Millican and Millican Construction

1. Johnson's mother was appointed his guardian ad litem; while the suits were pending he reached his majority and the court granted his motion to continue the action in his own name.

Company crossclaimed against Johnson for contribution and counterclaimed for property damage to the automobile. The claims were consolidated for trial.

The undisputed evidence shows that on 25 November 1976, Bigelow, aged fifteen, was visiting at the home of Johnson, who was sixteen years old. Johnson and Bigelow desired to go to another friend's home on Johnson's motorcycle, but Johnson had discovered earlier in the day that the headlamp of his vehicle was not working. Bigelow suggested that they attach a flashlight to the motorcycle as a substitute for the headlamp. They taped a five-cell flashlight to the stablizer bar between the handlebars, approximating the location of the original headlamp. They agreed that the flashlight projected light comparable to that of the original equipment and that it would provide adequate light for their trip.

At about 7:00 p.m., after dark, plaintiffs were proceeding east on Cornwallis Drive in Greensboro, North Carolina, at a speed of approximately 30 m.p.h. in a 35 m.p.h. zone. Defendant Millican pulled out of a parking lot of a 7-Eleven store on the south side of Cornwallis Drive, turning west onto that street. The automobile and the motorcycle collided, damaging the front end of each vehicle and injuring the plaintiffs.

Johnson testified that he saw the automobile, attempted to stop, and gave a verbal warning to Bigelow to "hold on."

Millican testified that he checked for lights and other vehicles in both directions as he left the parking lot at a speed of 5 to 10 m.p.h. He did not see the motorcycle until after the impact.

At the close of all evidence the trial judge granted directed verdicts for all defendants in the personal injury actions on grounds of contributory negligence as a matter of law. Millican Construction Company and Johnson reached a settlement as to the cross action for property damage to the automobile and filed notice of dismissal with prejudice. Plaintiffs appeal the granting of defendants' motions for directed verdict.

Parker and West, by Gerald C. Parker, for plaintiff appellant Bigelow.

Shope, McNeil and Maddox, by E. Thomas Maddox, Jr., for plaintiff appellant Johnson.

Nichols, Caffrey, Hill, Evans & Murrelle, by Lindsay R. Davis, Jr., for defendant appellee Johnson.

Perry C. Henson and Jack B. Bayliss, Jr. for defendant appellees James Marion Millican and Millican Construction Company.

MARTIN (Harry C.), Judge.

[1] The directed verdicts in favor of the defendants should be affirmed because the plaintiffs' failure to have a lighted headlamp as required by law constitutes contributory negligence as a matter of law.

N.C.G.S. 20-129(c) provides:

> Headlamps on Motorcycles. — Every motorcycle shall be equipped with at least one and not more than two headlamps which shall comply with the requirements and limitations set forth in G.S. 20-131 or 20-132. The headlamps on a motorcycle shall be lighted at all times while the motorcycle is in operation on highways or public vehicular areas.

The section of N.C.G.S. 20-131 pertinent to this appeal provides:

> (a) The headlamps of motor vehicles shall be so constructed, arranged, and adjusted that . . . they will at all times mentioned in G.S. 20-129, and under normal atmospheric conditions and on a level road, produce a driving light sufficient to render clearly discernible a person 200 feet ahead [amended to 400 feet in 1979] . . . .

[1,2] We note that although the above quoted statute does not define "headlamp," it demands not only that a headlamp "produce a driving light sufficient to render clearly discernible a person 200 feet ahead," but that it be "so *constructed, arranged,* and *adjusted*" to produce such visibility. (Emphasis added.) From this requirement one must conclude that the General Assembly intended that a headlamp be a certain type of specifically designed and positioned light, not merely any object which would illuminate the road for a minimum distance. Webster's Third New International Dictionary 1042 (1971) refers the definition of "headlamp" to "headlight . . .: a light usu. having a reflector and special lens and mounted on the front of a . . .

motor vehicle for illuminating the road ahead." A flashlight taped on the handlebars of a motorcycle does not meet the qualifications implicit in the definition or the common usage of the term headlamp.

If the General Assembly had intended for motorcycles to be equipped with merely any type of temporary light of the requisite power, it would not have used the term "headlamp," but rather would have employed language similar to that which requires bicycles to "be equipped with a lighted *lamp* on the front thereof ...." N.C. Gen. Stat. 20-129(e) (emphasis added). While the statute does not expressly describe the specifications for headlamps, it differentiates them from lamps on bicycles (N.C.G.S. 20-129(e)), rear lamps (N.C.G.S. 20-129(d)), lights on other vehicles (N.C.G.S. 20-129(f)), spot lamps (N.C.G.S. 20-130(a)), and auxiliary driving lamps (N.C.G.S. 20-130(b)). N.C.G.S. 20-131(b) specifies the level to which the beam of the headlamp must be adjusted. This would imply a permanently adjusted fixture, not a make-shift attachment.

"The lights required by our statute [N.C.G.S. 20-129] serve two purposes: first, to enable the operator of the automobile to see what is ahead of him; second, to inform others of the approach of the automobile." *Reeves v. Campbell*, 264 N.C. 224, 227, 141 S.E.2d 296, 298 (1965). The fact that N.C. G.S. 20-129(c) requires motorcyclists to have their headlamps lighted "at all times while the motorcycle is in operation on highways or public vehicular areas" emphasizes the importance of the warning function with regard to this type of motor vehicle. A motorcycle's size and potential speed make it more difficult for other drivers to identify readily, and the absence of a standard lighted headlamp can make its approach dangerously deceptive. It seems reasonable to conclude that the framers of the statute intended motorcycles to be equipped with headlamps similar to those required for use on automobiles, which are controlled by safety regulations promulgated by the Commissioner of Motor Vehicles pursuant to N.C.G.S. 20-183.8. No one would argue that an automobile with flashlights taped to its body was "equipped with headlamps." There is no reason to define a headlamp more broadly with regard to a motorcycle.

The plaintiffs concede that the motorcycle on which they were riding did not have a functioning headlamp, but rather

that a flashlight was attached as a *substitute* for a headlamp. N.C.G.S. 20-129(c) does not provide for headlamp substitutes, however powerful or reasonable. A "statute prescribes the standard, and the standard fixed by the Legislature is absolute .... No person is at liberty to adopt other methods and precautions which in his opinion are equally or more efficacious to avoid injury." *Aldridge v. Hasty*, 240 N.C. 353, 360, 82 S.E. 2d 331, 338 (1954). The issue is not whether the flashlight employed was adequate to illuminate the road for 200 feet, but whether the plaintiffs' motorcycle had a lighted headlamp at all. The plaintiffs have admitted that it did not. Violation of N.C.G.S. 20-129 constitutes negligence as a matter of law. *Reeves v. Campbell, supra; Thomas v. Motor Lines*, 230 N.C. 122, 52 S.E. 2d 377 (1949).

Plaintiff Bigelow has conclusively established his contributory negligence by his pleadings. In his complaint Bigelow alleged that Johnson "failed to have adequate lights on said vehicle to apprise him adequately of things and conditions in the road ahead of him that was or likely would be a danger in operating said motorcycle." Bigelow is bound by this allegation. *See Davis v. Rigsby*, 261 N.C. 684, 136 S.E. 2d 33 (1964). In addition, Bigelow testified that he suggested the use of the flashlight and assisted in attaching it to the motorcycle. He admitted that he voluntarily and with full knowledge rode with Johnson: "I didn't have to go on that trip, but I wanted to go with him." A passenger is required to exercise due care for his own safety. *Atwood v. Holland*, 267 N.C. 722, 148 S.E. 2d 851 (1966). Failure to do so is contributory negligence.

> [T]he consensus of opinion ... is to the effect that one who voluntarily places himself in a position of peril known to him fails to exercise ordinary care for his own safety and thereby commits an act of continuing negligence which will bar any right of recovery for injuries resulting from such peril.
>
> . . . .
>
> The guest cannot acquiesce in negligent driving and retain a right to recover against the driver for resulting injuries therefrom.

Bogen v. Bogen, 220 N.C. 648, 651-52, 18 S.E.2d 162, 164 (1942). Bigelow was unquestionably contributorily negligent for riding

with Johnson on a motorcycle that was not equipped with a headlamp.

The defendant driver had a right to assume until contrary notice that an approaching vehicle would be properly equipped to warn him of its approach. *See White v. Lacey*, 245 N.C. 364, 96 S.E. 2d 1 (1956). The plaintiffs' negligence excused the defendant driver's failure to see the approaching motorcycle. Because this negligence was the actual cause of defendant's inability to see plaintiffs' approach and thereby avoid the collision, there is no issue as to proximate causation. In view of our decision that plaintiffs were contributorily negligent as a matter of law, we consider it unnecessary to discuss their other assignments of error. The trial court was correct in granting defendants' motions for directed verdict because the uncontroverted evidence that the plaintiffs did not use a headlamp precludes their recovery.

Affirmed.

Judge WELLS concurs.

Judge WEBB dissents.

Judge WEBB dissenting:

I dissent. The majority goes to some length to define "headlamp" and to explain why a flashlight cannot be a "headlamp." I cannot agree with the majority because G.S. 20-131 defines "headlamp" and the statutory definition does not comport with the definition by the majority. The statute says: "headlamps ... shall be so constructed, arranged, and adjusted that ... they will ... under normal atmospheric conditions and on a level road, produce a driving light sufficient to render clearly discernible a person 200 feet ahead ...." If a light complies with this statutory requirement, I do not believe we should go further and say it has to be of a particular design. To do so is to add something to the statute. The burden of proof on the contributory negligence issue is on the defendant. *See* 9 Strong's N.C. Index 3d, *Negligence* § 26 (1977). I believe it is a jury question as to whether the flashlight met the statutory requirements.

I also disagree with the majority's holding that the plaintiff Bigelow conclusively established his contributory negligence by his pleadings. Bigelow alleged that Johnson "failed to have

adequate lights on said vehicle to apprise him adequately of things and conditions in the road ahead of him that was or likely would be a danger in operating said motorcycle." I agree that Bigelow is bound by this allegation but Bigelow does not contend it was the failure of Johnson to see Millican that was the proximate cause of the collision. He contends it was the failure of Millican to see the motorcycle.

For the reasons stated in this dissent, I vote to reverse the judgment of the superior court and remand this case for trial.

NORTH CAROLINA A & T UNIVERSITY v. ODESSA G. KIMBER

No. 8010SC225

(Filed 7 October 1980)

1. **State § 12– State employee – dismissal for absenteeism, tardiness, falsification of time sheets – improper reinstatement by State Personnel Commission**

The State Personnel Commission's determination that North Carolina A & T University acted unfairly in dismissing a secretarial employee was not supported by substantial evidence, and the Commission exceeded its authority in ordering that the employee be reinstated to a comparable position and that her falsification of her time records be made a part of her permanent record, where the Commission found upon substantial evidence that the employee was dismissed because she had been absent on numerous occasions without approved leave, had a habitual pattern of failing to report for duty at the assigned time, and had falsified her time sheets in order to reflect inaccurately her arrival time, since such facts constituted sufficient grounds for the employee's dismissal, and the Commission had no authority to excuse such improper conduct.

2. **State § 12– State employee – dismissal for absenteeism – hindrance of operation – knowledge of whereabouts**

The State Personnel Commission acted arbitrarily in basing its decision that North Carolina A & T University acted unfairly in dismissing a secretarial employee for absenteeism, habitual tardiness and falsification of time sheets in part upon findings that the University failed to prove that her absences were not for valid reasons, that her absences hindered the operation of the secretarial pool, or that the University was unaware of her whereabouts.

3. **State § 12– State employee – dismissal for absenteeism, tardiness – failure to grant "flex time"**

The dismissal of a secretarial employee at North Carolina A & T University for absenteeism, habitual tardiness and falsification of time sheets was not unfair because her supervisors denied her "flex time" where the

record shows that the physical plant where the employee worked operated on a 24-hour basis, persons granted "flex time" were given such for the benefit of the administration, and the dismissed employee was assigned to a particular supervisor and her hours were set to conform to his.

APPEAL by respondent from *Bailey, Judge.* Order entered 5 October 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 10 September 1980.

Respondent Odessa Kimber was employed in the physical plant at North Carolina A & T University for fifteen years and was a member of the newly established secretarial pool from 1976 until her employment was terminated effective 4 July 1978. The letter of dismissal written by her supervisor informed Ms. Kimber that she was dismissed for three reasons:

(1) Absence without approved leave;

(2) Habitual pattern of failure to report for duty at the assigned time;

(3) Falsification of records.

Ms. Kimber appealed her dismissal through the various steps and procedures outlined in Chapter 126 of the General Statutes and Regulations of the State Personnel Commission. The hearing officer found facts showing that Ms. Kimber's personal problems required her to be late for work on occasion; that she exhausted her petty leave and was denied the use of annual leave because she could not give two weeks' notice; that she was asked to punch a time card and keep a record of her time of arrival; and that she falsified the records to show an earlier arrival.

The hearing officer concluded that because the petitioner had failed to show that Ms. Kimber's absences were not for valid reasons, that her absences hindered the operation of the secretarial pool, or that the petitioner was unaware of respondent's whereabouts, the University had not shown just cause to dismiss Ms. Kimber. Secondly, the hearing officer concluded that Ms. Kimber's habitual failure to report for duty at the assigned time was related to her supervisor's refusal to give her a later time to report for work and that her personal circumstances and the unreasonable refusal to modify her work schedule did not warrant her being disciplined for reporting to work

late. The hearing officer concluded that Ms. Kimber's falsifications of the time sheets were not done for the purpose of cheating the State out of money, but to avoid being dismissed, and that because her requests to report at a later time had been unjustifiably denied, dismissal under the circumstances of this case was too harsh a disciplinary measure. The officer concluded, however, that Ms. Kimber should be disciplined in some manner. Finally, the hearing officer concluded that Ms. Kimber had not received the type and quality of supervision expected in State Government to aid her in performing her job, and that the responsibility for her dismissal rests equally on Ms. Kimber's and management's shoulders.

The hearing officer recommended that the State Personnel Commission reinstate Ms. Kimber to a comparable position which would permit her to report to work at 8:30 or later and receive back pay in the amount of one-half of her net loss, together with her attorney fees.

The State Personnel Commission adopted the findings of fact made by the hearing officer, but modified the conclusions reached, adjudging that Ms. Kimber's actions warranted disciplinary action but not dismissal. The Commission ordered Ms. Kimber's reinstatement at another location plus one-half net pecuniary loss and attorney fees.

The University petitioned the superior court for judiciary review, contending the Commission's decision was arbitrary and capricious in violation of G.S. 150A-51(6), unsupported by substantial evidence in violation of G.S. 150A-51(5), and in excess of the statutory authority of the Commission in violation of G.S. 150A-51(2). The judge examined the records and briefs, heard arguments of counsel, made findings and conclusions, and ordered the decision of the Commission be reversed and the action of the University in dismissing Ms. Kimber be affirmed. Ms. Kimber appealed.

Attorney General Edmisten, by Special Deputy Attorney General Edwin M. Speas Jr., for North Carolina A & T University, petitioner appellee.

Loflin, Loflin & Acker, by Thomas F. Loflin III, for respondent appellant.

HILL, Judge.

[1] The superior court's first ground for reversing the State Personnel Commission was that the Commission had acted in excess of its statutory authority. The authority of the court is clear:

> 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:
>
> * * * * * * * *
>
> (2) In excess of the statutory authority or jurisdiction of the agency;

G.S. 150A-51(2).

The authority of the Full Commission has been addressed by this Court in *Brooks v. Best*, 45 N.C. App. 540, 263 S.E. 2d 362, *disc. rev. denied* 300 N.C. 371 (1980). This Court concluded in *Brooks* that "[t]he Full Commission, pursuant to G.S. 126-37, may reinstate a state employee to the position from which he has been removed. The implication in that section, however, is that the Commission can only act to correct an abuse or where there is a wrongful denial." *Brooks* at p. 542.

[1] Was Ms. Kimber wrongfully terminated? We find that she was not and that the Commission exceeded its authority when it reinstated Ms. Kimber. The reviewing court was correct in holding that the Commission's determination that the University acted unfairly in dismissing Ms. Kimber is not supported by substantial evidence. *See* G.S. 150A-51(5).

G.S. 150A-51(5) provides that the court may modify or reverse the Commission's decision if it is "unsupported by substantial evidence ... in view of the entire record ...." The standard of judicial review in subdivision (5) is the whole record test. The reviewing court is not at liberty to replace the Commission's judgment as between two reasonably conflicting views. Yet, the court must take into account whatever in the record fairly detracts from the weight of the Commission's evidence. Under subdivision (5), the reviewing court may not consider the evidence which justifies the Commission'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. 2d 538 (1977).

The reviewing court found that the evidence presented to the Commission showed Ms. Kimber was dismissed for three reasons. Ms. Kimber had been absent without approved leave, had an habitual pattern of failing to report for duty at the assigned time and had falsified her time sheets in order to inaccurately reflect her arrival time. Such facts, which were found by the Commission and for which there is substantial evidence in the record, constituted sufficient grounds for Ms. Kimber's dismissal.

It is at this point that the Commission exceeded its authority in breach of G.S. 150A-51(2). The Commission found no facts to indicate there had been a "wrongful denial" of employment. Yet, in this case the hearing officer and the Commission sought to create an intermediate remedy by reinstating Ms. Kimber to a comparable position and ordering that her falsification of time records be made part of her permanent record. We find no authority for the Commission's action. An examination of the whole record shows no substantial evidence for a finding that Ms. Kimber had been wrongfully denied employment.

In fact, the record is replete with evidence of fair and reasonable treatment of the appellant by her supervisors. This evidence is ignored by the hearing officer. The record reveals the supervisor had been working with Ms. Kimber for several years to remedy her failure to report to work on time. She was warned on at least five occasions, either in writing or orally, that her habitual absences and failure to obtain such approval for leave could lead to her dismissal. Ms. Kimber failed to heed these warnings, and it was not until it became clear that she would not change her behavior that she was terminated. In addition, Ms. Kimber was specifically warned immediately prior to the falsification of her time record to record the time she actually came to work and not the time she was scheduled to come to work. The very next day she falsified her records. The time record indicated substantial tardiness on a daily basis.

The Commission's action reinstating Ms. Kimber was in excess of its statutory authority. *See* G.S. 150A-51, G.S. 126-35, G.S. 126-37. The Commission has no policy under which it can excuse improper conduct by an employee and no such policy has

been approved by the Governor. *See Reed v. Byrd*, 41 N.C. App. 625, 629, 255 S.E. 2d 606 (1979).

[2] Ms. Kimber next contends the findings of fact made by the Personnel Commission that she was unfairly treated are supported by substantial evidence so that the Commission's findings are not arbitrary and capricious.

G.S. 150A-51(6) provides that the reviewing court may modify the decision of the Personnel Commission if the substantial rights of the petitioner have been prejudiced because the Commission's findings, inferences, conclusions or decisions are arbitrary or capricious.

The hearing officer in recommending that relief should be granted to Ms. Kimber, did so, at least in part, because the University failed to prove that her absences hindered the operation of the University's work and because the University failed to prove that it was unaware of her whereabouts. This conclusion was not modified by the Full Commission. The reviewing court held this action by the Commission to be arbitrary and capricious in violation of G.S. 150A-51(6). In the words of the reviewing court:

> As an apparent part of its determination of unreasonableness and unfairness to Ms. Kimber, the Commission cited the failure of the University to prove that her 'absences hindered the operation' of the University's work and the failure of the University to prove that they were 'unaware of (Ms. Kimber's) whereabouts.' *In effect, the Commission has said that it is unfair and unreasonable to dismiss an employee unless it can be proved that work was not completed or performed because of an absence, or unless it can be proved that no one knows of the whereabouts of the employee. Such considerations had no logical or rational relation to the issues before the Commission* and to the extent the Commission weighed these considerations in its decision it acted arbitrarily and capriciously within the meaning of G.S. 150A-51(6). (Emphasis added.)

Ms. Kimber does not deny that such propositions are arbitrary and capricious. Instead, she argues that these factors "were offered only to buttress the conclusion" that her supervisors acted unreasonably and unfairly in denying her "flex

time." These factors may not have been of primary importance in the Commission's determination of unreasonable and unfair actions by the University's supervisors. Nevertheless, such factors clearly infected and played a part in the Commission's decision and the decision-making process. The infection of an agency decision by consideration of such arbitrary and capricious matter is clearly violative of G.S. 150A-51(6).

[3] Finally, Ms. Kimber argues that the reviewing court erred in finding no evidence in the record to support a finding of fact or conclusion by the State Personnel Commission that the work schedule of other employees at the University was varied to suit those employees' personal needs.

Without question, there is evidence that some employees were allowed "flex time." However, it is unquestioned that Ms. Kimber was assigned to a particular supervisor and her hours were set to conform to his. Likewise, there is evidence that non-administrative employees were granted "flex time." However, there is also evidence that the Physical Plant where Ms. Kimber worked was operating on a 24-hour basis, and the persons granted "flex time" were given such for the benefit of the administration. We do not believe the legislature intended the Personnel Commission to sit as a "Super Employment Committee" with authority to substitute its judgment for every person having supervisory authority over any employee.

We conclude the reviewing court was correct in its decision to reverse the action taken by the Personnel Commission.

The decision of the reviewing court is

Affirmed.

Judges HEDRICK and WHICHARD concur.

STATE OF NORTH CAROLINA v. CARL STEPHEN ROBERTS

No. 7928SC1190

(Filed 7 October 1980)

Constitutional Law § 48– effective assistance of counsel – no denial of right

Defendant was not denied his right to effective assistance of counsel

where (1) trial counsel failed to move pursuant to G.S. 15A-1225 for the exclusion of the three State's witnesses from the courtroom until each one was called to testify, since any correlation between the certainty of each witness's testimony and the fact that the witness heard another witness's statements prior to his own was completely speculative, and even if defendant's counsel had moved for the exclusion of the State's witnesses from the courtroom there is no assurance that the judge would have ordered it; (2) trial counsel failed to object to the in-court identification of defendant by the State's witnesses and failed to request a voir dire examination of those witnesses to determine the admissibility of their identifications, since the record did not indicate any impermissibly suggestive pretrial identification procedures that would taint the witnesses' in-court identifications; and (3) trial counsel, when establishing defendant's alibi defense, questioned him about his whereabouts on 1 January 1979 instead of 3 January 1979 when the robbery actually occurred, did not attempt to establish on redirect examination a statement defendant gave the authorities was not actually inconsistent with his testimony at trial, did not negate the negative impact of the testimony of the State's rebuttal witness concerning defendant's employment on the day of the robbery, and failed to move for dismissal on the ground of insufficiency of the evidence.

APPEAL by defendant from *Allen (C. Walter), Judge.* Judgment entered 9 August 1979, Superior Court, BUNCOMBE County. Heard in the Court of Appeals in Waynesville 26 August 1980.

Defendant was indicted on two counts of armed robbery arising out of the same set of circumstances, the armed robbery of an employee and customers of the Village Inn Pizza Restaurant in Asheville on 3 January 1979. Defendant was found guilty on both charges, and was sentenced to two concurrent terms of not less than 20 nor more than 25 years each.

The State's evidence at trial consisted of three witnesses all of whom made in-court identifications of the defendant as one of the robbers of the Village Inn Pizza Restaurant on 3 January 1979. One of these witnesses, Tim Pearson, was an employee of the restaurant and was working on the evening of the robbery. Pearson testified that defendant and his friend had come into the restaurant earlier in the day, "as it was getting dark," and that they drank two or two and one half pitchers of beer. They left the restaurant after being there approximately two hours. They returned to the restaurant around closing time, 10:00 or 10:15 p.m., and ordered more beer. Pearson refused to serve them, because of the lateness of the hour. Defendant's friend then left the restaurant and returned with a gun. Defendant

and his friend proceeded to tie up Pearson and the other two customers present in the restaurant at the time with either a telephone or juke box cord they had torn from its receptacle. The robbers forcibly took an undetermined amount of money from the restaurant cash register.

State's witnesses Vickie Wilkerson and James Michael Alfieri, customers in the restaurant at the time of the robbery, also identified the defendant as one of the robbers. Wilkerson and Alfieri both testified that they had been in the restaurant for about an hour waiting for Tim Pearson to get off work. At the time of the robbery the defendant approached them with a "Bowie knife about twelve inches long" and escorted them to the part of the restaurant where defendant's friend had Pearson at gunpoint. They were both then bound with a cord. Defendant's friend took two dollars from Wilkerson's pocketbook, while defendant took Alfieri's watch and approximately $130 from his wallet.

The defendant offered evidence of an alibi defense through his own testimony and the testimony of three corroborating witnesses. Defendant testified that on the day of the robbery he was employed at the Slosman Corporation as a hoister driver. He stated that on the evening of the robbery in question his wife picked him up from work and they drove to his brother-in-law's home to spend the evening. At approximately 10:30 p.m. defendant left his brother-in-law's and took his young daughter across the street to his own home. His wife, Patricia Roberts, followed him home several minutes later. After returning home defendant went to bed around 11:00 p.m. and did not leave his house until the following morning. Defendant's testimony was corroborated by that of his wife, brother-in-law, and sister-in-law.

Defendant and his wife both told the jury that he had been working at the Slosman Corporation on the date of the robberies. The State rebutted this evidence with the testimony of Robert Zillgitt, Personnel Director of Slosman Corporation, who stated that defendant was not employed by the Corporation on the date of the robberies, 3 January 1979.

Attorney General Edmisten, by Associate Attorney Barry S. McNeill, for the State.

Brock, Begley and Drye, by Michael W. Drye, for defendant appellant.

MORRIS, Chief Judge.

The question before us is whether defendant, Carl Stephen Roberts, was denied his constitutional right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the Constitution of North Carolina. The traditional test for ineffective assistance of counsel was adopted by the North Carolina Supreme Court in *State v. Sneed*, 284 N.C. 606, 201 S.E. 2d 867 (1974). In that case Justice Branch (now Chief Justice) stated the rule for the Court:

> [T]he incompetency (or one of its many synonyms) of counsel for the defendant in a criminal prosecution is not a Constitutional denial of his right to effective counsel unless the attorney's representation is so lacking that the trial has become a farce and a mockery of justice. *Snead v. Smyth*, 273 F. 2d 838; *Doss v. State of North Carolina*, 252 F. Supp. 298; *Edgerton v. State of North Carolina*, 230 F. Supp. 264; *DuBoise v. State of North Carolina*, 225 F. Supp. 51; *Jones v. Balkcom*, 210 Ga. 262, 79 S.E. 2d 1, cert. den. 347 U.S. 956, 98 L. Ed. 1101; See Annot., 74 A.L.R. 2d 1390 (1960), Conviction - Incompetency of Counsel.

284 N.C. at 612, 201 S.E. 2d at 871. We think that this standard is a good one, because a subsequent view of the record of a criminal trial will usually reveal some error in counsel's judgment or in his use of trial tactics. Defendants should be protected from the errors of ineffective counsel, but it is certainly not our purpose or intent to encourage frivolous or unwarranted claims which would result in the unnecessary trials of their counsel.

There are no specific criteria for determining whether a defendant has received the effective assistance of counsel. "[E]ach case must be approached upon an *ad hoc* basis, viewing circumstances as a whole, in order to determine whether an accused has been deprived of effective assistance of counsel. (Citations omitted.)" *State v. Sneed, supra*, at 613, 201 S.E. 2d at 872.

Defendant cites several tactical errors which he alleges his counsel made at trial and he argues that these errors amount to a violation of his constitutional rights. Defendant first contends that his trial counsel's failure to move pursuant to G.S. 15A-1225 for the exclusion of the three State's witnesses from the courtroom until each one was called to testify is evidence of ineffective assistance of counsel. He argues that because the State's witnesses were allowed to hear each others' testimony it was possible that their own memory of the events to which they testified was reinforced or even colored by suggestion which caused each one's testimony to more closely coincide with the others.

Defendant's alleged correlation between the certainty of each witness's testimony, and the fact that the witness heard another witness's statements prior to his own is completely speculative. Even if defendant's counsel had moved for the exclusion of the State's witnesses from the courtroom there is no assurance that the judge would have ordered it. G.S. 15A-1225 states:

> Upon motion of a party the judge *may* order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify .... (Emphasis added.)

The trial judge's decision on whether to make an order of exclusion is discretionary. There is no indication from the record that counsel's failure to so move was a tactical mistake, and even if there were, an error of judgment of this nature is not itself an indication that counsel was rendering ineffective assistance.

The defendant next complains that his trial counsel was ineffective because he failed to object to the in-court identification of the defendant by the State's witnesses and because he failed to request a *voir dire* examination of those witnesses to determine the admissibility of their identifications. The North Carolina Supreme Court has previously dealt with the question of whether failure to object to and request a *voir dire* examination of a witness's in-court identification amounts to a constitutional violation. In *State v. Mathis*, 293 N.C. 660, 239 S.E. 2d 245 (1977), the Court stated:

> The record indicates no impermissible pre-trial identification procedures. While the defendant's counsel did not request a *voir dire* examination of the prosecuting witness before she was permitted to identify the defendant in-court as her assailant, the record indicates no basis for the belief that such an examination would have tainted her in-court identification .... Under these circumstances, the failure of counsel to demand a *voir dire* examination of the prosecuting witness, prior to her in-court identification, cannot be deemed such evidence of ineffective assistance of counsel as to warrant the granting of a new trial.

293 N.C. at 670-71, 239 S.E. 2d at 252.

The Court's reasoning is equally applicable here. The record does not indicate any impermissibly suggestive pretrial identification procedures that would taint the witnesses' in-court identifications. All of the State's witnesses' identifications were positive, and it appears from the record that each witness had ample time to view the defendant during the course of the robbery. There is no basis for the belief that had counsel objected or moved for a *voir dire* that any taint of the in-court identification testimony would have been discovered. No defense counsel is required to make frivolous motions or objections. In view of the facts of this case defendant's counsel's failure to object or move for a *voir dire* examination is not indicative of ineffective representation.

Finally, defendant makes a general allegation that his trial counsel did not skillfully conduct the presentation of his evidence. Specifically, he complains that defense counsel, when establishing defendant's alibi defense, questioned him about his whereabouts on 1 January 1979 instead of 3 January 1979 when the robbery actually occurred; defense counsel did not attempt to establish on redirect examination that a statement defendant gave the authorities was not actually inconsistent with his testimony at trial; defense counsel did not negate the negative impact of the testimony of the State's rebuttal witness, Robert Zillgitt, by showing that defendant had been at Slosman Corporation on 3 January 1979 to collect his last paycheck and not to work; defense counsel failed to move for dismissal on the grounds of insufficiency of the evidence at the close of all the evidence.

We have examined the record with respect to each one of these errors of which defendant complains. We find that defense counsel was confused in his references to the date of the robbery on direct examination of the defendant. However, the defendant corrected the mistake upon cross-examination, and defense counsel made no further improper references to the date. Defendant himself upon cross-examination attempted to reconcile the earlier statement he had given the police with his testimony at trial as to his whereabouts on the night of the robbery. Defense counsel did try to negate the effect of State's rebuttal witness, Robert Zillgitt, through cross-examination. The defense counsel's reluctance to probe into the matter any further after defendant and his wife had both testified that defendant had been at work at Slosman's that day is understandable and is not indicative of ineffective assistance of counsel. The defense counsel's failure to move for dismissal on the grounds of insufficient evidence at the close of all the evidence did not prejudice the defendant, because the sufficiency of the evidence is reviewable on appeal without regard to whether a motion was made at trial. G.S. 15A-1227(d).

We have examined each of the errors which defendant alleges his trial counsel made in his representation. Viewing them both individually and collectively we have determined that the defense counsel's representation was not so lacking that the trial became "a farce and mockery of justice." We hold that under the standard adopted in North Carolina defendant's constitutional right to the effective assistance of counsel has not been violated, and there is no error.

Judges CLARK and MARTIN (Harry C.) concur.

JAFFA S. WATSON v. DAVID C. WATSON

No. 8024DC174

(Filed 7 October 1980)

1. **Rules of Civil Procedure § 15.1– answer amended after case calendared – no error**

The trial court did not err in allowing defendant's motion to amend his answer after the case was calendared for trial, since plaintiff failed to show prejudice because the motion was granted; defendant's original counsel had

been removed from the case upon plaintiff's motion; and the motion for amendment was the first appearance by defendant's new counsel.

2. **Divorce and Alimony § 28.1; Judgments § 39; Estoppel § 4.3– foreign divorce decree – validity – reliance on decree by plaintiff – summary judgment for defendant proper**

In plaintiff's action to have a Florida divorce judgment declared invalid, the trial court properly entered summary judgment for defendant where defendant submitted a certified copy of the official court record of the Florida divorce action; the judgment was valid on its face, and defendant's pleadings asserted the validity of the decree and the legitimacy of defendant's domicile at the time of the original action; plaintiff offered no proof of the matter other than her own allegations contained in her pleadings, brief, and affidavit; included in the record was a notarized document signed by plaintiff stating that "undersigned acknowledges receipt of the complaint in this cause [the Florida divorce action], accepts the service thereof and enters a general appearance in this cause"; and plaintiff admitted in a "Compromise Settlement Agreement," copies of which both plaintiff and defendant entered into the record, that she had been divorced from defendant at an earlier time. Moreover, even if the Florida divorce were invalid and if plaintiff otherwise had standing to contest the decree, she would be estopped from doing so, since she relied upon the divorce judgment, without raising the question of its validity, in entering a settlement agreement under which she received valuable consideration.

APPEAL by plaintiff from *Braswell, Judge.* Judgment entered 23 September 1979 in District Court, WATAUGA County. Heard in the Court of Appeals 28 August 1980, at Waynesville, North Carolina.

Plaintiff brought this action seeking to have a Florida divorce judgment declared invalid. She additionally sought to restrain defendant from remarrying, to set aside a property settlement, and to obtain alimony, as well as other relief not germane to this appeal.

Plaintiff, Jaffa S. Watson, and defendant, David C. Watson, were married on 15 September 1965 in Watauga County, North Carolina. David Watson brought an action for divorce in the state of Florida and was granted a final judgment of divorce on 3 February 1969, in the Circuit Court of Saint Lucie County, Florida. Subsequent to the divorce, plaintiff and defendant lived together on some occasions and jointly purchased property. On 27 August 1975 the parties executed a compromise settlement agreement, prepared by plaintiff's attorney. The agreement divided property owned jointly and separately by the parties.

More than a year after the settlement agreement was entered into, on 8 November 1976, plaintiff instituted this action. She now seeks to have the Florida divorce judgment declared void on the grounds that the Florida court had no jurisdiction because defendant was not a bona fide resident of that state. After considerable delay, defendant's attorney was removed from the case upon plaintiff's motion. In his first appearance in the case, defendant's new counsel filed a motion to amend defendant's answer on 20 February 1979, after the case had been calendared for the following week. The motion was allowed. Defendant then moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Upon submission of briefs and affidavits by the parties, Judge Braswell granted the summary judgment motion in part, dismissing plaintiff's claims for invalidating the divorce judgment, for an injunction against defendant's remarriage, and for temporary alimony. The action for nullifying the settlement agreement was not dismissed. Plaintiff appeals from the granting of defendant's motion to amend and to the entry of summary judgment.

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

James M. Deal, Jr. for defendant appellee.

MARTIN (Harry C.), Judge.

[1] Plaintiff's first assignment of error is that the trial court abused its discretion in allowing defendant to amend his answer after the case was calendared for trial. N.C.G.S. 1A-1, Rule 15(a), allows amendments to be made after the action has been placed upon the trial calendar "only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires." This rule has been liberally construed and the trial judge has been given broad discretion in granting such motions. *Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 249 S.E. 2d 827 (1978), *disc. rev. denied*, 296 N.C. 736 (1979); *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E. 2d 119, *disc. rev. denied*, 294 N.C. 736 (1978). The objecting party has the burden of satisfying the trial court that he would be prejudiced by the granting or denial of a motion to amend. *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972); *Garage v. Holston*, 40 N.C. App. 400, 253 S.E. 2d 7 (1979). The exercise of the court's discretion is not reviewable absent a clear showing

of abuse thereof. *Garage, supra; Willow Mountain Corp. v. Parker,* 37 N.C. App. 718, 247 S.E. 2d 11, *disc. rev. denied,* 295 N.C. 738 (1978).

Plaintiff argues that she demonstrated prejudice because the motion for amendment was made on the day the trial calendar was called and plaintiff had subpoenaed witnesses from other cities. There is, however, no time limit for amendment under Rule 15. *Gladstein, supra.* Defendant's original counsel had been removed from the case upon plaintiff's motion and the motion for amendment was the first appearance by defendant's new counsel. Under these circumstances, it is manifest that the trial judge acted within his sound discretion in granting defendant's motion to amend his answer, and the assignment of error is overruled.

[2] Plaintiff's other assignment of error, that the trial court's granting summary judgment to defendant on three of plaintiff's four claims for relief was improper, is based upon the argument that the 1969 divorce was void. Plaintiff alleges that defendant lacked the requisite domicile in Florida to bestow jurisdiction upon the courts of that state. Plaintiff argues that she made no appearance in the divorce case and is not barred from presently attacking the validity of the Florida court's final judgment. Plaintiff thus launches a collateral attack upon the judgment. "A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid." 8 Strong's N.C. Index 3d Judgments § 16, at 41 (1977). *See also Thrasher v. Thrasher,* 4 N.C. App. 534, 167 S.E. 2d 549, *cert. denied,* 275 N.C. 501 (1969).

It is well established that a divorce decree, rendered in the state of domicile of one of the spouses, is entitled to recognition in other states under Article IV, Section 1, of the United States Constitution, even though the defendant spouse in the divorce action was not personally before the court. *Williams v. North Carolina,* 317 U.S. 287, 87 L. Ed. 279, 143 A.L.R. 1273 (1942). *See Martin v. Martin,* 253 N.C. 704, 118 S.E. 2d 29 (1961). If the party obtaining the divorce in fact fulfilled the domicile requirements under the rendering state's law, it is immaterial that domicile was established solely for the purpose of obtaining a divorce. 1 R. Lee, N.C. Family Law § 96 (4th ed. 1979). *But cf. Shaffer v.*

Heitner, 433 U.S. 186, 53 L. Ed. 2d 683 (1977) (minimum contacts necessary for all assertions of state court jurisdiction to comply with requirements of due process clause). However, the issue of whether the spouse was in fact domiciled in that state, in order to give the court subject matter jurisdiction, remains open for reexamination when the judgment in an ex parte divorce is attacked in another state. *Williams v. North Carolina*, 325 U.S. 226, 89 L. Ed. 1577, 157 A.L.R. 1366, *rehearing denied*, 325 U.S. 895, 89 L. Ed. 2006 (1945). Although false testimony alone is generally not a ground for setting aside a divorce, perjury for the purpose of falsely conferring jurisdiction is regarded as a fraud on the court and may be sufficient to render a resulting judgment void. 1 R. Lee, *supra*, § 90. *See Thrasher, supra.* Even though a judgment obtained without proper jurisdiction would generally be considered void, a spouse who participated in the divorce action may not later attack the decree where the decree is not susceptible to attack in the courts of the state which rendered it. *Sherrer v. Sherrer*, 334 U.S. 343, 92 L. Ed. 1429, 1 A.L.R. 2d 1355 (1948); *Coe v. Coe*, 334 U.S. 378, 92 L. Ed. 1451, 1 A.L.R. 2d 1376 (1948). *See Johnson v. Muelberger*, 340 U.S. 581, 95 L. Ed. 552 (1951).

When jurisdiction is attacked, there is a presumption in favor of the validity of the judgment. Lack of jurisdiction in a suit on a foreign judgment must be proved by the party challenging it, unless it affirmatively appears from the opposing party's pleadings or from the judgment itself. *Thomas v. Frosty Morn Meats*, 266 N.C. 523, 146 S.E. 2d 397 (1966). *See also Thrasher, supra.* In the instant case the judgment is valid on its face and defendant's pleadings assert the validity of the decree and the legitimacy of defendant's domicile at the time of the original action. Plaintiff offered no proof of the matter other than her own allegations contained in her pleadings, brief, and affidavit. Rule 56(e), North Carolina Rules of Civil Procedure, states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Plaintiff here has offered no such specific facts.

The moving party is entitled to summary judgment if he presents material that would require a directed verdict in his favor if presented at trial, unless the party opposing the motion comes forward with evidence that there is a triable issue of material fact. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970). Defendant submitted a certified copy of the official court record of the Florida divorce action. Included in the record is a notarized document signed by Jaffa S. Watson stating: "The undersigned acknowledges receipt of the complaint in this cause, accepts the service thereof and enters a general appearance in this cause." Plaintiff admits that she signed the original form but alleges that she was not given any accompanying papers and signed the paper at defendant's request. Her allegations are insufficient to deny the validity of the notarized document.

Both parties have entered into the record copies of the "Compromise Settlement Agreement." That document stipulates that "the parties hereto were ... divorced in St. Lucie County, Florida, on February 3, 1969." Plaintiff was represented by counsel upon the signing of the agreement, which was prepared by her attorney at her request. Defendant was not represented by counsel at that time. Plaintiff's claims for relief on the agreement itself were not dismissed by the trial court, as material issues of fact relating to its execution were controverted, but plaintiff admitted in that document that she recognized that she had been divorced from defendant at an earlier time. The evidence indicates that defendant was domiciled in Florida at the requisite time. His sworn testimony and that of his witness in the divorce action support the Florida court's conclusion that it had proper jurisdiction. Plaintiff offered no proof to the contrary. We hold that she did not present evidence sufficient to demonstrate the existence of a genuine issue of material fact regarding the validity of the Florida divorce. The motion for summary judgment was properly granted.

An additional basis for the granting of the summary judgment motion is that even if the divorce decree were invalid and if plaintiff otherwise had standing to contest the decree, she would be estopped from doing so at this time. Plaintiff relied

upon the divorce judgment, without raising the question of its validity, in entering the 1975 settlement agreement. She received valuable consideration from the agreement; she now seeks to have it set aside in order to obtain a more favorable property division. 1 R. Lee, *supra*, § 98, at 463-64, states:

> Conduct other than participation in the foreign divorce proceeding may also be the basis for the application of the estoppel doctrine. One seeking relief from a divorce decree, either domestic or foreign, may, by reason of his conduct subsequent to the rendition of the decree, be estopped from attacking it. A person cannot attack a divorce decree after using the benefits which it confers.
>
> The doctrine of estoppel is applicable even though the plaintiff has obtained a divorce in an *ex parte* proceeding in a proceeding in a state in which neither the plaintiff nor the defendant is domiciled.

Even if the decree were invalid, "[h]aving chosen to recognize the divorce by treating it as valid, the spouse [against whom an invalid divorce is obtained] cannot thereafter seek to impeach the jurisdiction of the court which rendered the decree." *Id.* at 465. The time for plaintiff to have questioned the legitimacy of defendant's Florida residency and thereby the Florida court's jurisdiction, was in any event no later than the time she arranged for a property settlement on the basis of the divorce. Ideally, she should have raised the issue at the time she obtained notice of the action, when she received service and signed a form conceding to a general appearance. By not taking advantage of her earlier opportunities to protest, plaintiff is now estopped from raising the issue.

Affirmed.

Judges CLARK and HILL concur.

In re Register

IN THE MATTER OF LORI AND VICKI REGISTER

No. 805DC417

(Filed 7 October 1980)

1. **Parent and Child § 7; Divorce and Alimony §24.1– child support – mother's deliberate depression of income**

The court's finding that respondent mother is deliberately depressing her income and is failing to fulfill her earning capacity because of her disregard for her responsibility to provide reasonable support for her child by a previous marriage was supported by the evidence where respondent testified that she has had one year of college; she has not worked in seven years except for a two week period when she was separated from her second husband; she received pay of $160 for those two weeks; she is in good physical condition; and she does not work because she feels there would be nothing left after paying transportation costs and the cost of care for a child by her second marriage.

2. **Parent and Child § 7; Divorce and Alimony § 24– child support by both parents**

G.S. 50-13.4(b) does not require a finding that the father is unable to bear alone the burden of supporting a minor child prior to ordering support payments by the child's mother, and the statute authorized the court to order support of a minor child by both parents where the child was removed from the mother's home pursuant to a petition filed by the social services office alleging that she was abused, and the child remained in the custody of her grandparents upon order of the court when the mother resumed marital habitation with her second husband.

Judge WELLS dissenting.

APPEAL by respondent from *Burnett, Judge.* Order entered 12 December 1979 in Juvenile Court, NEW HANOVER County. Heard in the Court of Appeals 18 September 1980.

This action originally came before the court on a juvenile petition filed by the New Hanover County Department of Social Services alleging the two girls, Lori and Vicki Register, were abused children under N.C.G.S. 7A-278(4) [N.C.G.S. 7A-517(1) effective 1 January 1980]. Judge Burnett ordered on 12 September 1978 that the mother Carol Malpass retain custody of the minor children pursuant to a 1968 divorce decree from Kenneth Register, but that she apprise the court in the event of a reconciliation between her and Dudley Malpass before either child reached the age of eighteen. Upon a motion for review filed by the children's guardian ad litem, the court found as fact that Carol and Dudley Malpass had resumed marital cohabitation, and that "it would be in the best interests and welfare of the

child if custody of the child, Vicki Register, be in the maternal grandmother, Lucy Jordan, and her husband, the step-grandfather, Henry Jordan." The court thereupon ordered both Kenneth Register and Carol Malpass to pay $12.50 per week to Lucy and Henry Jordan for the maintenance and support of Vicki Register.

The matter was reviewed six months later by order of the court, where Carol Malpass objected to the court's order that she contribute to the support of her minor child, Vicki Register. The hearing was continued until 4 September 1979. Carol Malpass testified at the hearing that: she finished one year of college; had worked only two weeks of the past seven years; has no estate of her own; owns no property, savings account, stocks, bonds or other assets; has no income from any source; has a six-year-old child by her second marriage (to Dudley Malpass); and does not work because she feels her earnings would not cover the travel expense and child care costs.

The court found as fact that:

(1) Carol Malpass is the natural mother of Vicki Register, and the said Carol Malpass has completed one year of college. She is in good health and in good physical condition. Carol Malpass has not been employed in 1979 and has had no income from any source during 1979 and is deliberately depressing her income, and is failing to fulfill her earning capacity because of her disregard of her responsibility to provide reasonable support for her child. Carol Malpass worked temporarily in 1978 for a period of two weeks while temporarily separated from her present husband and earned during said two weeks the sum of $150. Other than that two weeks period of work, the said Carol Malpass has not been employed for more than seven years prior to this hearing. The said Carol Malpass has no savings accounts, stocks or bonds, and no income. She has a young child at home by her present marriage who is six years of age. She testified that the $12.50 per week which she had previously been sending for the support of said Vicki Register had been paid by her husband. Upon inquiry by the Court, the said Carol Malpass testified that she was not working now because she would have nothing left after buying gas and paying someone to look after her six-year-old child. When

Carol Malpass and her present husband, Dudley Malpass separated in the latter part of 1978, the two of them borrowed the sum of $15,000 on the marital home, which said $15,000 was paid to Carol Malpass by Dudley Malpass as a lump sum property settlement. Upon the resumption of those marital relations two weeks later, the said $15,000 was repaid by the said Carol Malpass to the lender who had originally loaned said sum to her and her husband. The said Carol Malpass is now living with her present husband following the reconciliation.

(2) Kenneth Register, the father of Vicki Register, is an able-bodied man, regularly and gainfully employed and earning approximately $ per month. Kenneth Register has agreed to pay for the support of Vicki Register the sum of $15 per week.

Based on the findings of fact above, the court concluded that Carol Malpass had the earning capacity to support her child and that the child needed $30 per week support. The court ordered on 12 December 1979 both Carol Malpass and Kenneth Register to contribute $15 each per week for the maintenance and support of Vicki Register. Carol Malpass appeals from this order of support.

William G. Smith and Bruce H. Jackson, Jr., for respondent appellant.

Attorney General Edmisten, by Assistant Attorney General Henry H. Burgwyn, amicus curiae.

ARNOLD, Judge.

Respondent Carol Malpass contends: first, that the evidence does not support Judge Burnett's finding of fact that she "is deliberately depressing her income, and is failing to fulfill her earning capacity because of her disregard for her responsibility to provide reasonable support for her child," and second, that the findings of fact fail to support the judge's conclusion that Ms. Malpass has the earning capacity to support her child. Finally, appellant argues that N.C.G.S. 50-13.4(b) which governs the support of minor children mandates Kenneth Register, the child's natural father, bear the entire burden of supporting Vicki.

[1] Ms. Malpass stringently protests the judge's finding that she deliberately depressed her income, yet her own testimony provides evidence to support such a finding. She testified: she has a high school degree and one year of college; she has not worked in seven years except for a two week period when she was separated from Mr. Malpass; payment for the two weeks was approximately $160; she is in good physical condition; and she does not work because she feels there would be nothing left after paying for child care and transportation costs. While respondent attempted to explain why she does not work, her testimony does support the finding that she deliberately depressed her income. She is physically able to work and is as well or better educated than a major portion of the nation's work force.

Despite the recent influx of women in the work force, we recognize that Ms. Malpass has the absolute right to stay at home and care for her six-year-old child. However, she also has the legal and moral obligation to support her minor child.

[2] Ms. Malpass asserts that N.C.G.S. 50-13.4(b) relieves her of this obligation by placing on the father the primary responsibility of support. The statute provides:

> (b) In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother, or any person, agency, organization or institution standing in loco parentis shall be liable, in that order, for the support of a minor child. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. Upon proof of such circumstances the judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child, as may be appropriate in the particular case ....

The record in this case contains adequate "proof that the circumstances" warrant support by the mother in addition to the natural father. The child, Vicki, was removed from the home pursuant to a petition filed by the social services office alleging that she was abused. When Ms. Malpass decided to resume marital habitation with her second husband, the child re-

mained in the custody of her grandparents upon order of the court. Vicki continues to live with her grandparents.

The appellant argues that "other circumstances" in the statute should be limited to a showing that the father is unable to provide adequate support for the child based on his income and position in life. However, the statute itself states: "Such other circumstances may include, but shall not be limited to . . ." proof that the father cannot provide support. Appellant also cites multiple authorities for the proposition that she should not pay support under the statutory scheme. None of the cases cited involved a fact situation similar to the one at hand. *Hicks v. Hicks*, 34 N.C. App. 128, 237 S.E. 2d 307 (1977), cited by appellant, recognizes the mother's obligation to support her child. This Court stated that where the plaintiff-mother sought reimbursement for support expenses "The plaintiff is not entitled to be compensated for support for the children provided by others, nor is she entitled to be reimbursed for sums expended by her for the support of the children which represent her share of support as determined by the trial judge . . . ." *Id.* at 130.

N.C.G.S. 50-13.4(b) authorizes the judge to order support of a minor child by both parents under circumstances such as those in this case. Further, the statute does not require a finding by the trial court that the father is unable to bear the support burden alone prior to ordering payments by the child's mother.

The evidence supports the findings of fact and the findings logically lead to the conclusions by the trial judge. The decision of the trial judge is

Affirmed.

Judge ERWIN concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

I must respectfully dissent from the majority opinion for the reason that it has the effect of placing upon mothers a burden of support of minor children equal to that of fathers. In *Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976), in *Wells v. Wells*, 227 N.C. 614, 44 S.E. 2d 31 (1947), and in many cases preceding *Wells*, see cases cited therein, our Supreme Court has

said again and again that fathers have the primary duty of support. In the case *sub judice*, the trial court made no effort toward fidelity to this principle of law: he simply found the mother equally responsible. This matter should be remanded with instructions for a determination as to the father's ability to meet his primary duty of support.

STATE OF NORTH CAROLINA v. JOHN HENRY McGUIRE

No. 8023SC330

(Filed 7 October 1980)

1. **Criminal Law § 66.20– pretrial identification procedures – voir dire hearing – failure to find facts**

While it is preferable that the trial judge make detailed findings of fact after a hearing to determine whether out-of-court identification procedures were impermissibly suggestive, failure to do so is not error when there is no conflict in the evidence presented at the hearing.

2. **Criminal Law § 66.3– pretrial identification procedures – finding of no impermissible suggestiveness – review by appellate court**

Where the trial judge finds and concludes that out-of-court identification procedures were not "impermissibly suggestive," such finding and conclusion is binding on the appellate court when the record contains evidence supporting the finding and conclusion.

3. **Criminal Law § 66.9– photographic identification procedure – photographs different size – some photographs in color**

The fact that photographs first exhibited to a witness were not all the same size and some were in color while others were in black and white did not render the photographic identification improper.

4. **Criminal Law § 66.6– lineup – officer telling defendant to hold head up**

Evidence tending to show that defendant held his head down at a lineup and was told by the officer in charge to "hold your head up" does not require a finding that the lineup was impermissibly suggestive, especially where the evidence tends to show that all of the people in the lineup were black males of similar age and physical characteristics.

5. **Criminal Law § 66.15– in-court identification – independent origin – no taint from pretrial procedures – failure to make detailed findings**

The trial court did not err in failing to make detailed findings of fact after a *voir dire* hearing on defendant's motion to suppress the in-court identification of defendant as the perpetrator of the crimes charged on the ground that certain out-of-court identification procedures were impermissibly suggestive where the court found that out-of-court identification proce-

dures were not impermissibly suggestive; the trial court's denial of defendant's motion implicitly included a conclusion that the victim's in-court identification of defendant was of independent origin and not tainted by any out-of-court identification procedure; and the proximity of the victim to defendant for more than an hour and the victim's opportunity to observe defendant during daylight hours clearly demonstrate that his in-court identification was of independent origin and not tainted by any out-of-court procedure.

6. **Criminal Law § 86.6– impeachment – refusal to play back voir dire testimony**

Where the victim testified on cross-examination that he did not recall his testimony on a particular point during a *voir dire*, the trial court did not err in refusing to play back the *voir dire* as a method of impeaching the victim.

7. **Criminal Law § 71– shorthand statement of fact**

An officer's testimony that the victim's wrists "had marks coming all the way around as if it had been tied" was competent as a shorthand statement of fact.

8. **Criminal Law § 34.5– officer's communications with Department of Corrections – relevancy to show how person matching victim's description was found**

An officer's testimony concerning "communications with the Department of Corrections" was relevant to show how the police came to find a person matching the description given by a victim of kidnapping and crime against nature; furthermore, defendant was not prejudiced by such testimony since any connection between defendant and prisoners in a nearby correctional center was quickly dispelled by an officer's testimony that all the inmates were accounted for.

9. **Crime Against Nature § 3; Kidnapping § 1.2– sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for the kidnapping of and crime against nature with an eleven year old boy.

10. **Kidnapping § 1.3– kidnapping person under age 16 – absence of parents' consent – erroneous instruction – absence of prejudice**

Defendant was not prejudiced by a portion of the charge in which the court stated that two of the essential elements of kidnapping a person under the age of 16 were "that the victim did not consent, that the victim had not reached his sixteenth birthday," where the court in other portions of the charge instructed the jury that before it could find defendant guilty of kidnapping the State must prove beyond a reasonable doubt, among other things, that "he had not reached his sixteenth birthday; and that his *parents* did not consent to his confinement or restraint."

APPEAL by defendant from *Riddle, Judge*. Judgment entered 27 September 1979 in Superior Court, WILKES County. Heard in the Court of Appeals on 10 September 1980.

Defendant was charged with kidnapping in violation of G.S. § 14-39 and with crime against nature in violation of G.S. §

14-177. On 19 September 1979, before trial, defendant moved to suppress the identification testimony of the prosecuting witness on the grounds that a lineup and certain photographic identification procedures in which the prosecuting witness identified defendant were impermissibly suggestive. A *voir dire* hearing was conducted and the court thereafter denied the motion.

The State's evidence tended to show the following:

On 16 May 1979, the prosecuting witness, eleven years of age, was at a city park participating in a baseball team practice that ended around 6:30 p.m. While the prosecuting witness was waiting for his father to pick him up, he was approached by a man, identified as defendant, wearing beige pants and a yellow cap. Defendant began talking with the prosecuting witness, then grabbed the youth's arm and dragged him into some nearby woods beside a "little creek." The prosecuting witness tried to resist, saying, "I want to go home," but defendant replied, "Hush up," in a "mean kind of way." Defendant tied the prosecuting witness' hands with a piece of rope, laid him on the ground on his stomach, and proceeded to remove his pants and underwear. Defendant "raped" the prosecuting witness for "about thirty minutes." Defendant then took the prosecuting witness, whose hands remained tied, to several other areas within the park, ducking out of sight when a car passed. Defendant then took the prosecuting witness behind a warehouse, where defendant again "raped" the prosecuting witness for "about twenty or thirty minutes." Defendant then cut the rope holding the prosecuting witness' hands together, telling the youth that if anyone was told, defendant would kill the youth's parents. Defendant walked away and the prosecuting witness ran to a nearby store where an employee called the youth's parents.

Defendant offered no evidence.

Defendant was found guilty as charged in both cases and from judgments imposing prison sentences of "not less than forty (40) nor more than forty-five (45) years . . ." for kidnapping and "not less than nor more than ten (10) years . . ." for crime against nature, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

Max F. Ferree, by William C. Gray, Jr., for the defendant appellant.

HEDRICK, Judge.

By his first and second assignments of error, defendant argues that the trial judge erred in failing to make "proper and required" findings of fact after a *voir dire* hearing on defendant's motion to suppress the witness' in-court identification of defendant as the perpetrator of the crimes charged because certain out-of-court identification procedures were impermissibly suggestive.

In determining whether out-of-court identification procedures are impermissibly suggestive, the trial judge must evaluate several factors, such as the opportunity of the witness to view the criminal at the time of the crime, the degree of attention of the witness, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the challenged confrontation, and the length of time between the crime and the confrontation. *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *modified*, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976). Based on these factors, he must find whether under the totality of the circumstances the out-of-court procedures were so impermissibly suggestive and conducive to irreparable mistaken identification as to be a denial of due process. *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978); *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977).

[1,2] While it is preferable that the trial judge make detailed findings of fact after a hearing to determine whether out-of-court identification procedures were impermissibly suggestive, failure to do so is not error when there is no conflict in the evidence presented at such a hearing. *State v. Dunlap*, 298 N.C. 725, 259 S.E. 2d 893 (1979); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Russell*, 22 N.C. App. 156, 205 S.E. 2d 752, *cert. denied and appeal dismissed*, 285 N.C. 667, 207 S.E. 2d 764 (1974). Where, as here, the trial judge finds and concludes that the out-of-court identification procedures were not "impermissibly suggestive," such a finding and conclusion is binding on the appellate court when the record contains evidence supporting such a finding and conclusion. *State v. Dunlap, supra; State v. Gibbs*, 297 N.C. 410, 255 S.E. 2d 168 (1979). Moreover, it

is not error to admit the in-court identification of defendant as the perpetrator of the crime by the witness, when the record discloses that the out-of-court identifications are not impermissibly suggestive, and the in-court identification is of independent origin and based solely on what the witness observed during the commission of the crime. *State v. Hamilton*, 298 N.C. 238, 258 S.E. 2d 350 (1979); *State v. Simms*, 41 N.C. App. 451, 255 S.E. 2d 282 (1979).

[3] In the present case, the trial judge did find and conclude that the out-of-court identification procedures were not impermissibly suggestive. We have carefully reviewed the evidence adduced on *voir dire* and find it not to be in conflict with respect to any material fact and the evidence supports the conclusion made by the trial judge. The evidence on *voir dire* tending to show that the photographs first exhibited to the witness were not all the same size, and that some of the photographs were in color while others were in black and white, is of no legal significance and clearly does not require a finding on the part of the trial judge that the photographic identification procedure was not improper. The evidence regarding the photographic identification clearly supports the finding and conclusion of the trial judge in that respect.

[4] Evidence tending to show that defendant at the "lineup" held his head down and was told by the officer in charge to "hold your head up" is not sufficient to dictate a finding by the trial judge that the lineup was impermissibly suggestive. This is especially true when the evidence tends to show that all of the people in the lineup were black males of similar age and physical characteristics. The evidence, in our opinion, supports the trial judge's finding and conclusion regarding the lineup procedure.

[5] Finally, implicit in the finding of the trial judge, and in his denial of the motion to suppress, is the conclusion that the in-court identification by the prosecuting witness was of independent origin and based solely on what he observed and experienced during the commission of the crime, and such an in-court identification was not tainted by any out-of-court identification procedure. Throughout, the witness insisted that his assailant had a "large long scar approximately an inch and a half long located one inch above his right eyebrow," and the

record discloses that defendant did have such a scar. From the outset, the witness was able to give a description of defendant which ultimately led to his apprehension. A significant portion of the time that the witness was in defendant's presence occurred during daylight hours. Also, the testimony indicates that the witness was in the presence of defendant for more than one hour. The proximity of the witness to defendant, and the witness' opportunity to observe, demonstrate clearly that his in-court identification of defendant was of independent origin and not tainted by any out-of-court procedure. The totality of the circumstances in this case requires a holding on our part that the denial of defendant's motion to suppress and the admission of the testimony of the prosecuting witness with respect to the identification of defendant was not error. These assignments of error have no merit.

[6] On cross-examination, counsel for defendant asked the prosecuting witness several questions regarding whether he remembered telling counsel that "of those five pictures, four of them were color pictures and one picture was black and white" and that "the one black and white picture in the group was larger than the four colored pictures." The prosecuting witness insisted that he did not recall precisely what he had told counsel "this morning" (referring to the *voir dire).* Counsel for defendant then asked the court to "play back the voir dire to refresh his recollection." The court denied the motion and the exception to this ruling is the basis for defendant's third assignment of error. In his brief, defendant contends that the witness' response that he could not recall what he said earlier "is a prior inconsistent statement ..." and that "the Voir Dire should have been played back as a method of impeaching the witness." Obviously, at trial counsel sought to "refresh his recollection" and on appeal he wishes to argue that his purpose was to impeach the witness. If the witness did not remember his earlier testimony, a reading of that testimony would not reveal a prior statement inconsistent with his current testimony. A reading of the witness' testimony on *voir dire,* in addition, would defeat the very purpose of conducting a *voir dire* outside the hearing of the jury. Finally, the scope of cross-examination is largely within the discretion of the trial judge and his rulings thereon will not be disturbed on appeal except when prejudicial error is disclosed. *State v. Mayhand,* 298 N.C. 418, 259 S.E. 2d 231 (1979). We hold this assignment of error to be meritless.

[7] Defendant contends in his fourth assignment of error that the trial judge erred in "allowing a police officer not qualified as an expert witness to give his opinion as to certain markings on the wrist of the prosecuting witness." This assignment of error is based upon the following testimony at trial:

> Q. What, if anything, did you observe about his wrists?
>
> A. His wrists had marks coming all the way around as if it had been tied.

The response of the police officer is not an "opinion," but is merely a shorthand statement of a material and relevant fact, and as such obviously did not prejudice defendant in any way. Defendant's fourth assignment of error is thus without merit.

[8] In his fifth assignment of error, defendant argues that the trial judge erred in "allowing Officer David Pendry to testify as to communications with the Department of Corrections." Defendant contends that this testimony was "irrelevant evidence whose admission had the sole effect of exciting the prejudice of the jury." We disagree. The officer's testimony was relevant to show how the police came to find a person matching the description given by the prosecuting witness. We also fail to see where any prejudice to defendant resulted from the testimony, since any connection between defendant and prisoners in a nearby correctional center was quickly dispelled by the officer's testimony that "all the inmates were accounted for." This assignment of error is meritless.

[9] Defendant's seventh assignment of error is addressed to the denial of his motions to dismiss and for judgment as of nonsuit. Suffice it to say the evidence is sufficient to require submission of these cases to the jury and to support the verdict. No useful purpose would be served by further elaboration on the evidence and the several elements comprising the crimes charged in the bills of indictment.

[10] Based on an exception duly noted in the record, defendant in his final assignment of error argues that the court erred in not adequately describing the essential elements of the crime of kidnapping. The portion of the charge to which defendant excepts is as follows: "that the victim did not consent, that the victim had not reached his sixteenth birthday, . . ." Defendant argues that the court should have instructed the jury "[t]hat

the victim had not reached his 16th birthday and his parents did not consent to this confinement, restraint, or removal." It is true that G.S. § 14-39(a) provides:

> Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, *or any other person under the age of 16 years without the consent of a parent or legal custodian of such person,* shall be guilty of kidnapping ... (Our emphasis)

In his instructions to the jury, the trial judge, in delineating the several elements of the crime of kidnapping, instructed the jury that before it could find defendant guilty of kidnapping, the State must prove beyond a reasonable doubt, among other things, that "he had not reached his sixteenth birthday; and that his parents did not consent to this confinement or restraint." We hold that the charge, when read contextually as a whole, was free from prejudicial error, and defendant was in no way prejudiced by that portion of the charge to which he excepted.

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

No error.

Judges HILL and WHICHARD concur.

JACKIE W. GRIFFIN v. STARLITE DISCO, INC., A CORPORATION, AND WADE REECE, AN INDIVIDUAL

No. 8030SC24

(Filed 7 October 1980)

1. Assault and Battery § 3.1– summary of evidence in instructions – no error

In an action to recover for injuries sustained by plaintiff in an assault, the trial court did not err in summarizing the evidence; the court positively charged the jury that it was their duty to determine what the evidence showed and if defendants were not satisfied with the summary of the evidence, they had an affirmative duty to make timely objection; and the fact that the jury returned to the courtroom and asked one question with respect to the evidence allegedly improperly summarized did not indicate that the jury was confused on the issue.

2. **Assault and Battery § 2– self-defense – instructions proper**

In an action to recover for injuries sustained by plaintiff in an assault, the trial court properly instructed on self-defense where he plainly told the jury that if the circumstances at the time defendant acted "were such as would create in the mind of a person of ordinary firmness a reasonable belief" that defendant's actions were necessary to protect himself from bodily injury or offensive contact and that defendant had such a belief, then defendant would not be liable to plaintiff, and where the court instructed that self-defense was a defense only if defendant was not the aggressor, or if defendant voluntarily entered into the fight, he was the aggressor, or unless he thereafter attempted to abandon the fight and gave notice to plaintiff that he was doing so.

3. **Damages § 17.7– punitive damages – instructions proper**

In an action to recover for injuries sustained in an assault, evidence was sufficient to support the trial court's instructions on punitive damages.

4. **Damages § 17.5– loss of earnings and profits – instructions proper**

In an action to recover for injuries sustained in an assault, the trial court properly instructed on damages for loss of profits, since plaintiff's business was small; the income produced was largely due to the personal services and attention of plaintiff; and the earnings of the business could therefore afford a reasonable basis in establishing plaintiff's loss of earnings.

APPEAL by defendants from *Ferrell, Judge.* Judgment entered 18 September 1979 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 26 August 1980, at Waynesville, North Carolina.

Plaintiff brought this action for compensatory and punitive damages resulting from an alleged assault upon him by defendant Wade Reece. Defendants stipulated that on the occasion alleged Wade Reece was an agent of defendant Starlite Disco, Inc.

Plaintiff's evidence showed that on 25 March 1977 he was self-employed in the automobile body repair and paint business. He had one employee, Harry Jordan, and "after taxes and everything was taken out," plaintiff received an income of about $150 a week. On this day, Jordan asked plaintiff to go with him to the Starlite Disco to look for Jordan's wife. They arrived at the disco about 7:15 p.m., went inside, and plaintiff requested a lady at the desk to page Jordan's wife. She agreed to do so and told him he would have to wait outside. Two off-duty officers, Brown and McClure, as well as defendant Reece, were there in the area when he was asked to wait outside. As plaintiff turned

to leave, he saw Reece's fist come toward him, and he was hit in the face. The next thing plaintiff remembered was waking up the next day in the hospital where he remained four days. He incurred a $708.55 hospital bill and a $290 doctor bill. He was unable to work for four weeks, and his income for the following two weeks was less than usual. Plaintiff still suffers from the injuries he sustained.

Defendants' evidence showed that the incident occurred outside the disco building at approximately 10:00 p.m. Reece had to escort Jordan and plaintiff outside the building. As he did so both jerked away from him, and plaintiff said he was going to cut him. Plaintiff and Jordan "went for their knives at the same time in a hurried fashion," although Reece did not see a knife. He hit plaintiff at that time, and plaintiff fell. The police got a knife out of the pockets of both plaintiff and Jordan. The off-duty officers testified the event occurred outside and that they were not present.

The jury answered the issues in favor of plaintiff and defendants appeal.

Stephen J. Martin for plaintiff appellee.

Morris, Golding, Blue & Phillips, by James N. Golding, for defendant appellants.

MARTIN (Harry C.), Judge.

[1] Appellants argue that the trial court committed prejudicial error in its charge, requiring a new trial. They contend the court instructed the jury that it was Harry Jordan, rather than the plaintiff, who threatened to cut defendant Reece. The challenged portion of the charge was a part of the court's summary of the evidence. The pertinent part follows:

> [T]he defendants, as the Court recalls, offered evidence which they, the defendants, contend tends to show . . . that he, the defendant, Reece, escorted Jordan out the front door, and that he then escorted the plaintiff out the door; that the defendant, Reece, was told to take his hands off Jordan, that he'd cut him; that the plaintiff put his hand in his pocket as if to reach for a knife and that Reece struck him with his hand, . . .

> . . . What, if anything, the evidence shows is for you, the jury, to say and determine.

The quoted part of the charge clearly shows that the court instructed only that the threat to Reece had been made, not who made the threat. Although the court was careful to leave it to the jury to determine who made the threat to Reece, the immediately following phrase "that the plaintiff put his hand in his pocket as if to reach for a knife," indicates that it was the plaintiff, and not Jordan, who made the threat.

We hold the court did not err in the challenged summary of the evidence. In any event, the court positively charged the jury that it was their duty to determine what the evidence showed, and if defendants were not satisfied with the summary of the evidence, they had an affirmative duty to make timely objection. *State v. Sanders*, 276 N.C. 598, 174 S.E. 2d 487 (1970), *rev'd death penalty*, 403 U.S. 948, 29 L. Ed. 2d 860 (1971). Defendants failed to so do, although specifically invited by the trial court, and they are now precluded from assigning this as error. *Id.* Counsel make the specious argument that to call the court's attention to the alleged error in the presence of the jury would exacerbate the matter. It might so result, but counsel well know such matters are discussed in the absence of the jury. Defendants further contend that the jury was confused over this issue and returned to the courtroom to ask a question. The jury inquired who was present when the threat was made and where they were located at that time. The jury did not inquire as to who made the threat to Reece. After telling the jury that the court reporter could not read the testimony to the jury, the court asked the jury if there were other questions, and the foreman replied, "No, there is no other question." Clearly, the jury only requested who was present when the threat was made and their location. There is no indication that the jury was confused about the issue. The court properly denied defendants' motion for mistrial.

[2] Defendants complain of the court's charge on self-defense. We find no error in these instructions. The court plainly told the jury that if the circumstances at the time defendant acted "were such as would create in the mind of a person of ordinary firmness a reasonable belief" that defendant Reece's actions were necessary to protect himself from bodily injury or offen-

sive contact and that Reece had such a belief, then defendants would not be liable to plaintiff. The jury was further charged that self-defense was a defense only if defendant Reece was not the aggressor, or if defendant Reece voluntarily entered into the fight, he was the aggressor, or unless he thereafter attempted to abandon the fight and gave notice to plaintiff that he was doing so. Defendants contend the trial court's use of the word "or" between these phrases confused the jury on these instructions and was error. We do not so find. Although not presented in the most precise language possible, we cannot hold the charge to be prejudicial error. Whether defendant Reece was the aggressor depends upon the surrounding facts and circumstances, and not on his simple belief. If Reece voluntarily entered into the fight, he was the aggressor. *State v. Randolph*, 228 N.C. 228, 45 S.E. 2d 132 (1947); *State v. Crisp*, 170 N.C. 785, 87 S.E. 511 (1916). Actually the charge was more favorable to defendants than the evidence supported, as there was no evidence that Reece attempted to abandon the conflict. We find no prejudicial error in the court's charge on self-defense.

[3] Defendants contend the court erred in its charge to the jury concerning punitive damages. Punitive damages may be awarded where plaintiff alleges and proves he was wantonly assaulted by an agent of a corporation acting in the course of his employment, or assaulted in a willful, wanton, or malicious manner. *Clemmons v. Insurance Co.*, 274 N.C. 416, 163 S.E. 2d 761 (1968). The trial court's instructions are almost identical to that quoted in *Blackwood v. Cates*, 297 N.C. 163, 254 S.E. 2d 7 (1979). Certainly, defendant Reece's conduct in assaulting plaintiff, as found by the jury, was sufficiently outrageous to warrant submitting the issue of punitive damages. The assignment of error is without merit.

[4] Last, defendants argue the evidence does not support an instruction with respect to damages for loss of profits. The trial court charged the jury:

> Damages, members of the jury, for personal injury include such amount as you find by the greater weight of the evidence as fair compensation to the plaintiff for loss of time or loss from inability to perform ordinary labor which are the immediate and necessary consequences of the injury. In determining this amount you are to consider the

> evidence as to the plaintiff's age and occupation and nature and extent of his employment; the value of his services; the amount of his income at the time of his injury; for loss of profits from a business occupation.

The evidence supporting this instruction follows:

> I presently do paint and body work for a living. On the 25th day of March, 1977, I was painting a car for a living. Yes, sir, I own my own shop. My shop is located up there at Hazelwood, at Five Points, back of Charlie's Shell. Yes, sir, I have employees. I had Harry Jordan. Just one. Yes, sir, that was my sole employee. . . .
>
> . . . .
>
> I was recuperating in my home, where I could not work, three to four weeks. I worked six days a week at my job. As a result of that injury I missed approximately 4 weeks from my job. I was receiving around a Hundred and fifty a week weekly income from my job while I was working. That was after taxes and everything was taken out. Yes, sir, my take-home was approximately a Hundred and fifty dollars a week. No, sir, I did not receive any pay during the approximately 4-week period that I did not work. Yes, sir, I returned to work after that 4-week period. Yes, sir, I returned to the same place of business. My approximate income the week I returned was about Fifty dollars that week. It was approximately, about 2 weeks, before my income returned to the estimated One Hundred and fifty dollars a week level.

This evidence supports the inference that the $150 income that plaintiff received weekly was profit from the operation of his automobile body shop. The $150 was "after taxes and everything was taken out." "Everything" would include wages to Harry Jordan, his employee, costs of materials and supplies, utilities, licenses and other expenses, leaving plaintiff's profit of $150 per week. Where plaintiff's business is small and the income produced is largely due to the personal services and attention of the owner, the earnings of the business may afford a reasonable basis in establishing plaintiff's loss of earnings. *Smith v. Corsat*, 260 N.C. 92, 131 S.E. 2d 894 (1963). Plaintiff's business comes within this rule. We do not perceive any prejudicial error to defendants in the charge.

The evidence in this case was sharply divided; the twelve have resolved the dispute, and defendants received a fair trial free of prejudicial error.

No error.

Chief Judge MORRIS and Judge CLARK concur.

STATE OF NORTH CAROLINA v. LARRY HARTMAN

No. 8027SC372

(Filed 7 October 1980)

1. **Constitutional Law § 53– 319 days between indictment and trial – delay caused by defendant – no denial of speedy trial**

Defendant, who was tried 319 days after he was indicted, was not denied his right to a speedy trial under G.S. 15A-701, because, excluding 205 days consumed by defendant's continuances granted on the ground of lack of availability of an essential witness, he was tried within the 120 day limit of the statute. Moreover, defendant was not denied his right to a speedy trial under the Sixth Amendment to the U.S. Constitution, because 319 days was not a sufficient time, standing alone, to constitute unreasonable or prejudicial delay; most of the delay was caused by defendant's motions for continuance; defendant did not assert his right to a speedy trial prior to this appeal; and defendant showed no prejudice resulting from the delay.

2. **Criminal Law § 91.7– absence of witness – denial of continuance proper**

The trial court did not err in denying defendant's motion for a continuance based on the absence from the trial of an allegedly essential witness, because two earlier orders had been entered by the court continuing the case to enable defendant to produce the witness; defendant had ample notice by virtue of the second order of continuance that no further continuances would be granted for the purpose of enabling him to produce the witness at trial; defendant nevertheless delayed subpoenaing the witness until too late for the sheriff to serve it in time for trial; and defendant succeeded in placing before the jury by his own testimony and that of two other witnesses evidence which the absent witness probably would have testified to.

3. **Criminal Law § 7– no entrapment as matter of law**

The trial court did not err in failing to dismiss the case on the ground that the evidence disclosed entrapment as a matter of law, because the evidence indicated that an officer met defendant for the first time when the alleged offense occurred and the officer never told persons from whom he purchased drugs that he would help them find employment if they provided controlled substances for him, and the evidence therefore did not compel a finding that the criminal intent and design originated in the mind of one other than defendant.

State v. Hartman

APPEAL by defendant from *Lewis, Judge.* Judgment entered 9 January 1980 in Superior Court, LINCOLN County. Heard in the Court of Appeals 9 September 1980.

Defendant was charged in a two count indictment with the felonious possession of the Schedule I controlled substance Lysergic Acid Diethylamide (hereinafter L.S.D.) with intent to sell and deliver it and with the sale and delivery of the same controlled substance on 2 February 1979. Defendant entered pleas of not guilty as to each count and received a trial by jury.

In summary, the evidence for the State tended to show that Detective Sergeant Larry Boyes of the Shelby Police Department was working undercover in Lincoln County buying narcotics when he met the defendant on 2 February 1979. The meeting took place in a driveway near defendant's residence at about 4:25 p.m. Defendant handed Boyes five light blue tablets wrapped in a piece of tissue paper. Boyes told defendant he wanted ten tablets if the price was still $3.00 "a hit." Defendant then produced five more blue tablets and Boyes handed defendant $30.00. Defendant stated, "I wished I could give you some slack on these but Donnie didn't give me a break, maybe next week I can do you better on them." On cross-examination Boyes testified that he was assisted by Gary Crouse who was paid for his information and for his assistance in putting Boyes in touch with people willing to sell drugs. Boyes stated that no promises had been made to the defendant by either himself or Crouse as far as he knew. Further evidence established that the tablets contained L.S.D.

Defendant offered testimony from his father that Boyes had earlier asked for the defendant, explaining, "I'm looking to give him a job." Defendant testified that he and Crouse had worked together at the same plant where defendant was paid $2.85 per hour. On the morning of the day in question, Crouse had told defendant that he knew a supervisor at Duke Power who could get the defendant a job which paid $6.00 per hour if defendant could supply some L.S.D. that afternoon. Defendant testified that he obtained some L.S.D. tablets and took them home. Crouse and Boyes appeared at defendant's home that afternoon at which time defendant sold the tablets to Boyes. On cross-examination defendant testified, "Mr. Boyes did not talk

to me about a job"; and he stated that Boyes never promised him anything and he never asked Boyes for a job. Defendant offered testimony from two other witnesses that they had met Boyes who had offered them jobs with Duke Power and who had asked them for dope. They testified that they had supplied dope to Boyes and criminal convictions had resulted from those transactions.

The jury found the defendant guilty of each charge. From a judgment sentencing defendant to serve concurrent four year sentences of imprisonment as a committed youthful offender, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Dennis P. Myers, for the State.

Robert C. Powell, for defendant appellant.

WHICHARD, Judge.

[1] In his first assignment of error defendant asserts that both his statutory right to a speedy trial under G.S. 15A-701 and his right to a speedy trial under the Sixth Amendment to the United States Constitution were violated. Defendant was indicted on 24 February 1979 and tried on 9 January 1980. He obtained two continuances during that time on the grounds that an essential witness was unavailable. In computing the elapsed time between indictment and trial, defendant's counsel has excluded the time consumed by his continuances and has concluded that defendant was tried within the required 120 days. He has asked this Court to review his calculations.

The North Carolina Speedy Trial Act provides in pertinent part:

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

G.S. 15A-701(al) (1). Continuances allowed for the defendant on the basis of the absence of an essential witness are to be excluded in computing the 120 day period. G.S. 15A-701(b) (3).

Defendant obtained two continuances due to the absence of an essential witness: one on 28 March 1979 until the next session of Superior Court, which began on 14 May 1979; and another on 16 May 1979 "until the September term." We have taken judicial notice of the published calendar of sessions of superior court, as we are permitted to do. *State v. Anderson*, 228 N.C. 720, 724, 47 S.E. 2d 1, 4 (1948). We note that no September term was scheduled for Lincoln County. The case was set for trial during the next scheduled term after September, which began 22 October 1979; but it was not reached for various reasons until 9 January 1980. Of the approximately 319 days between the date of indictment and the date of trial, continuances granted for defendant on grounds of the lack of availability of an essential witness consumed approximately 205 days. When the time resulting from defendant's continuances is excluded from the calculation of the statutory period, it is clear that defendant was tried within 120 days and that there has been no violation of his statutory right to a speedy trial.

Defendant contends, nevertheless, that even if his statutory right to a speedy trial was not violated he was denied his right to a speedy trial under the Sixth Amendment to the United States Constitution. In considering defendant's contention we have, as he requested, applied the "balancing test" set forth in *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972). The United States Supreme Court there identified four factors "which courts should assess in determining whether a particular defendant has been deprived of his right" to a speedy trial. They are (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *Barker*, 407 U.S. at 530, 33 L.Ed. 2d at 117, 92 S.Ct. at 2192.

As to the length of delay, 319 days elapsed from the date of indictment to the date of trial. 319 days is not a sufficient time, standing alone, to constitute unreasonable or prejudicial delay.

As to the reason for the delay, most of the delay resulted from the granting of defendant's motions to continue the case

to enable him to find a missing witness, allegedly essential to his case. Delay occasioned by defendant's own motions, presumably made in his best interest, is entirely appropriate and can scarcely form the basis for his assertion of a denial of his constitutional right to a speedy trial. The additional delay, occasioned by the absence of criminal terms in Lincoln County, was well within tolerable constitutional limits.

As to defendant's assertion of his right, the United States Supreme Court noted that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532, 33 L.Ed. 2d at 118, 92 S.Ct. at 2193. The record in this case reveals no assertion by defendant of his right to a speedy trial prior to this appeal.

As to prejudice to the defendant, the record does not reveal nor does defendant's brief set forth any prejudicial results occasioned by the period of delay between the time of indictment and the time of trial.

In summary, we find no basis for concluding that defendant was denied his Sixth Amendment right to a speedy trial.

[2] In his second assignment of error, defendant asserts that the court erred in denying his motion for a continuance based on the absence from the trial of Gary Crouse, an allegedly essential witness. Orders had been entered by the trial court on 28 March 1979 and 16 May 1979 continuing the case to enable the defendant to produce Crouse as a witness. The order of 16 May 1979 specifically provided that "no further continuances shall be granted for the production of the person of Gary Crouse." The record indicates that the witness Crouse had been available at the scheduled times for trial on other occasions immediately preceding the date when trial actually occurred, but the case was not reached for trial on those occasions. A subpoena dated 2 January 1980 and filed 3 January 1980 was issued to secure the presence of the witness Crouse at trial. The sheriff's return states that the subpoena was received 8 January 1980, and that it was "not received in time to serve" for purposes of a trial to be conducted during the 7 January 1980 Session of Lincoln County Superior Court.

The defendant had ample notice by virtue of the order of 16 May 1979 that no further continuances would be granted for the purpose of enabling him to produce the witness Crouse at trial.

He nevertheless delayed subpoenaing the witness until the sheriff found the subpoena too late to serve in time for trial. Further, defendant testified at trial, without objection, to statements allegedly made by Crouse that Boyes would help defendant obtain employment with Duke Power if defendant would provide illegal drugs. Defendant also presented testimony from two additional witnesses regarding promises by Boyes and Crouse of employment opportunities if they would provide illegal drugs. It thus appears that defendant succeeded in placing before the jury, by his own testimony and that of two other witnesses, evidence regarding his encounter with Crouse; and it may be assumed that Crouse would not have added significantly to this testimony. *See State v. Tolley*, 290 N.C. 349, 357, 226 S.E. 2d 353, 361 (1976).

"A new trial will be awarded because of a denial of a motion for continuance only if the defendant shows that there was error in the denial and that the defendant was prejudiced thereby." *State v. Harrill*, 289 N.C. 186, 189, 221 S.E. 2d 325, 327-28, death penalty vacated, 428 U.S. 904, 49 L.Ed. 2d 1211, 96 S.Ct. 3213 (1976). In view of the facts cited above, we find no error in the ruling denying the motion to continue and no prejudice to the defendant as a result of that ruling.

[3] The defendant has abandoned his third assignment of error asserting that the court erred in failing to dismiss the case at the close of the state's evidence on the grounds of entrapment appearing as a matter of law. He nevertheless asks this court to consider it.

> Ordinarily, if the evidence presents an issue of entrapment, it is a question of fact for the jury to determine. . . . The court can find entrapment as a matter of law only where the undisputed testimony and required inferences compel a finding that the defendant was lured by the officers into an action he was not predisposed to take.

State v. Stanley, 288 N.C. 19, 32, 215 S.E. 2d 589, 597 (1975), quoting from *State v. Campbell*, 110 N.H. 238, 265 A. 2d 11 (1970). The evidence presented during the state's case in chief indicated that Officer Boyes met the defendant for the first time when the alleged offense occurred, and that Boyes had not told either Crouse or other persons from whom he purchased drugs that he would help them find employment if they provided

controlled substances for him. The evidence, viewed in the light most favorable to the state, did not compel a finding that the criminal intent and design originated in the mind of one other than the defendant. Therefore, the court acted properly in denying defendant's motion to dismiss and allowing the issue of entrapment to go to the jury.

In his fourth assignment of error defendant requests that this court examine the trial court's instructions on the law of entrapment. We have done so, and we find no prejudicial error.

We find that the defendant had a trial free from prejudicial error.

No error.

Judges HEDRICK and HILL concur.

STATE OF NORTH CAROLINA v. JESSE A. SHAFFNER

No. 8023SC331

(Filed 7 October 1980)

1. **Criminal Law § 162– general objection – same evidence without objection**

The benefit of defendant's general objection to evidence was lost when substantially the same evidence was thereafter admitted without objection.

2. **Intoxicating Liquor § 7– unauthorized sale – sufficiency of evidence**

The State's evidence was sufficient for the jury on the issue of defendant's guilt of unauthorized sale of intoxicating liquor in violation of G.S. 18A-3 where it tended to show that un undercover agent was served two mixed drinks for $1.50 each at a nightclub owned by defendant; defendant was behind the bar when the drinks were ordered and served; the club provided the liquor for the drinks; the agent was of the opinion that the drinks contained intoxicants; and defendant sold an unopened bottle of liquor to the agent for $5.50.

3. **Criminal Law § 117.3– failure to instruct on interest of State's witness**

The trial court did not err in instructing the jury that defendant was an interested witness without mentioning the interest of a former deputy sheriff who was the State's main witness since (1) the witness was no longer a deputy sheriff at the time of trial and could not have been improperly influenced by any hope of advancement or desire to please his employer, and (2) no instruction on the interest or credibility of a witness was required absent a timely request therefor.

State v. Shaffner

APPEAL by defendant from *Walker, Judge.* Judgment entered 27 November 1979 in Superior Court, WILKES County. Heard in the Court of Appeals 11 September 1980.

Defendant was found guilty of the unlawful sale of intoxicating liquor in violation of G.S. 18A-3 by the District Court. He received a trial de novo in Superior Court.

The State's evidence tended to show the following through the testimony of Larry Freeman, a former deputy of the Wilkes County Sheriff's Office. On 10 February 1979, Freeman, working undercover for the Sheriff's Office, went to an establishment known as the Moonlight Inn at approximately 10:10 p.m. The seating capacity of the inn is 150 to 200 people. Sandwiches were being served.

While there, Freeman bought two mixed drinks of Canadian Mist and coke which he consumed. He saw the drinks being prepared, and the liquor for the drinks was provided by the establishment. The drinks cost $1.50 each. Freeman ordered the first drink from a young lady behind the bar, the second one from defendant, Jesse Shaffner. Defendant owns the Moonlight Inn and was present when Freeman ordered the first drink. Defendant was behind the bar, about three feet from where Freeman was sitting. Before leaving, Freeman purchased one pint of Canadian Mist liquor from defendant at 11:10 p.m. He paid $5.50 for the pint using county money. The bottle, State's Exhibit No. 1, had not been opened when he purchased it. There were approximately a dozen people at the Moonlight Inn when he left.

Freeman further testified that he had previously worked for the Yadkin County Sheriff's Office and was familiar with intoxicating beverages. In his opinion, there was an intoxicating beverage in the drinks he was served.

On cross-examination, Freeman testified that he did not know defendant personally and had never seen him before that night at the Moonlight Inn. He denied that he went to the inn to meet someone or that he purchased a drink for himself and a young lady with him. Instead, he stated that he went to the establishment alone and left alone immediately after purchasing the pint of liquor. He resigned from the Sheriff's department in July 1979 several months after his undercover assignment at the Moonlight Inn.

Defendant testified that he was exclusively engaged in a convenience store business in February 1979 selling gasoline, groceries, beer and wine. He had opened a restaurant, Lucy's Seafood Steak, and a nightclub, the Moonlight Inn, in 1978. The grocery store, restaurant and nightclub were all located in the same building but were separated by walls. Defendant said the Moonlight Inn had been closed since 31 December 1978.

Defendant stated that he had known Larry Freeman since he was a teenager, knew that he went to work for the Wilkes County Sheriff's Department in December of 1978, and was able to recognize him on sight. He denied that Freeman came to the Moonlight Inn or that any sale of intoxicating liquor was made there on 10 February 1979.

On cross-examination, defendant again stated that the Moonlight Inn had been closed since 31 December 1978 and that there were no employees there on 10 February 1979. He did admit that he had mixed and served customers their own liquor when they brought it on the premises and checked the bottles with him.

Defendant was found guilty as charged, and judgment imposing a fine and suspended sentence was imposed.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Brewer and Freeman, by Paul W. Freeman, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Defendant makes several assignments of error which he contends require either a dismissal or a new trial. We do not agree. During cross-examination right after defendant said the inn had been closed since 31 December 1978, the following took place:

> Q. And as a matter of fact, didn't Sheriff Gentry speak to you about the sale of alcoholic beverages there?
>
> MR. BREWER: OBJECTION.
>
> COURT: OVERRULED.

Q. Didn't he speak to you about that?

A. He spoke to me — that was in the early part of the year, too.

A. In 1978?

A. No, '79.

The Sheriff and Mr. Harrison Dickson, the ABC officer in this area, came by to see me. Sheriff Gentry told me that he had complaints of me selling minors alcohol and I had Coca-Cola boys there working on the ice maker at the time that Mr. Gentry came in, the best I can recall. As far as I know, Sheriff Gentry did not advise me that he would be sending someone out to my establishment if I didn't stop this sale. Other than the Sheriff, there was some fellows there who were working for the Coca-Cola Bottling Company.

Defendant argues that in the foregoing the court improperly allowed "evidence of other offenses to be presented to the jury over the defendant's objection." Even if we assume that the question to which defendant objected was not asked in order to impeach defendant's testimony that the inn had been closed since 31 December 1978 or was otherwise improper, defendant has waived any right to complain on appeal. The objection we have set out was the only one made. The damaging part of the testimony came in response to subsequent questions. The evidence came in without a single objection or objection to a specified line of questioning. No motion to strike was ever made. The benefit of defendant's general objection was, consequently, lost when substantially the same evidence was thereafter admitted. *Power Co. v. Winebarger*, 300 N.C. 57, 265 S.E. 2d 227 (1980); *State v. Owens*, 277 N.C. 697, 178 S.E. 2d 442 (1971).

[2] Defendant's second contention is that his conviction may not be sustained because the evidence was insufficient as a matter of law. Viewing all the evidence in a light most favorable to the State, we find that substantial evidence was presented which supported a reasonable inference of guilt sufficient to send the case to the jury. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). Essentially the evidence in this case consisted of the testimony of just two witnesses, Freeman and defendant. Freeman testified for the State to facts which, if believed,

established a violation of G.S. 18A-3. Freeman was served two mixed drinks of Canadian Mist and coke at the Moonlight Inn on 10 February 1979 for $1.50 each. Defendant owned this establishment and was behind the bar when the drinks were ordered and served. The club provided the liquor for the drinks, and defendant sold an unopened pint of Canadian Mist for $5.50. Freeman drank the drinks and testified that in his opinion they contained intoxicants. The State produced the bottle of liquor at trial. Clearly, this evidence was sufficient as a matter of law to sustain a conviction for the unauthorized sale of intoxicating liquor. The jury, as it was free to do, simply chose not to believe defendant's testimony negating the possibility of any violation.

[3] Finally, defendant contends that the trial judge expressed an impermissible opinion regarding defendant's guilt by only instructing the jury that defendant was an interested witness without mentioning the interest of prosecution witness Freeman. We do not agree. First, Freeman was no longer employed as a deputy sheriff at the time of this trial. Thus, defendant's reliance on the following cases in his brief is misplaced. *State v. Love*, 229 N.C. 99, 47 S.E. 2d 712 (1948); *State v. Boynton*, 155 N.C. 456, 71 S.E. 341 (1911). Freeman was not a paid detective when he testified and could not have been improperly influenced by any hope of advancement or desire to please his employer. Second, the possible interest or bias of Freeman was a subordinate feature of the case and was not a subject upon which the trial judge was required to instruct. *State v. Sealey*, 41 N.C. App. 175, 254 S.E. 2d 238 (1979). In addition,

> We find little support in case law for the proposition that the trial court is required to charge that a police officer or any other witness is an interested witness as a matter of law.
>
> . . .
>
> ... However, the court, though it charges that defendant is an interested witness, is not required to find that any other witness is *per se* an interested witness.

State v. Richardson, 36 N.C. App. 373, 375-76, 243 S.E. 2d 918, 920 (1978). Thus, no instruction on Freeman's interest or credibility was required unless defendant made a timely request for it. *State v. Taylor*, 236 N.C. 130, 71 S.E. 2d 924 (1952); *State v. Tise*,

39 N.C. App. 495, 250 S.E. 2d 674, *review denied*, 297 N.C. 180, 254 S.E. 2d 36 (1979). Defendant admits that "no request for special instructions was tendered to the Court in the present matter." In the absence of such a request, the trial court properly instructed the jury.

No error.

Judges MARTIN (Robert M.) and WEBB concur.

PATRICIA M. REDFERN v. CHARLES H. REDFERN

No. 8026DC94

(Filed 7 October 1980)

Divorce and Alimony § 29; Estoppel § 3.1– alimony action – invalidity of marriage alleged – date of entry of judgment not controlling – estoppel to assert invalidity of marriage

Defendant and his first wife were divorced as of 18 December 1978, the date of hearing on the matter, rather than as of 8 February 1979, the date the divorce judgment was actually signed, so that the marriage of plaintiff and defendant on 23 December 1978 was a lawful marriage; moreover, defendant in this alimony action should be equitably estopped from asserting the defense of invalidity of the marriage, since he himself instituted the prior divorce action; he was at least culpably negligent in not obtaining a signed divorce judgment on the date of the initial hearing; and he was negligent subsequent to learning of the alleged problem with his prior divorce in not advising plaintiff of the same and taking necessary steps to have the judgment amended so as to relate back to 18 December 1978.

APPEAL by defendant from *Lanning, Judge*. Judgment entered 17 September 1979 in District Court, MECKLENBURG County. Heard in the Court of Appeals 3 June 1980.

This is an action for alimony pendente lite, permanent alimony and attorney fees. Plaintiff alleges she and defendant were married to each other on 23 July 1978; that she is a dependent spouse; that the defendant is the supporting spouse; and that the defendant has offered such indignities to the person of the plaintiff so as to render her condition intolerable and her life burdensome. The defendant in his answer denied the marriage and the other allegations concerning entitlement to ali-

mony and alimony pendente lite. The presiding judge found as a fact that the plaintiff and defendant were married to each other on 23 December 1978, that the defendant had offered such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome and made an award of temporary alimony and attorney fees. Defendant appealed.

R. Kent Brown for plaintiff appellee.

Lindsey, Schrimsher, Erwin, Bernhardt & Hewitt, by Lawrence W. Hewitt, for defendant appellant.

HILL, Judge.

Plaintiff appellee filed a motion with this Court on 2 June 1980 requesting the matter be remanded to the Mecklenburg County Superior Court for an examination of whether plaintiff voluntarily sought to dismiss this action in the superior court after appeal had been perfected in this Court. Appeal having been made to this Court, this Court has jurisdiction of the matter. No attempt by plaintiff appellee to dismiss the action can be effective. We proceed to deal with the appeal on its merits.

Defendant contends the court erred in its finding of fact that the plaintiff and defendant were legally married to each other and, therefore, erred in awarding alimony pendente lite based upon said void marriage.

Defendant testified that prior to his purported marriage to plaintiff he had appeared at a hearing in the Mecklenburg County District Court on 18 December 1978 for the purpose of obtaining a divorce from Katie R. Redfern. Defendant left the courtroom having been advised that he was in fact divorced. Thereafter, plaintiff and defendant went through a marriage ceremony on 23 December 1978.

The judgment roll for Mecklenburg County for 18 December 1978 reveals the divorce case was "For Judgment," indicating the trial was concluded on that date. The judgment docket contains a judgment entitled *"Charles H. Redfern v. Katie R. Redfern,* 78CVD9072," which is dated 8 February 1979, but which recites that the matter came on for hearing on 18 December 1978. The docket thereafter sets out the requisite finding of fact on which to base a divorce.

Defendant contends the date the divorce judgment was signed is controlling and that judgment was not entered *nunc pro tunc;* that his marriage to plaintiff is void; and that the award of alimony to plaintiff and attorney fees is error.

Defendant cites G.S. 51-3, which states:

> All marriages ... between persons either of whom has a husband or wife living at the time of such marriage ... shall be void.

Defendant cites numerous cases holding that a marriage between parties, either of whom has a living spouse at the time of the purported marriage, is void *ab initio. Cunningham v. Brigman,* 263 N.C. 208, 139 S.E. 2d 353 (1964); *Pridgen v. Pridgen,* 204 N.C. 533, 166 S.E. 591 (1932). Such a marriage being a nullity, it may be attacked collaterally at any time, and no legal rights flow from it. *Ivery v. Ivery,* 258 N.C. 721, 129 S.E. 2d 457 (1963).

We find no North Carolina cases on point. However, the case of *McIntyre v. McIntyre,* 211 N.C. 698, 191 S.E. 507 (1937), is similar in many respects. Therein, plaintiff filed a suit against her husband for divorce from bed and board and alimony. The defendant pled that alimony could not be awarded as he was not properly divorced from his first wife, and, therefore, a valid marriage between the plaintiff and himself did not exist. In *McIntyre,* the defendant husband prior to his marriage to plaintiff had gone to Nevada to obtain a divorce from his first wife. The plaintiff wife was made aware of the facts surrounding the divorce and also the fact that defendant felt the Nevada divorce was legal in all respects.

Our Supreme Court held that:

> The single question presented by this Appeal is this: May a resident of the State, who is the defendant in a suit for alimony, be permitted to set up as a defense thereto the invalidity of a divorce decree which he himself obtained in another state dissolving a previous marriage with a former wife? The answer is 'No'.
>
> While this precise question has never before been considered by this Court, it would not seem to be in accord with reason and justice that one who has voluntarily invoked

> the jurisdiction of another state for the purposes of obtaining a divorce from a former wife, and has thereby been enabled to enter into marital relations with another, should be heard to impeach the decree which he had obtained, or to question its jurisdiction, when new rights and interests have arisen as a result of his second marriage.

McIntyre, at p. 699.

The fact situation in *McIntyre* is similar to that of the case at hand. In the case at hand, although the defendant did not go out of state to obtain a divorce, he now relies on the invalidity of a court proceeding he himself instituted. Further, it is important to note that defendant became aware of the possible flaw in his divorce on 8 February 1979, yet continued to live with the plaintiff and did not advise her of this problem. In addition, as is noted in the order dated 17 September 1979, many of the indignities suffered by plaintiff came after the date defendant learned of the problem with his prior divorce.

Defendant appellant should be equitably estopped from asserting a defense of this nature in that he was at least culpably negligent in not obtaining a signed divorce judgment of the date of the initial hearing and was certainly negligent subsequent to learning of the alleged problem with his prior divorce in not advising plaintiff of the same and taking the necessary steps to have the judgment amended so as to relate back to 18 December 1978.

The conduct of the defendant does not appeal to the conscience of this Court. However, the record presents for our consideration and determination a question of law rather than one of ethics.

This Court has long held the requirement that a judgment be signed by the judge is only directory and that when a judgment is given in open court and filed with the papers as a part of the judgment roll, it is a valid judgment. *McDonald v. Howe*, 178 N.C. 257, 100 S.E. 427 (1919); *Brown v. Harding*, 170 N.C. 253, 86 S.E. 1010 (1915).

> Ordinarily when a court renders a judgment and there is some memorandum or minute in the records of the court

which discloses what the judgment was, it will be held sufficient and a formal judgment based thereon may be entered *nunc pro tunc* at a succeeding term.

Lee v. Rhodes, 227 N.C. 240, 241, 41 S.E. 2d 747 (1947), and cases cited therein.

The defendant has introduced the judgment granting his divorce from Katie R. Redfern dated 8 February 1979, which contains the requisites for an absolute divorce. It further recites the matter was heard by the honorable judge presiding over the 18 December 1978 Civil Non Jury Session of the District Court. Defendant does not attack the validity of the divorce or the action of the court on the date of trial — only the date of judgment. If a trial judge can enter a judgment *nunc pro tunc* at a later date, it is evident that such act is ministerial in nature. We conclude that the defendant and Katie R. Redfern were divorced as of 18 December 1978, and the marriage of plaintiff and defendant on 23 December 1978 was a lawful marriage.

The judgment of the trial court awarding temporary alimony and attorney fees is

Affirmed.

Judges MARTIN (Robert M.) and ARNOLD concur.

STATE OF NORTH CAROLINA v. BRENDA GRONER HOYLE

No. 8026SC311

(Filed 7 October 1980)

1. **Criminal Law § 29– competency to stand trial**

The trial court's determination that defendant was competent to stand trial was supported by the evidence, including the testimony of a psychiatrist who examined defendant at the court's request.

2. **Criminal Law § 63– testimony by psychiatrist – results of test given by another – hearsay**

A psychiatrist's testimony that her diagnosis of defendant was based in part on a personality inventory test administered to defendant by a psychologist which indicated that defendant's behavior pattern is often seen in persons who are habitual liars was incompetent hearsay and its admission was prejudicial to defendant since (1) the psychologist who administered the

test was not present at defendant's trial and therefore could not be cross-examined; (2) there was no evidence that the test was properly administered; (3) neither the psychologist who administered the test nor the psychiatrist stated whether the conditions found on the date of the test were temporary or permanent in nature; (4) the psychiatrist's testimony was admitted to prove the truth of the matter asserted therein; and (5) the trial court did not instruct the jury to limit the evidence for a particular purpose.

APPEAL by defendant from *Snepp, Judge.* Judgment entered 25 October 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 September 1980.

Defendant was charged in a bill of indictment, proper in form, for the offense of murder in the second degree. Defendant was found guilty of murder in the second degree and, from the imposition of a sentence of confinement of not less than eight nor more than twelve years, appealed.

Attorney General Edmisten, by Associate Attorney General Francis W. Crawley.

Lacy W. Blue, for defendant appellant.

ERWIN, Judge.

[1] Defendant contends that the trial court committed error in finding defendant competent to stand trial. We do not agree.

G.S. 15A-1002 provides a comprehensive procedure to determine incapacity of a defendant to proceed in a criminal trial. We note that defense counsel did not follow any remedies provided by statute. The court, on its own motion, raised the issue of defendant's capacity to proceed.

The court stated at a bench conference with counsel for the State and for the defendant: "Gentlemen, I have serious doubts that this woman is competent to stand trial. I have sent for the report from Dorothea Dix. They said she is competent. I have serious doubts that she is competent to stand trial after this rambling testimony."

The following morning, Dr. Mary Rood testified at the request of the court, and the court entered the following:

> "COURT: All right. Thank you, doctor. All right. Take this for the record. During the trial on October 23, 1979, the court observed the defendant while she was testifying, and

the manner of her speech and delivery, and some question arose in the court's mind as to whether the defendant is presently competent to stand trial.

At the request of the court, Dr. Mary Ann Rood, psychiatrist from the Forensic Unit at Dorothea Dix Hospital, Raleigh, N.C., talked with the defendant in the Mecklenburg County Jail where she had been placed by the court overnight. Dr. Rood's opinion is that the defendant is able to comprehend her position, to understand the nature and object of the proceedings against her and to assist her attorney in her defense in a rational manner.

The court therefore finds that the defendant is presently competent to stand trial.

To each and every one of the court's findings of fact and to each and every one of the court's conclusions of law, the defendant in apt time objects and excepts.

DEFENDANT'S EXCEPTION NO. 3"

The record reveals that Dr. Thomas Fox and Dr. Edward C. Holscher, both expert in the field of psychiatry, testified for defendant, and neither stated that defendant was unable to stand trial by reason of her mental condition. Defendant did not make any inquiries into this area of defendant's mental health.

The evidence in the record is sufficient to support the trial judge's findings of fact, and the findings of fact support the conclusion of law. Where, as here, the court's findings of fact are supported by competent evidence, they are conclusive on appeal. *State v. Willard*, 292 N.C. 567, 234 S.E. 2d 587 (1977); *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975). Defendant's reliance on *State v. O'Kelly*, 285 N.C. 368, 204 S.E. 2d 672 (1974), and *State v. Wheeler*, 249 N.C. 187, 105 S.E. 2d 615 (1958), is misplaced. We overrule this assignment of error.

[2] By Exception Nos. 4, 5, 6, 7, and 8, defendant raises the question: "Was it error to allow the psychiatrist to testify that the Defendant is a habitual liar, if testimony is based upon test administered by a psychologist?" We feel that testimony was improperly admitted to defendant's prejudice.

The record reveals the following: "The court finds as a fact that Dr. Rood is an expert in the field of psychiatry."

Dr. Rood testified for the State, in part:

"The purpose of the M.M.P.I. [Minnesota Multiple Personality Inventory] test is to give a picture of the patient's personality, what sort of person he is. You don't do well or badly on it. It just gives a picture. It indicates to the psychologist who interpreted it —

Objection of the defendant.

Sustained by the court.

This test was administered to Mrs. Hoyle and it was used as a basis for my diagnosis.

Q. Tell the jury how she did on that test.

For that the court did overrule the objection of the defendant.

DEFENDANT'S EXCEPTION NO. 4

A. There was an extreme elevation of the lie scale. The lie scale is an index of how truthful a person is and an extreme elevation of the lie scale indicated that a person is likely to be unreliable in his statements.

For that the court did overrule the motion of the defendant to strike this answer.

DEFENDANT'S EXCEPTION NO. 5

Q. Taking all of those elevated scales together, did the psychologist who administered those tests reach any overall findings as to the defendant, Mrs. Hoyle?

For that the court did overrule the objection of the defendant.

DEFENDANT'S EXCEPTION NO. 6

A. Would it be acceptable to read the psychologist's —

COURT: No. Did she reach any findings?

MR. REUSING: First you will need to answer yes or no as to whether there were any findings.

A. Yes, there were findings.

Q. What were those findings?

The court sustained the objection of the defendant.

Q. Again, Dr. Rood, did you rely on these findings from the psychologist at Dorothea Dix Hospital in making your diagnosis about the defendant's condition?

For that the court did overrule the objection of the defendant.

DEFENDANT'S EXCEPTION NO. 7

A. I used them in making my diagnosis.

Q. What, if anything, did the psychologist indicate to you?

For that the court did overrule the objection of the defendant.

DEFENDANT'S EXCEPTION NO. 8

A. The Pattern on the M.M.P.I. is one that is associated with acting out behavior. Her particular pattern is sometimes seen in people who tell lies habitually and unnecessarily, and act on impulses indiscriminately."

Dr. Rood testified further: "When it came right down to putting my opinion on paper, I was relying more on my own observation than I was on all the other data. I took all the other data into consideration."

In this case, the State relies on *State v. DeGregory*, 285 N.C. 122, 130-31, 203 S.E. 2d 794, 800 (1974), where it is stated:

> "Over defendant's objection the solicitor was permitted to propound the following question to Dr. Robert Rollins, Superintendent of Dorothea Dix Hospital, a medical expert specializing in the field of psychiatry: 'Based upon your own personal examination and interview of Karl DeGregory, *and any other information contained in his official record of which you were the custodian and had available to you,* did you make a diagnosis of the defendant?' "

The "other information" was not testified to by the medical expert. The expert stated that he had relied on it in reaching his opinion. This is a distinction.

The record clearly shows that: (1) the psychologist who administered the test was not present at the trial of defendant and, therefore, could not be cross-examined; (2) there was not any testimony that the test in question was properly administered as required by instructions; (3) neither the psychologist who administered the test nor Dr. Rood stated whether the conditions found on the date of the examination were temporary or permanent in nature; (4) the complained of testimony was admitted to prove the truth of the matter asserted therein; and (5) the trial court did not instruct the jury to limit the evidence for a particular purpose. We are compelled to hold that the evidence in question was hearsay and incompetent, and its admission was highly prejudicial to defendant.

Defendant is awarded a

New trial.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. ARTHUR SYLVESTER CHAPMAN

No. 8018SC326

(Filed 7 October 1980)

Robbery § 5.4– armed robbery charged – failure to instruct on felonious larceny – error

In a prosecution for armed robbery the trial court erred in failing to instruct the jury on the lesser included offense of felonious larceny where defendant's testimony that he did not at any time draw a knife on the victim's assistant manager, did not have a knife in his possession at any time while he was with the assistant manager, did not say anything at any time to threaten or force the assistant manager to give him money, but merely walked out with the money when the assistant manager turned his back to defendant would have negated the element of violence or intimidation required to elevate the crime of felonious larceny to that of common law robbery or armed robbery; moreover, the fact that defendant closed the door to the assistant manager's office as he ran out and locked it from the outside, leaving the assistant manager confined inside was not precedent to nor concomitant or contemporaneous with the act of taking the money bag, and the act of closing and locking the door therefore could not be held to constitute the requisite violence or putting in fear to make the crime in question robbery as a matter of law.

State v. Chapman

APPEAL by defendant from *Seay, Judge.* Judgment entered 30 October 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 September 1980.

Defendant was charged in a proper indictment with armed robbery pursuant to G.S. 14-87. The evidence for the State tended to show that defendant, a former employee of Tuesday's Restaurant in Greensboro, went to the restaurant on 17 June 1979 at approximately 10:00 p.m. He entered the restaurant office and found the assistant manager, John Richard Jones, at his desk involved with the daily paper work, having just completed "bagging up" the money accumulated during the day. Defendant asked that the bartender leave so he could talk to Jones; and Jones, believing he "was going to get some sort of a confession or something," requested that the bartender leave, which he did. Defendant then spoke briefly with Jones to the effect that he thought he should not have been arrested for the theft of some meat that had been taken from the restaurant. During the conversation defendant grabbed Jones around the neck, pulled him to one knee and stabbed him. He then said he wanted the truth (presumably about the stolen meat) and that Jones had better get it for him; and he stabbed Jones a second time. When defendant released Jones, Jones fell back onto a partition in the office. Defendant then, while holding the knife in front of Jones, picked up the bag containing the money and left through the door to the office, closing the door behind him and locking it from the outside leaving Jones confined inside. The bag contained the sum of $5,165.73, all in cash.

Defendant's evidence consisted solely of his testimony on his own behalf. He testified that he and Jones smoked a joint of marijuana and drank enough gin to make them intoxicated. When Jones "had enough alcohol into his system to be drunk," he turned his back toward defendant. Defendant thereupon "picked up the money bag and ran out the door." Defendant testified:

> I closed the door and dropped the lock over the latch, and I ran out of the restaurant. I did not at any time draw a knife on Mr. Jones. I did not have a knife in my possession at any time while I was with Mr. Jones. I did not say anything at any time to threaten or force Mr. Jones into giving me any money.

The trial court charged the jury on the crimes of armed robbery and common law robbery and instructed the jury that it could find defendant guilty of either of those crimes or it could find him not guilty. The jury found the defendant guilty of the crime of armed robbery.

From a judgment of imprisonment, defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General John R.B. Matthis and Associate Attorney John F. Maddrey, for the State.

Robert L. McClellan, Assistant Public Defender, for defendant appellant.

WHICHARD, Judge.

Defendant assigns as error the failure of the trial court to charge the jury on the lesser included offense of felonious larceny.

> [R]obbery, a common-law offense not defined by statute in North Carolina, is merely an aggravated form of larceny, and has been defined as 'the taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation.' Absent the elements of violence or intimidation, the offense becomes larceny. (Citations omitted.)

State v. Bailey, 4 N.C. App. 407, 411, 167 S.E. 2d 24, 26 (1969).

Nothing else appearing, the defendant's testimony that he did not at any time draw a knife on the victim's assistant manager, Jones; did not have a knife in his possession at any time while he was with Jones; and did not say anything at any time to threaten or force Jones to give him the money, but merely walked out with the money when Jones turned his back to defendant, if believed by the jury, would have negated the element of violence or intimidation required to elevate the crime of felonious larceny to that of common law robbery or armed robbery. The State contends, however, that the defendant, by his own admission, closed the door to Jones' office as he ran out and locked it from the outside, leaving Jones confined inside; and that this additional fact constitutes the requisite

use of force or violence in the taking of the property of another necessary to preclude a possible verdict of felonious larceny.

The general rule applicable to the State's contention in this regard is set forth in 67 Am. Jur. 2d, *Robbery*, § 26, p. 45 (1973) as follows:

> The violence or intimidation [necessary to elevate felonious larceny to robbery] *must precede or be concomitant or contemporaneous with the taking.* Hence, although the cases are not without conflict, the general rule does not permit a charge of robbery to be sustained merely by a showing of retention of property, *or an attempt to escape*, by force or putting in fear. (Emphasis supplied.)

See also Annot., 93 A.L.R.3d 643 (1979).

The law of this jurisdiction is in accord with the general rule quoted above. In *State v. John*, 50 N.C. 163 (1857), while the victim and the defendant were examining a "bill of money" which the defendant said he had found, the victim felt the defendant's hand in his pocket on his pocketbook. The victim seized the defendant's arm at the same time the defendant snatched the victim's money, and a scuffle ensued in which the victim was thrown out of his wagon. When the victim arose, the defendant had escaped with the victim's pocketbook and the "bill of money." The court there viewed the struggle between defendant and the victim as "fairly imputable to an effort on the part of the prisoner to get loose from [the victim's] grasp and make his escape," *John*, at 169; and it held that the facts did not constitute highway robbery. The court said: "There was no violence — no circumstance of terror resorted to for the purpose of inducing the prosecutor to part with his property for the sake of his person." *John*, at 167.

In the case *sub judice*, the defendant's admitted act of closing and locking the office door as he exited, leaving the victim's assistant manager confined in the office, was not precedent to nor concomitant or contemporaneous with the act of taking the money bag. It is, even more so than the scuffle between the defendant and the victim in the *John* case, "fairly imputable to an effort on the part of the [defendant] to . . . make his escape." Thus, the act of closing and locking the door cannot be held to constitute the requisite violence or putting in fear to

make the crime in question robbery as a matter of law, so as to preclude the possibility of a verdict of felonious larceny.

It was incumbent upon the trial court, therefore, to charge the jury on the lesser included offense of felonious larceny. Its failure to do so denied the defendant the potential benefits of his own testimony by effectively limiting the possible verdicts to guilty of robbery (armed or common law) or not guilty. The jury could not comply with the court's instructions and at the same time return a verdict giving credence to the defendant's testimony in his own behalf.

> When a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment. Further, when there is *some evidence* supporting a lesser included offense, a defendant is entitled to a charge thereon even when there is no specific prayer for such instruction, and error in failing to do so will not be cured by a verdict finding defendant guilty of a higher degree of the same crime.

State v. Bell, 284 N.C. 416, 419, 200 S.E. 2d 601, 603 (1973). (Emphasis supplied.)

Because of the trial court's failure to instruct the jury on the lesser included offense of felonious larceny, there must be a

New trial.

Judges HEDRICK and HILL concur.

RALEIGH CITY LIMITS, INC., D/B/A "MONDAY'S" v. H.A. SANDMAN, BERTHA KATZ, AND T.W. SMITH, D/B/A SKS PROPERTIES

No. 8010DC228

(Filed 7 October 1980)

Landlord and Tenant § 18– belated payment of rent – waiver of right to declare lease in default

Defendants waived their right to declare a lease in default because the

rent for one month was not timely paid when they took plaintiff's checks for that month and for succeeding months and converted them into "official bank checks" payable to defendants.

APPEAL by plaintiff from *Barnette, Judge.* Judgment entered 1 October 1979 in District Court, WAKE County. Heard in the Court of Appeals on 10 September 1980.

On 2 October 1979, plaintiff filed a complaint in the district court seeking to have defendants enjoined "from denying plaintiff the right to enter said premises under the terms of the lease agreement entered into in April, 1977," asking for "such monetary damages as may be suffered by reason of defendants' refusal to allow them to enter said premises, . . ." seeking that "the costs of this action be taxed against defendants," and seeking that "this Court award such other and further relief as to it may seem just and proper." On 2 November 1978, defendants submitted an answer and counterclaim admitting the existence of a lease agreement dated 18 April 1977 covering certain premises. Defendants alleged, however, that the lease entitled them to terminate and take possession upon plaintiff's failure to pay rent on time and upon plaintiff's use of a "materially changed method of operation." Plaintiff replied on 2 January 1979, denying the material allegations of the counterclaim.

An understanding of the facts of this case can best be obtained by quoting the unchallenged findings by the judge after trial before him without a jury:

> 1. A lease agreement was entered into between the plaintiff corporation as tenant and the defendant partnership as landlord for the lease of a certain space located at 2404 1/2 Hillsborough Street in Raleigh, North Carolina. The date of the lease was April 18, 1977. It was to run until August 31, 1982.
>
> 2. The only stockholder of the plaintiff corporation from April 18, 1977, until August 18, 1978, was Pat Gryder.
>
> 3. The lease provided that the premises was [sic] only to be used as a club by the Plaintiff. The word "club" is not defined in the lease.
>
> To H. Arthur Sandman, one of the partners in the Defendant and the Defendants' negotiator, the word "club" in

the lease meant a nice tavern that sold beer but did not have live entertainment nor had special sales of beer.

To Pat Gryder the word "club" in the lease did include live entertainment and beer specials.

There was never a meeting of the minds between Sandman and Gryder at the inception of the lease as to whether or not the word "club" included live entertainment and beer specials.

4. On or about August 18, 1978, Pat Gryder sold his stock in the plaintiff to Barry Lee Green and John Robert Ray.

5. The new owners of the Plaintiff entered into possession of the premises immediately and began running a tavern or club known as "Monday's." This club from its inception regularly featured live entertainment and beer specials. Pat Gryder, when he ran the establishment on the same premises, from time to time, had live entertainment and beer specials but never to the degree the new operation did.

6. Sandman, on behalf of the Defendant, objected to this use of the premises by the Plaintiff as run by Green and Ray and continues to object.

7. Other tenants of the Defendant in the same building have also objected.

8. The Court cannot find that the Defendant has suffered any actual damages as a result of the Plaintiff's operation of the premises.

9. The lease provided that the Plaintiff was to pay the regular monthly rent in advance on the first day of each month.

The lease further provided that if the rent was not paid within ten (10) days after the rent was regularly due, the Defendant could declare the lease in default.

10. The rent that was due on August 1, 1978, was not paid on that day or within ten (10) days thereafter.

11. The rent which was due on August 1, 1978, was tendered after August 10, 1978.

On August 22, 1978, Sandman, on behalf of the defendant, notified Pat Gryder by letter, with copies to Barry Green and his attorney, that as of that date he was refusing the tender of the August rent, and that he was declaring the lease in default unless their differences over the operation of the premises could be resolved.

12. On September 5, 1978, Barry Green paid September's rent and has paid each month's rent thereafter within ten (10) days of the first of each month.

13. On September 28, 1978, Sandman, on behalf of the Defendant, notified the attorney for the Plaintiff that the checks tendered as August rent and September rent were not being accepted, and the lease was still considered by the Defendant to be in default. Each check received was converted into official bank checks and held by Sandman but not deposited in the Defendant's account.

14. Every month when the Plaintiff tendered the rent, Sandman, on behalf of the Defendant, followed the same procedure as stated in Finding of Fact No. 13.

15. In the notice of September 28, 1978, Sandman further notified the Plaintiff that the Defendant intended to take possession of the premises on October 1, 1978.

On that day the Defendant attempted to take possession but was unsuccessful.

Up until the present time the Defendants' efforts to take possession have continued to be unsuccessful.

Based upon these findings of fact, the court made the following pertinent conclusions of law:

1. The Plaintiff has not used the leased premises in a way that was unintended by the lease.

2. The Defendant is not entitled to recover anything of the Plaintiff as damages for acts or omissions arising out of the use of the premises under the lease over and above the amount ordered below, for the Plaintiff's occupancy of the

premises while this matter has been and remains in dispute.

. . .

5. The Defendant did not waive its right to consider the lease in default.

Based on the foregoing findings of fact and conclusions, the trial judge entered judgment for defendants. Plaintiff appealed.

J. Franklin Jackson, for the plaintiff appellant.

Lake & Nelson, by Broxie J. Nelson, for the defendant appellees.

HEDRICK, Judge.

The sole question presented by this appeal is whether the trial judge erred in concluding that defendants did not waive their right to declare the lease in default on the grounds that the August 1978 rent, and succeeding month's rent, was not timely paid. In *Winder v. Martin*, 183 N.C. 410, 411, 111 S.E. 708, 709 (1922), the Supreme Court stated:

> It is the generally accepted rule that if the landlord receive rent from his tenant, after full notice or knowledge of a breach of a covenant or condition in his lease, for which a forfeiture might have been declared, such constitutes a waiver of the forfeiture which may not afterwards be asserted for that particular breach, or any other breach which occurred prior to the acceptance of the rent . . . .

In *Office Enterprises, Inc. v. Pappas*, 19 N.C. App. 725, 200 S.E. 2d 205 (1973), this Court, citing *Winder v. Martin, supra*, held that a landlord is estopped from claiming a breach and demanding forfeiture of the lease when a check for the payment of rent, although tendered late and never cashed, was taken by the landlord and delivered to his attorney.

We find the unchallenged finding of fact in the present case, that defendants received plaintiff's check for the August and succeeding months' rent and converted the checks into "official bank checks," to be a waiver of defendants' right to declare the lease in default for failure to pay rent on time. The facts as

found by the trial judge in this case are even more conclusive than the facts in *Office Enterprises, Inc. v. Pappas, supra.* The evidence supporting the findings of fact discloses that defendants actually took plaintiff's checks and converted them into "official bank checks" payable to defendants. Plaintiff's account was debited for each check. The trial court's conclusion that defendants did not waive their right to declare the lease in default is erroneous and not supported by the unchallenged findings.

Manifestly, the unchallenged findings dictate a conclusion that defendants waived any right they had to declare a default for untimely payment. The unchallenged finding by the court that defendants were refusing the tender of August rent, "unless their differences over the operation of the premises could be resolved," illuminates defendants' intentions. Obviously, defendants wanted to exercise, as landlord, more control over plaintiff's operation in the leased premises than was provided in the agreement; and they were availing themselves of the lease provision concerning default in order to do so.

The erroneous conclusion requires that the judgment for defendant be vacated. Since the unchallenged findings dictate the conclusion that defendants waived their right to declare the lease in default, the cause must be remanded to the district court for the making of such a conclusion and the entry of a proper judgment based on the findings and conclusions for plaintiff declaring that the lease is and has been in full force and effect, and that plaintiff is entitled to recover his costs. The judgment is vacated and the cause is remanded to the district court for further proceedings consistent with this Opinion.

Vacated and remanded.

Judges HILL and WHICHARD concur.

Scallon v. Hooper

CHARLES S. SCALLON, ADMINISTRATOR OF THE ESTATE OF LARRY ALAN AIKEN v. PHILLIP McINTYRE HOOPER, JANET P. CALDWELL, AND CHARLES KENNETH CALDWELL

No. 8010SC270

(Filed 7 October 1980)

1. **Automobiles § 106– driver who is not owner – prima facie evidence of agency – instruction required**

Plaintiff in a wrongful death action was entitled to an instruction on G.S. 20-71.1, which essentially provides that proof of ownership of the automobile by one not the driver makes out a prima facie case of agency of the driver for the owner at the time of the driver's negligent act, since it was stipulated that one defendant who was not the driver was the registered owner of the vehicle at the time of the accident, and an instruction on the statute was required even though plaintiff presented no positive evidence that defendant driver was defendant owner's agent.

2. **Automobiles § 106– driver as agent of owner – peremptory instruction in favor of owner erroneous**

The trial court in a wrongful death action erred in giving a peremptory instruction in favor of defendant automobile owner who was not the driver at the time of the allegedly negligent acts complained of, though plaintiff relied solely on G.S. 20-71.1 and did not offer independent proof of agency, since defense counsel did not present any evidence to rebut plaintiff's prima facie case of agency under the statute, and a stipulation that the female defendant "had the vehicle in her custody and control and the right to exercise all incidents of ownership of the automobile as to its operation" did not exclude the possibility that defendant driver was acting as defendant owner's agent at the time of the collision.

APPEAL by plaintiff from *Hobgood (Hamilton H.), Judge.* Judgment entered 15 October 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 16 September 1980.

Plaintiff brought an action for the wrongful death of intestate caused by the negligent operation of a motor vehicle. A directed verdict was entered in favor of Janet P. Caldwell. On 4 October 1979, the jury returned a verdict for plaintiff against defendant Hooper only. The court ordered a partial new trial on 15 October 1979.

The parties made the following stipulations of undisputed facts in the final pretrial order. Plaintiff's intestate, Larry Aikens, died on 1 July 1976 as a result of injuries he received in an automobile accident. He was twenty-two years old. The collision occurred on 30 June 1976 on Beach Drive in Long Beach. The vehicle operated by plaintiff's intestate was a 1974 Datsun

pickup truck owned by his employer. The vehicle operated by defendant Hooper was a 1975 Pontiac convertible. Hooper was a provisional driver under G.S. 20-13 and seventeen years old at the time. Defendant Charles Caldwell was the registered owner, but defendant Janet Caldwell had the vehicle in her custody and control and the right to exercise all incidents of ownership as to its operation. Neither of the Caldwells was in the car at the time of the accident. After the pretrial stipulations were read in open court, defense counsel further stipulated, in the jury's presence, that defendant Hooper's negligence was the proximate cause of Larry Aiken's death.

Plaintiff's sole evidence was the testimony of William B. Hewitt, a former officer with the Long Beach Police Department. Hewitt testified as to Aiken's condition upon his arrival at the scene. Defendants presented no evidence. At the end of plaintiff's evidence, a directed verdict was granted in favor of defendant Janet Caldwell without objection. Defendants also moved for directed verdict in favor of Charles Caldwell on the grounds that "there was no evidence whatsoever that he was negligent" or "that the motor vehicle was being operated for any family purpose or maintained by him." The court overruled the motion.

The court gave a peremptory instruction in favor of defendant Charles Caldwell and did not instruct the jury on the application of G.S. 20-71.1 to the facts of the case. The jury returned a verdict against defendant Hooper and found that he was not acting as the agent of defendant Charles Caldwell at the time of the collision. Plaintiff received an award of $1000.00 for decedent's pain and suffering and $10,000.00 for the present monetary value of decedent. Pursuant to plaintiff's motion under G.S. 1A-1, Rule 59, the court ordered a new trial but only on the issue of damages for the present monetary value of decedent.

Bailey, Dixon, Wooten, McDonald and Fountain, by Wright T. Dixon, Jr., and Gary S. Parsons, for plaintiff appellant.

Ragsdale and Liggett, by George R. Ragsdale and Peter M. Foley, for defendant appellees.

VAUGHN, Judge.

We shall consider plaintiff's assignments of error concerning the trial court's instructions first. The two basic issues are whether plaintiff was entitled to an instruction on G.S. 20-71.1 and whether a peremptory instruction was properly given in favor of defendant Charles Caldwell. We conclude that the trial court committed error in both regards and order a new trial on the agency issue.

[1] It cannot be questioned that G.S. 20-71.1 was applicable to this case. As explained by the Court in *Duckworth v. Metcalf*, the statute essentially provides that:

> [p]roof of ownership of the automobile by one not the driver makes out a *prima facie* case of agency of the driver for the owner at the time of the driver's negligent act of omission, but it does not compel a verdict against the owner upon the principle of *respondeat superior.*

268 N.C. 340, 343, 150 S.E. 2d 485, 488 (1966). It was stipulated that defendant Charles Caldwell was the registered owner of the vehicle at the time of the accident. Clearly, the judge had a duty to explain the rule of G.S. 20-71.1, even absent a special request by plaintiff, because it was the law arising from the evidence. G.S. 1A-1, Rule 51; Shuford, N.C. Civil Practice and Procedure § 51-3(1975). Moreover, this instruction was required even though plaintiff presented no positive evidence that Hooper was Caldwell's agent. *Whiteside v. McCarson*, 250 N.C. 673, 110 S.E. 2d 295 (1959); *Hartley v. Smith*, 239 N.C. 170, 79 S.E. 2d 767 (1954). We note that a model instruction is available as a guide for explaining G.S. 20-71.1 to the jury. N.C.P.I. — Civ. 103.40 (1973).

[2] Nevertheless, the judge gave the following peremptory instruction for defendant:

> Now, we have an issue here which is the first issue which says this: Was the Defendant Phillip McIntyre Hooper, at the time of the collision, acting as the agent of the Defendant Charles Kenneth Caldwell?
>
> As to this issue, members of the jury, which is number one, if the jury finds that on the occasion of the collision on June 30, 1976, that the Defendant Hooper was driving the Defendant Charles Kenneth Caldwell's car at Long Beach

and that the Defendant Hooper was not on a mission or errand of any kind for the Defendant Charles Kenneth Caldwell, as all of the evidence tends to show, it would be your duty to answer issue number one "no."

A peremptory instruction may be given in a proper case. Generally, "[t]his device may be used when there is a sufficient quantum of evidence, all tending to establish one side of an issue, and which, if credible, gives rise as a matter of law to but one permissible inference." 2 McIntosh, N.C. Practice 2d, § 1516, at 42-43 (Supp. 1970). Specifically, it has been held repeatedly that defendant is entitled to a peremptory instruction when plaintiff relies solely on G.S. 20-71.1, and defendant offers uncontradicted evidence on the issue of agency tending to show that the driver was on a purely personal mission or errand at the time of the collision. *Torres v. Smith*, 269 N.C. 546, 153 S.E. 2d 129 (1967); *Passmore v. Smith*, 266 N.C. 717, 147 S.E. 2d 238 (1966); *Nolan v. Boulware*, 21 N.C. App. 347, 204 S.E. 2d 701, *cert. den.*, 285 N.C. 590, 206 S.E. 2d 863 (1974). The case before us does not meet this test.

Plaintiff relied solely on G.S. 20-71.1 and did not offer independent proof of agency. Defense counsel did not present any evidence to rebut plaintiff's prima facie case of agency under the statute. There is no authority that a peremptory instruction may be given in favor of a defendant who offers no evidence whatsoever on the critical issue. Therefore, it was error to instruct the jury that *all* of the evidence tended to show that defendant Hooper was not on a mission for Charles Caldwell. The only evidence that even had this tendency was a pretrial stipulation which provided that "the Defendant Janet P. Caldwell had the vehicle in her custody and control and the right to exercise all incidents of ownership of the automobile as to its operation."

Defendant contends that this stipulation had the effect of negating plaintiff's prima facie case under the statute and thus required plaintiff to come forward with independent proof of agency. We do not agree. It is significant that the stipulation did not say that Janet Caldwell had exclusive custody and control of the car. Moreover, it did not provide that she had all incidents of ownership with respect to the car. It merely stated that she had the right to exercise all incidents of ownership. The stipula-

tion did not, therefore, exclude the possibility that Hooper was acting as Charles Caldwell's agent at the time of the collision. We must conclude that this stipulation was not positive, uncontradicted evidence of the lack of agency sufficient to require a peremptory instruction. Giving a peremptory instruction in this case defeated the plain and obvious purpose of G.S. 20-71.1, which is to enable plaintiff to submit a prima facie case of agency to the jury which it can decide to accept or reject. *Chappell v. Dean*, 258 N.C. 412, 128 S.E. 2d 830 (1963); *Travis v. Duckworth*, 237 N.C. 471, 75 S.E. 2d 309 (1953). A peremptory instruction is warranted only when compelling evidence permitting one reasonable conclusion is presented; otherwise, this procedural device could be used to reduce G.S. 20-71.1 to a meaningless exercise.

Though it is not necessary to our disposition here, we agree with two other contentions made by plaintiff. First, the judge expressed an improper opinion in his opening instructions on what the evidence tended to show on the agency issue when he said that "at the proper time in my charge I will instruct you that on the basis of the evidence that you will answer that issue 'no.' " Such a comment on the evidence is prohibited by G.S. 1A-1, Rule 51(a). The remark was so absolute that a juror may have believed that the judge had already given the correct conclusion. *See* Shuford, N.C. Civil Practice and Procedure § 51-4 (1975). Second, the form of the peremptory instruction was also incorrect. When G.S. 20-71.1 applies to a case, the instruction must relate directly to particular facts shown by defendant's positive evidence. *Belmany v. Overton*, 270 N.C. 400, 154 S.E. 2d 538 (1967); *Whiteside v. McCarson*, 250 N.C. 673, 110 S.E. 2d 295 (1959).

Plaintiff's final assignment of error is that the court erred in denying his motion for a new trial on the ground of inadequate damages for decedent's pain and suffering. We decline to grant a new trial on this issue. The judge's decision on the matter was within his discretion, and we can find no abuse of discretion here. *Robinson v. Taylor*, 257 N.C. 668, 127 S.E. 2d 243 (1962); *Gwaltney v. Keaton*, 29 N.C. App. 91, 223 S.E. 2d 506 (1976). Thus, in addition to the trial court's order of a new trial on damages for decedent's present monetary value, we order a new trial on the agency issue.

New trial.

Judges MARTIN (Robert M.) and WEBB concur.

SAMUEL B. BROWN, JR., EMPLOYEE, PLAINTIFF, v. J.P. STEVENS & COMPANY, INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS.

No. 8010IC205

(Filed 7 October 1980)

Master and Servant § 68– workers' compensation — textile worker — lung disease not caused by employment

The Industrial Commission's determination that plaintiff textile worker's lung disease was not caused by cotton dust and lint and that plaintiff thus did not suffer from a compensable disease peculiar to those working in cotton mills was supported by medical testimony that "there is not specifically any objective indication that he has any type of pulmonary disease related to his employment" and that "it is possible although unlikely that his occupational exposure could or might have caused [his] substantial respiratory impairment."

APPEAL by plaintiff from order of North Carolina Industrial Commission entered 8 August 1979. Heard in the Court of Appeals 27 August 1980.

Plaintiff filed a claim under the Workers' Compensation Act for an alleged occupational disease resulting from exposure to cotton dust. Hearings were held before Deputy Commissioners in Roanoke Rapids, Raleigh, and Hillsborough. The evidence showed that plaintiff was employed by J.P. Stevens and Company, Inc. for 37 years. In his employment with J.P. Stevens, he was exposed to cotton dust. From 1955 until 1975 he was also exposed to varsol. Plaintiff testified that he was 58 years of age at the time of the hearing, and that he had not had any serious illness before 1955. He also testified he had smoked a pack of cigarettes a day from the time he was approximately 20 years of age until 1975 when he reduced his smoking to approximately four packs of cigarettes per week. Plaintiff had a heart attack in 1971 but returned to work approximately three months later and worked until he had a second heart attack in 1974. After returning to work after the first heart attack, he "noticed [he] was getting short of breath."

Dr. J.W. Boone testified that he had treated plaintiff from 1966 and that, in his opinion, plaintiff's heart problem is the primary reason plaintiff became unable to work. Dr. Boone testified further that "[b]ased upon [his] examination and treatment of Mr. Brown, there is not specifically any objective indication that he has any type of pulmonary disease related to his employment."

Dr. Ted R. Kunstling, a member of the Industrial Commission's Textile Occupational Disease Panel, testified that he examined the plaintiff on 30 September 1977. He testified that from that examination, he found plaintiff had a history of angina pectoris, chronic bronchitis, chronic obstructive pulmonary disease, degenerative arthritis, chronic sinusitis, varicose veins and other medical problems. He testified that he felt plaintiff's "exposure to cotton dust ha[d] been a significant contributing factor to the development of the pulmonary impairment," but there were other factors, as cigarette smoking, which were also significant. On cross-examination, he said that plaintiff's exposure to cotton dust does not give "a history suggesting the diagnosis of byssinosis" because plaintiff's "shortness of breath began more in relationship to exertion rather than to the dust exposure pattern . . . ."

Dr. Mario C. Battigelli testified that, in his opinion, "the work history that [he] obtained from Mr. Brown and the development of symptoms was not consistent with the diagnosis of byssinosis." He also testified: "[M]y opinion satisfactory to myself to a reasonable degree of medical certainty is that it is possible although unlikely that his occupational exposure could or might have caused the substantial respiratory impairment which I have diagnosed in my report." He found it significant that plaintiff's breathing problems increased after the first and second heart attack. He stated that it "would signify that the heart attack must have had a direct bearing on the deterioration of his respiratory function."

On 29 November 1978, the Hearing Commissioner rendered a decision. Among the findings of fact were the following:

> "9. Plaintiff has fullous emphysema, possibly caused by smoking but not caused by cotton dust and lint.
>
> 10. Plaintiff does not have byssinosis.

11. Plaintiff is totally disabled. The primary cause of this is plaintiff's heart condition. Some small part of the disability is due to his pulmonary condition. Plaintiff could not return to any work in the cotton mill because of his pulmonary condition — the cotton dust and lint and the varsol would aggravate his pulmonary condition."

The Hearing Commissioner made a conclusion of law that the plaintiff "does not suffer from a disease peculiar to those working in cotton mills and his claim is therefore not compensable." Coverage was denied. The Full Commission affirmed the decision of the Hearing Commissioner.

Hassell and Hudson, by Charles R. Hassell, Jr. and Robin E. Hudson, for plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, by C. Ernest Simons, Jr., for defendant appellees.

WEBB, Judge.

The plaintiff, on this appeal, does not contend the evidence shows he has byssinosis. He contends that the whole record does show that he had a pulmonary disease which was due to causes and conditions which are peculiar to his employment at J.P. Stevens and the disease is not an ordinary disease of life to which the general public is exposed outside of the plaintiff's employment. For this reason, the defendant contends his disease is covered by G.S. 97-53(13). *See Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979).

The Hearing Commissioner made a finding of fact that the plaintiff's lung disease was not caused by cotton dust and lint. The Hearing Commissioner concluded that he did "not suffer from a disease peculiar to those working in cotton mills . . . ." This finding and conclusion were affirmed by the Full Commission. The finding of fact is sufficient to support the conclusion of law that the plaintiff's disease is not compensable. If the finding of fact is supported by the evidence, the decision of the Full Commission must be affirmed. *See Moore v. Stevens, Inc.*, 47 N.C. App. 744, 269 S.E. 2d 159 (1980). We hold that the testimony of Dr. Boone that "there is not specifically any objective indication that he has any type of pulmonary disease related to his employment" and the testimony of Dr. Battigelli "that it is possible although unlikely that his occupational ex-

posure could or might have caused the substantial respiratory impairment" is evidence which supports the finding of fact. There was evidence from which the Hearing Commissioner could have found otherwise but since the evidence supports the finding of fact, we are bound by it.

The appellant contends the Hearing Commissioner did not apply the standard of compensability required by G.S. 97-53(13) as interpreted by *Booker v. Medical Center, supra.* He contends that North Carolina has adopted the increased risk approach to compensability and cotton mill workers have an increased risk of developing lung diseases. He contends that all the evidence shows the plaintiff's condition became more serious during his exposure to cotton dust. The Hearing Commissioner found as a fact that "[p]laintiff could not return to any work in the cotton mill" because exposure to cotton dust and varsol would aggravate his condition. The plaintiff argues that aggravation is synonymous with causation under the proper interpretation of G.S. 97-53(13). As we read *Booker*, in order for an occupational disease which develops over a long period of time to be compensable under G.S. 97-53(13), it must be proved that it was caused by the plaintiff's employment. In the case sub judice, there was competent evidence that plaintiff's disease was not caused by his employment and the Hearing Commissioner so found.

Affirmed.

Judges VAUGHN and MARTIN (Robert M.) concur.

CHARLES HARRISON, JR., T/A CRAFT MART HOMES, INC. v. BARBARA M. McLEAR

No. 8027SC212

(Filed 7 October 1980)

Contracts § 28.1– partial construction of house – builder's right to partial payment — instructions inadequate

In an action to recover for the building of a house, plaintiff is entitled to a new trial where the evidence tended to show that plaintiff performed on the parties' contract by constructing at least a portion of the house, then requested partial payment according to the terms of the agreement, and defendant did not authorize FHA to make partial payments as provided in

the contract, but the trial court's instructions did not, with reference to the evidence, declare and explain under what circumstances, if any, plaintiff would be entitled to payments or under what circumstances, if any defendant would be justified in refusing to approve payments.

APPEAL by plaintiff from *Thornburg, Judge*. Judgment entered 10 August 1979 in Superior Court, GASTON County. Heard in the Court of Appeals on 9 September 1980.

In this civil action, plaintiff, a building contractor, seeks to recover $12,956.41 for having built a house for defendant pursuant to a contract entered into on 16 December 1977. In his complaint, plaintiff alleged, among other things, that plaintiff and defendant entered into a contract under which plaintiff agreed to construct a dwelling for defendant in consideration for $23,800; that plaintiff began construction on or about 20 December 1977; that on or about 6 March 1978 plaintiff furnished defendant with a statement of labor and materials procured under the contract and requested defendant to release a portion of certain funds held by the Farmers Home Administration, which defendant refused to do; that plaintiff continued to work on the dwelling until mid-May 1978, when defendant refused to allow plaintiff or any of those working for plaintiff to come on defendant's property; and that plaintiff had made numerous demands of the defendant for sums owed to plaintiff for labor performed and materials furnished, but that defendant had failed to pay those sums. Defendant filed answer, admitting the existence of the contract and that plaintiff had furnished labor and materials for construction of a dwelling, but alleging that plaintiff did not commence construction until late January 1978 and that defendant did not prevent plaintiff from working on the house until July 1978. Defendant further alleged that plaintiff breached the contract when he quit working on the house. So much of the evidence offered at trial as is necessary for an understanding of the decision in this case is set out in the Opinion to follow.

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

1. Did the plaintiff and defendant enter into a contract on December 16, 1977, for construction of a home by plaintiff?

ANSWER: YES

2. Did plaintiff last furnish labor, supplies, or both during the last week of June or first week of July, 1978?

ANSWER: YES

3. Did defendant breach her contract with plaintiff by failing to authorize payments of sums due under the terms of the contract?

ANSWER: NO

4. Did plaintiff breach his contract with defendant by:

(a) failing to complete the home within the specified contract period?

ANSWER:

(b) failing to complete construction of the home called for under the terms of the contract?

ANSWER:

5. What amount of damages is plaintiff entitled to recover from defendant?

ANSWER: $

From a judgment entered on the verdict that plaintiff have and recover nothing from defendant, plaintiff appealed.

Lloyd T. Kelso, for the plaintiff appellant.

Robert H. Forbes, for the defendant appellee.

HEDRICK, Judge.

Plaintiff's several assignments of error relate to the issues submitted to the jury, and the instructions given thereon. It is the duty of the trial judge to declare and explain the law arising on the evidence given in the case. G.S. § 1A-1, Rule 51 (a); *N.C. Board of Transportation v. Rand*, 299 N.C. 476, 263 S.E.2d 565 (1980); *Rector v. James*, 41 N.C. App. 267, 254 S.E.2d 633 (1979). This means, among other things, that the judge must submit to the jury such issues as when answered by them will resolve all material controversies between the parties, as raised by the pleadings. *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971); *Wes-*

ley v. Lea, 252 N.C. 540, 114 S.E.2d 350 (1960); *Howell v. Howell*, 24 N.C. App. 127, 210 S.E.2d 216 (1974). *See also* G.S. § 1A-1, Rule 49(b). Therefore, the trial judge must explain and apply the law to the specific facts pertinent to the issue involved. *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E.2d 342 (1972).

The evidence offered at trial tends to show the following: Plaintiff, a home builder with sixteen years' experience, first discussed building defendant's house with defendant in late August or early September 1977. Plans were drawn up, and on 16 December 1977, the parties entered into a construction contract with the Farmers Home Administration (FHA). Under this contract, the house was to be completed by 16 March 1978, and plaintiff was to receive upon his request and upon approval by FHA and defendant monthly payments not to exceed sixty percent (60%) of the value of the work in place. Work on the house was not begun until mid-February because of "unusually cold and wet" weather. By mid-March 1978, the house "was enclosed, with all walls and the roof in place." At that time, plaintiff asked FHA for a partial payment, and FHA requested that plaintiff install another subflooring prior to payment, which plaintiff did. Plaintiff never received any payment, however, because defendant refused to approve it. Plaintiff continued to work on the house, and on 3 June 1978 defendant demanded changes in the trim; plaintiff refused.

Plaintiff thereafter delayed work until 19 June 1978 to allow defendant to do the trim changes herself. When plaintiff resumed work, defendant continued to complain, and sometime around the first of July 1978, work ceased on the house altogether. The house was approximately 55% completed at that point, and plaintiff never received any payment for work done on the house.

Our disposition of this case makes it unnecessary for us to discuss whether the issues submitted to the jury were altogether sufficient to resolve the controversies between plaintiff and defendant, or whether the instructions with respect to all issues were adequate and free from prejudicial error. We hold the instructions with respect to the third issue were so inadequate as to require a new trial. As to the third issue, the entire instructions were as follows:

Did the defendant breach her contract with the plaintiff by failing to authorize payments of sums due under the terms of the contract?

The burden of proof on this issue is on the plaintiff to satisfy you from the evidence and by its greater weight that the defendant did in fact breach her contract with the plaintiff by failing to authorize payments of sums due under the terms of the contract.

Now, a breach of contract, members of the jury, is a violation or nonfulfillment of the obligation, agreement, or duties imposed by the contract. A breach occurs when a party without legal excuse fails to perform any promise which is all or a part of the contract. An unjustified failure to pay or authorize payment of the total sums or a portion of the sums due under the terms of the contract would constitute a breach of the contract terms.

Now, in this case, the plaintiff contends that he was entitled to draw at least a portion of the money due under the terms of the contract as the work progressed but that the defendant in this case refused to authorize payments under the terms of the contract.

The defendant on the other hand contends that the plaintiff could have had some of the money but was not entitled to the amount of money that he sought or is now seeking.

So, as to this issue, members of the jury, the court instructs you that if the plaintiff has satisfied you from the evidence and by its greater weight that the defendant breached her contract with the plaintiff by failing to authorize at least a portion of the payment of sums due under the terms of the contract, then it would be your duty to answer this issue yes. However, on the other hand, if you fail to so find by the greater weight of the evidence, then it would be your duty to answer this issue no.

Now, if you answer this issue no, you would not answer the remaining issues, . . .

Under the terms of the contract between the parties, plaintiff agreed to construct a house for defendant. When plaintiff

performed his part of the bargain, defendant had a duty to authorize partial payments as provided by the terms of the contract. The evidence tends to show that plaintiff performed by constructing at least a portion of the house, and requested partial payment according to the terms of the agreement. The evidence further tends to show defendant failed to perform her duty by authorizing FHA to make partial payments as provided in the contract. The instructions made no reference to the evidence regarding plaintiff's performance, or defendant's duty in the event of plaintiff's performance. The only reference to the evidence with respect to performance and duty made by the trial judge was that plaintiff contended he was entitled to payments, and defendant contended "plaintiff could have had some of the money but was not entitled to the amount of money that he sought or is now seeking." Nowhere did the trial judge with reference to the evidence and the law declare and explain under what circumstances, if any, plaintiff would be entitled to payments or under what circumstances, if any, defendant would be justified in refusing to approve payments.

While we realize the instructions on the fourth issue were more complete and definitive, that portion of the instructions that the jury was not to consider the fourth and fifth issues if it answered "no" to the third issue, coupled with the court's failure to explain and apply the law to the specific facts pertinent to the issue involved, erroneously and effectively prejudiced plaintiff's claim. For the reasons stated, the judgment entered on the verdict is vacated, and the cause is remanded to the superior court for a new trial.

New trial.

Judges HILL and WHICHARD concur.

DENNIS B. RUSSELL v. SAM SOLOMON COMPANY

No. 8012SC297

(Filed 7 October 1980)

1. Evidence § 33– testimony not hearsay

In an action to recover for injuries received by plaintiff from a glass display counter in defendant's store, a witness's testimony that an employee

of defendant showed him a counter and "said that is the one that broke and that [plaintiff] got cut on" was not objectionable hearsay but was admissible as a part of the operative conduct itself offered for its own sake and not as evidence of the truth of any statement made; furthermore, such testimony was also admissible for the purpose of corroborating plaintiff's testimony that defendant's courtroom exhibit was not an accurate replica of the counter which injured him.

2. **Negligence § 31– shattering of glass display shelf — res ipsa loquitur**

The doctrine of *res ipsa loquitur* applied to provide an inference of negligence by defendant in an action to recover for injuries received by plaintiff when a glass display shelf in defendant's store shattered where plaintiff's evidence tended to show that the display was under defendant's control; no one else was present when the injury occurred so only plaintiff could testify as to how it happened; the shelving instantaneously "gave way" as plaintiff placed his hand upon it; plaintiff did not lean upon the glass shelf and exerted only minimal pressure upon it; and the broken shelf was not presented by defendant at any time for testing and was discarded after the accident.

APPEAL by plaintiff from *Braswell, Judge.* Judgment entered 23 October 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 18 September 1980.

Plaintiff sued for injuries received from a glass display counter in defendant's store. At the conclusion of plaintiff's evidence on negligence, the court granted defendant's motion for a directed verdict.

On 15 June 1976, plaintiff, with his wife and some friends, went to defendant's store in Fayetteville to look for a canasta tray. They dispersed into different departments to find this item. Plaintiff asked a clerk in the camera department about a tray and then walked over to the next area, the cosmetic department. There were no store employees there. Only plaintiff could testify as to how the accident happened.

> (Indicating) Exactly what I did was to place my hand upon the glass counter so as not to disturb the articles that were displayed on it. There were men's cologne placed on it at the time I walked up to it. As I approached the counters and placed my hand right here (indicating on shelf) so that I wouldn't disturb anything, and looked into the inside, because the small racks were very difficult to see, and as I was standing there looking at it, this thing gave way. As to what I actually did I placed my hand here about like I am doing now (indicating on shelf) and looked inside. I exerted

> minimal force upon my hand as I sat it down upon that shelf. I did not lean or in any way rest upon the shelf. As I stood there with my hand on the shelf, the shelf caved in. I felt pain — instant pain in my arm and then as I pulled my arm back away from the counter, it was gushing blood then. (Witness was instructed to be seated). Before I felt pain, I did not feel the shelf do anything, it was instantaneous. I heard crashing noises as everything was going; but again, it was instantaneous. I moved my arm away and in the process of moving, the shelves sliced into my wrist. . . . At that point we started moving away — the parties with me, and some store people came over at this point including Mr. Nichols. Mr. Nichols is the gentleman seated in the back in the glasses. I did not see anyone else that I recall at this time. If these are employees, I don't recognize or recall any female people being there. I remember Mr. Nichols and some other men there. At that point we went to the right front of the building which is by the restrooms where they have a little table, like a small lounge there; and someone in the store called an ambulance or rescue team to come over. In the meantime, I gave them some information as to whatever they were asking. . . .

On cross-examination, plaintiff denied that he had drunk any type of whiskey before entering the store. He further stated:

> I did not come up to a display case similar to that [defendant's courtroom exhibit]. I did not come up initially and put my right hand there in an attempt to look at some items that were on the back side. . . . I did not take my right hand and lean on the shelf of the counter and did not lean over the counter and put my hand there to catch my balance.

Plaintiff then demonstrated how he placed his hand on the counter using the one defendant had brought to the courtroom. Nevertheless, he explained the difficulty in doing so since defendant's exhibit was not like the display counter which had injured him. He also said that he had not seen any signs like "please do not lean on the counter."

Tommy Underwood, an investigator, was called as a witness for plaintiff. He said that he went to defendant's store in early July 1976 and had a conversation with a store employee,

William Nichols. Underwood requested Nichols to show him something. The rest of Underwood's testimony was taken by voir dire examination. He testified that Nichols took him to the cosmetics counter and showed him some glass shelving. Underwood said this shelving was not like the counter top entered as defendant's exhibit and described it as being loose, movable and unsecured. He stated that he did not see the actual shelving that injured plaintiff because Nichols told him it had been cleaned up and thrown away. Defendant objected to "any testimony by this witness on any conversation he had with Mr. Nichols as being incompetent and hearsay." The court sustained defendant's objection, and Underwood was not allowed to give this testimony before the jury.

James R. Nance, Jr., for plaintiff appellant.

Anderson, Broadfoot and Anderson, by Henry L. Anderson, Jr., for defendant appellee.

VAUGHN, Judge.

Two issues are brought for our review: whether Underwood's testimony concerning the statements and actions of defendant's employee should have been excluded and whether a directed verdict should have been granted to defendant. We answer both questions in the negative and reverse.

The following portions of Underwood's testimony were especially relevant to plaintiff's case:

> The shelving I was shown was not a counter top as this. It was just open on the front and back. It was only three shelves on it when I saw it. It was glass shelving. ... Of course, the top piece was missing or one of the shelves was missing. As to what I did with regard to the shelving I was shown, I put my hand on the shelving and it was loose. ... The shelving was not secured in any manner. It was not clamped on. It was inlaid with a bracket but it was not clamped down. At the time I touched it, it was loose. You could move it back end to end and it was moveable. It was not tight, secure.

After reviewing his notes, Underwood further testified that Nichols had shown him the counter and "said that is the one that broke and that Dr. Russell got cut on."

This was not objectionable hearsay. Underwood's testimony as to what Nichols said as he showed him the counter was admissible as "a part of the operative conduct itself ... offered for [its] own sake and not as evidence of the truth of any statement made ... ." 1 Stansbury, N.C. Evidence, § 159, at 534 (Brandis rev. 1973). It is unnecessary to consider whether Nichols' statement meets all the requirements for an admission of an agent against his principal. "[A] statement accompanying an act is admissible *either for or against* the principal ... when the statement characterizes or qualifies the act, in which case it would be so admissible without regard to any question of agency, under one of the so-called *res gestae* principles." 2 Stansbury, *supra*, § 169, at 18-19.

Underwood's testimony was also admissible for the purpose of corroborating plaintiff's testimony that defendant's courtroom exhibit was not an accurate replica of the counter that injured him. Plaintiff's argument at trial for admission was, therefore, entirely correct:

> This man can testify to what he saw and observed. Now, this display case has been brought in and has sat here before the jury and Dr. Russell has been cross examined with regard to this display case; and, I think, that we can show through this witness that he approached an employee of the company who was present at the time the incident occurred and that he asked him to show him the area and the display case that was involved in this particular thing; and that he was shown a particular object and that it was not this particular case and I think that is proper at this point.

In addition, Underwood's description of the counter he was shown was relevant evidence tending to support an inference of defendant's negligence. Thus, it was prejudicial error to exclude Underwood's testimony.

[2] We also agree with plaintiff's second contention that the doctrine of *res ipsa loquitur* should have been applied to the facts of this case. *Res ipsa* applies when direct proof of the cause of an injury is not available, the instrumentality involved in the accident is under the defendant's control, and the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission. *Snow v. Power Co.*, 297 N.C. 591, 256

S.E. 2d 227 (1979); Restatement (second) of Torts, § 328 D (1965). *Res ipsa* may not, however, be used to infer negligence from the mere fact of an accident or injury. *O'Quinn v. Southard*, 269 N.C. 285, 152 S.E. 2d 538 (1967).

On this appeal, we must consider plaintiff's evidence as true, viewing it in the light most favorable to him with the benefit of every reasonable inference. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). His evidence tended to show the following. He was injured by a display counter which was under defendant's control. No one else was present when the injury occurred so only plaintiff could testify as to how it happened. He stated the shelving "gave way" as he placed his hand upon the shelf and that it was "instantaneous." The broken shelving was not presented by defendant at any time for testing or examination. It was discarded after the accident. Direct proof of the cause of the counter's collapse was, therefore, unavailable at trial. Nevertheless, in the ordinary course of things, a display counter does not shatter when one places his hand on it exerting only minimal pressure. *See Young v. Anchor Co., Inc.*, 239 N.C. 288, 79 S.E. 2d 785 (1954) (escalator suddenly jerked, stopped and quickly moved forward); *Page v. Sloan*, 12 N.C. App. 433, 183 S.E. 2d 813, *affd.*, 281 N.C. 697, 190 S.E. 2d 189 (1972) (explosion of an electric water heater).

A directed verdict can be granted only when plaintiff's evidence, as a matter of law, is insufficient to justify a verdict in his favor. *See* G.S. 1A-1, Rule 50. One of defendant's grounds for a directed verdict was that plaintiff's evidence failed to disclose any actionable negligence. We do not agree. *Res ipsa loquitur* provided an inference of defendant's negligence sufficient to authorize, but not compel, a verdict for plaintiff. *Lentz v. Gardin*, 294 N.C. 425, 241 S.E. 2d 508 (1978). Therefore, it was error to grant a directed verdict to defendant on that ground. *Husketh v. Convenient Systems*, 295 N.C. 459, 245 S.E. 2d 507 (1978); *McPherson v. Hospital*, 43 N.C. App. 164, 258 S.E. 2d 410 (1979). Defendant also requested a directed verdict on the ground that plaintiff was contributorily negligent. Plaintiff's evidence was that he did not lean upon the shelf and that he exerted only minimal pressure upon it. This does not disclose contributory negligence as a matter of law.

The judgment appealed from is reversed.

Reversed.

Judges MARTIN (Robert M.) and WEBB concur.

HILDA S. PAYNE v. ALFRED E. PAYNE

No. 8010DC286

(Filed 7 October 1980)

Divorce and Alimony § 16.9– amount of alimony — lump sum plus monthly payment — inadequacy

The trial court erred in ordering defendant to pay permanent alimony to plaintiff in a lump sum of $15,000 with $10,000 to be paid at the time the parties sell their joint residence and the remainder of that amount to be paid at the rate of $250 per month where the court found that plaintiff had a net income of $466 per month for nine months and a net income of $250 for three months; defendant had a net income of $1789 per month; the monthly mortgage payment on the residence was $434 which was to be paid by plaintiff; the parties had consumer debts of $5,491 which were to be paid by defendant; and plaintiff and defendant each have reasonable living expenses of $800 per month since (1) if the parties are not divorced and the residence is not sold, defendant might not be required to pay the $10,000 at all and plaintiff would be required to make the $434 monthly mortgage payments indefinitely, half of which would inure to the benefit of defendant, and (2) pursuant to the order, plaintiff will have a net monthly income which is $138 less than the $800 found by the court to be plaintiff's reasonable monthly expenses and defendant will have a net monthly income which is $739 more than the $800 found to be defendant's reasonable monthly expenses, and the order thus effectively destroys plaintiff's accustomed standard of living while substantially improving that of defendant.

APPEAL by plaintiff from *Parker, Judge.* Judgment entered 11 October 1979 in District Court, WAKE County. Heard in the Court of Appeals on 17 September 1980.

This is a civil action wherein plaintiff seeks a divorce from bed and board, permanent alimony, and counsel fees.

After trial before the judge without a jury, the court made the following pertinent findings regarding the payment of permanent alimony:

> 9. The plaintiff and the defendant own as tenants by the entireties [sic] and both reside in a residence located at

1316 Trinity Circle, Raleigh, North Carolina. The property is encumbered by first and second mortgages with monthly payments on those mortgages totaling approximately $434.00.

. . .

12. The plaintiff is forty-seven years of age and is employed as a secretary at North Carolina State University. The plaintiff's employment requires that she work full-time for nine months of each year and part-time for three months of each year. During her period of full-time employment, the plaintiff has a gross monthly salary of $661.00 and a net monthly salary of $466.00. During her term of part-time employment, the plaintiff's net monthly salary is approximately $250.00, that salary being based on a percentage of her full-time employment salary. This is plaintiff's sole support in addition to the support she has received from the defendant.

13. The plaintiff's reasonable living expenses are approximately $800.00 per month.

14. The defendant is fifty years of age and is employed by the Veterans Employment Service of the United States Department of Labor. His bi-weekly gross salary is $976.00 and his bi-weekly net salary is $652.00. In addition the defendant receives a monthly retirement payment from the U.S. Army in the net amount of $441.00 and a monthly disability payment from the Veterans Administration in the amount of $44.00. Defendant has used this income for the support of himself and the plaintiff.

15. The defendant's reasonable living expenses are approximately $800.00 per month.

. . .

17. During March, 1979, the defendant purchased for the plaintiff a 1978 Monte Carlo, title to which is registered in the defendant's name. There is presently outstanding an indebtedness upon this automobile of approximately $4258.00 with monthly payments of $138.00. Plaintiff regularly uses this automobile for her personal transportation.

18. Neither of the parties has personal assets other than the property located at 1316 Trinity Circle, Raleigh, North Carolina, personal effects, household furnishings, and savings accounts, plaintiff's savings account consisting of approximately $250.00 and defendant's savings account consisting of approximately $400.00.

. . .

21. The parties have presently outstanding total short term and consumer debts in the amount of $5,491.00. More than one-half of these debts were accumulated for the benefit of the defendant. The balance of these debts were [sic] accumulated for the benefit of the plaintiff.

. . .

27. The plaintiff is a dependent spouse as that term is defined in NCGS Sec 50-16.1.

28. The defendant is a supporting spouse as that term is defined in NCGS Sec 50-16.1.

29. Plaintiff is actually substantially dependent upon defendant for her maintenance and support and defendant has the financial means and ability with which to provide her with maintenance and support and it appears from all the evidence that the plaintiff is entitled to the relief demanded. (JHP)

Based on its findings and conclusions with respect to the payment of permanent alimony, the court ordered:

1. The defendant shall pay to the plaintiff, as permanent alimony, and for her support and maintenance, the lump sum of $15,000.00, to be paid as follows: $10,000 to be paid at the time that the parties sell their joint residence and the remainder of that amount to be paid at the rate of $250.00 per month beginning October 15, 1979.

2. The defendant shall transfer title, ownership and possession to the plaintiff of the 1978 Monte Carlo automobile presently used by her. Defendant shall make the monthly payments in satisfaction of the indebtedness presently existing on that automobile.

3. Subject to any encumbrances thereon, plaintiff is entitled to possession of the parties' residence located at 1316 Trinity Circle, Raleigh, North Carolina, until the date of the parties divorce.

4. Defendant shall assume and pay when due those charge account, short term, and consumer loans incurred by the parties as of September 1, 1979, those loans totaling approximately $5,491.00.

Plaintiff appealed.

Sanford, Adams, McCullough and Beard, by Renee J. Montgomery and Charles H. Montgomery, for the plaintiff appellant.

Stephen T. Smith, for the defendant appellee.

HEDRICK, Judge.

Plaintiff's assignments of error all relate to the amount of alimony the court ordered defendant to pay to plaintiff. G.S. § 50-16.5(a) provides: "Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." Although the trial judge must follow the requirements of this section in determining the amount of permanent alimony to be awarded, the trial judge's determination of the proper amount is within his sound discretion and his determination will not be disturbed on appeal absent a clear abuse of that discretion. *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976); *Eudy v. Eudy*, 288 N.C. 71, 215 S.E.2d 782 (1975); *Cornelison v. Cornelison*, 47 N.C. App. 91, 266 S.E.2d 707 (1980); *Clark v. Clark*, 44 N.C. App. 649, 262 S.E.2d 659 (1980). Plaintiff contends that the findings, conclusions, and order requiring defendant to pay permanent alimony to plaintiff in the lump sum of $15,000 constitute a clear abuse of discretion on the part of the trial judge. We agree.

The findings of fact made by the trial judge afford us some insight into the "accustomed standard of living" of the parties. Before they separated, the parties had a combined net income of $2,201 per month. They lived in a home with a monthly mortgage payment of $434, and plaintiff had the use of a 1978

Monte Carlo automobile. Their consumer indebtedness was within reasonable limits considering their net monthly income. While the parties had not accumulated assets of significant value, it is a reasonable inference that they lived quite well under all the circumstances.

Because of the patent ambiguities in the order providing the amount and manner of the payment of alimony, we are uncertain of the benefits to be derived by plaintiff and the obligation to be imposed upon defendant. If the parties are not divorced and the residence is not sold, defendant might not be required to pay the $10,000 at all, and plaintiff will be required to make the $434 monthly mortgage payments indefinitely, half of which will inure to the benefit of defendant as one of the tenants by the entirety. Under these circumstances, it is not likely that defendant would seek an early divorce or agree to any early sale of the property. On the other hand, plaintiff is not likely to obtain an absolute divorce, since that might jeopardize all of her rights to alimony. G.S. § 50-11(c); *McCarley v. McCarley*, 289 N.C. 109, 221 S.E.2d 490 (1976). Also, plaintiff is not likely to be anxious for a quick sale of the property, even though her obligation to make monthly mortgage payments would thereby be terminated, since she would be giving up her place of residence with all of the consequent inconvenience and expense of finding a new home. If, as suggested by counsel on oral argument in this case, the judge by the order intended to force a sale of the property, an opposite result most likely would have been accomplished.

It hardly seems necessary to elaborate further on the infirmities of the order in question. However, lest someone conclude that a lump sum payment of $15,000 by defendant to plaintiff would be adequate and proper under the circumstances of this case, we do so elaborate. As pointed out above, before their separation the parties had a combined net "spendable" income of $2,201 per month. After the order, plaintiff will have a net monthly income of $662. Such an amount is $138 less than the $800 per month found by the trial judge to be plaintiff's "reasonable monthly living expenses." On the contrary, after the order defendant will have a net monthly income of $1,539, which is $739 more than the $800 per month which the court found to be defendant's "reasonable monthly living expenses." These figures do not take into consideration that defendant

must liquidate the $5,491 consumer indebtedness of the parties, nor the fact that plaintiff, in order to have a place to live, must make monthly mortgage payments of $434. We do not need a computer, however, to convince us that the order challenged by this appeal effectively destroys plaintiff's "accustomed standard of living" while substantially improving defendant's. Overshadowing the entire matter is the inescapable fact that in five years plaintiff's right to "permanent alimony" will terminate, along with any semblance of her accustomed standard of living. Manifestly, the order fixing the amount and manner of payment of alimony fails to satisfy the minimal standards of G.S. § 50-16.5(a), and must be vacated and the cause remanded to the district court for another hearing with respect to the amount of alimony only, new findings, and a proper order. Those portions of the order declaring plaintiff to be a dependent spouse and defendant to be a supporting spouse and allowing plaintiff's claim for divorce from bed and board and attorneys fees are affirmed.

Vacated and remanded in part; affirmed in part.

Chief Judge MORRIS and Judge WHICHARD concur.

STATE HIGHWAY COMMISSION, PLAINTIFF v. C.W. CAPE AND WIFE, CREOLA CAPE; NANCY VIRGINIA CAPE GREEN AND HUSBAND, T.F. GREEN, DEFENDANTS

No. 8030SC138

(Filed 7 October 1980)

Eminent Domain § 14— two tracts of land — no unity of ownership — apportionment required in judgment

Where the trial court consolidates two condemnation actions concerning distinct tracts of land, and there is no unity of ownership, the judgment awarding damages and compensation for a taking must apportion the sum between the two distinct tracts.

APPEAL by defendant, C.W. Cape, from *Friday, Judge.* Judgment entered 7 September 1979 in Superior Court, GRAHAM County. Heard in the Court of Appeals in Waynesville on 27 August 1980.

The State Highway Commission (State), instituted a condemnation action (72CVS4) on 7 February 1972 seeking a trial by jury to determine the issue of just compensation for a piece of property allegedly owned by the defendants C.W. Cape and Nancy Cape Green as tenants-in-common. The purpose of the condemnation was to facilitate the widening of SR 1211 in Graham County. The strip of property which was taken by the State was divided by Talulah Creek. In his answer, defendant Cape alleged that the piece of condemned property west of Talulah Creek was in fact owned by him alone and that his sister, Nancy C. Green, had no interest therein. He admitted that he and his sister jointly owned a portion of land east of Talulah Creek. Defendant Cape prayed that the action be severed into two separate lawsuits because of the lack of unity of ownership.

Thereafter the State initiated a separate condemnation action against defendant Cape alone with respect to the portion of the real property west of Talulah Creek (73CVS59). On 15 March 1979, an order was consented to in 72CVS4 only, whereby the defendant landowners waived their right to further interest on any damages awarded at trial.

The cases were consolidated for trial. Prior to the taking of testimony the trial judge denied a motion by the defendants to sever the two cases.

The State presented the testimony of two real estate appraisers who testified to the location and extent of property taken in the two cases. Both appraisers testified to the total value of the two tracts before the taking and the total value of the two tracts after the taking. The appraisers estimated the total damages of between $2,000 and $2,200.

The defendants testified to the total damages as well as the before and after value of each tract separately. Their estimates totaled between $598,000 and $746,000.

A single issue was submitted to the jury:

> "What sum are the defendants, C.W. Cape and wife, Creola Cape; Nancy Virginia Cape Green, entitled to recover as just compensation for the appropriation of a portion of their property for highway purposes on the 7th day of February, 1972?

ANSWER: $11,400.00."

The trial judge ordered that $12,605 be deposited in the court and "be disbursed to the defendants, as their interests may appear . . . ." He denied defendants interest not only in 72CVS4, but also in 73CVS59, in which the accrual of interest had not been stayed.

Attorney General Edmisten by Senior Deputy Attorney General R. Bruce White, Jr. and Assistant Attorney General Guy A. Hamlin for the State.

Snyder, Leonard, Biggers & Dodd by Keith S. Snyder, William T. Biggers and Gary Dodd for defendant appellant.

CLARK, Judge.

The defendant asserts that the trial court erred in treating the consolidated cases as one case and the two separate tracts as one tract of land. We agree.

It was error for the trial judge to sign and enter the judgment when the issue of just compensation due for each of the tracts had not been finally adjudicated and determined. Our Supreme Court comments:

> "'Can the court, by consent, enter a fragmentary judgment settling a part of the case and leave part of the issues to be settled at a later date or in another action? A judgment is conclusive as to all issues raised by the pleadings. When issues are presented it is the duty of the court to dispose of them. Parties, even by agreement, cannot try issues piecemeal. The courts and the public are interested in the finality of litigation. . . . *Horne v. Edwards*, 215 N.C. 622, 3 S.E. 2d 1. "The law requires a lawsuit to be tried as a whole and not as fractions. Moreover, it contemplates the entry of a single judgment which will completely and finally determine all the rights of the parties." *Erickson v. Starling*, 235 N.C. 643, 71 S.E. 2d 384. . . . "Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from a final judgment.'" *Hicks v. Koutro*, 249 N.C. 61, 105 S.E. 2d 196."

McLean Trucking Co. v. Dowless, 249 N.C. 346, 351, 106 S.E. 2d 510, 514 (1959).

The judgment rendered does not finally adjudicate the compensation due in each of the cases. The judgment provides that the sum awarded the defendants should be disbursed to the defendants "as their interests may appear," yet the respective interests of Cape and Green are not identical in 73CVS59 and 72CVS4. While determination of these respective interests is possible, there must be some specific *res* to which the interests can be applied. From the judgment it is absolutely impossible to determine how much of the $11,400 is assignable solely to Cape as compensation for the State's taking of the tract on the west side of Talulah Creek, which he owned individually, and how much of the compensation must be shared by Cape with Green as tenants-in-common in the tract east of the creek. A judgment which is uncertain and incapable of execution will not stand. *Barham v. Perry*, 205 N.C. 428, 171 S.E. 614 (1933).

The State cites G.S. 136-117 as support for its position that the judge could order the total compensation paid into court, "retain[ing] said cause for determination of who is entitled to said moneys ... ." That statute is directed at "adverse and conflicting claims" to a *specific sum*. The specific sum to which this statute would apply in the case *sub judice* could only be the amount allocable to the tract in 72CVS4, since it is undisputed that Cape had sole ownership of the tract at issue in 73CVS59; yet no specific sum allocable to 72CVS4 was determined. Moreover, G.S. 136-117 applies only to "adverse and conflicting claims," yet the rights of one tenant-in-common are not adverse to, nor do they conflict with, the rights of another tenant-in-common.

We hold that where the trial court consolidates two cases concerning distinct tracts of land, and there is no unity of ownership, the judgment awarding damages and compensation for a taking must apportion the sum between the two distinct tracts. We note that had this been done, it would be possible to pay out the compensation for the tract taken in 73CVS59 to Cape "and then to apportion [the value of property taken in 72CVS4] among the several owners according to their respective interests or estates ... ." *Barnes v. Highway Commission*, 257 N.C. 507, 520, 126 S.E. 2d 732, 742 (1962). From the foregoing discussion it follows *a fortiori* that any treatment of the two tracts as a single unit was error. The trial court should have

required the two experts to testify not to the total value of the two tracts as a unit, but to the value of each individual tract. The trial court should have instructed the jury to consider the two tracts as distinct and under separate ownership. The trial court should have submitted two separate issues to the jury concerning the respective values of each of the distinct tracts.

Since there was no unity of ownership in the two distinct tracts of land, the total sum awarded by the jury cannot be determined and apportioned by the court. The owner or owners of each tract must be justly compensated for the taking by the jury. Thus, since we cannot remand for apportionment of the total sum awarded by the jury among the owners, we order a new trial or trials on the issue of just compensation for each tract taken by the State.

Reversed and Remanded.

Judges MARTIN (Harry C.) and HILL concur.

STATE OF NORTH CAROLINA v. CASWELL GATES ELLIOTT

No. 8017SC287

(Filed 7 October 1980)

Constitutional Law § 40– waiver of assigned counsel — subsequent affidavit of indigency — finding of nonindigency — appearance at arraignment without counsel — necessity for inquiry into indigency

Where a defendant charged with sale and delivery of PCP executed a written waiver of assigned counsel before a district court judge, defendant thereafter filed an affidavit of indigency and request for appointed counsel, a superior court judge found that defendant was not an indigent, and defendant appeared at his arraignment and trial three weeks later without counsel, the trial court was required by G.S. 15A-942 to inquire at the arraignment into the question of defendant's indigency at that time, and defendant is entitled to a new trial by reason of the court's failure to make such inquiry.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 19 October 1979 in Superior Court, CASWELL County. Heard in the Court of Appeals 9 September 1980.

Defendant was arrested on 28 March 1979 and charged with two counts of possession of controlled substances, and with sale

and delivery of Phencyclidine (PCP). On the same day, defendant appeared before District Court Judge Peter McHugh and executed a written waiver of assigned counsel. On 18 April 1979 defendant appeared for his probable cause hearing with retained counsel. His retained counsel moved for withdrawal on 20 August 1979, stating that he had been unable to work out a financial arrangement with the defendant. The trial court granted the motion. Defendant's case came on for trial during the week of 26 September 1979. On that date defendant filed an affidavit of indigency with the court requesting appointed counsel. Superior Court Judge James Long found that defendant was not an indigent and continued the trial until the 15 October 1979 session.

Defendant appeared for arraignment and trial on 17 October 1979 without counsel. Upon arraignment, defendant entered a plea of not guilty to the charge of sale and delivery of PCP. He was tried before a jury without counsel. Defendant offered no objections during presentation of the state's case and offered no evidence on his own behalf. He did briefly question the state's witnesses.

The jury returned a verdict of guilty of sale and delivery of PCP. The court entered a judgment of imprisonment for a term of not less than 10 years nor more than 10 years. Defendant appeals to this Court.

Attorney General Edmisten, by Associate Attorney Sarah C. Young, for the State.

George B. Daniel, for defendant appellant.

WHICHARD, Judge.

Defendant presents, as his sole assignment of error, the denial of his right to be represented by court appointed counsel at his trial for sale and delivery of PCP. The record indicates that on the day of defendant's trial, during arraignment on other charges, the trial court stated that defendant had appeared before the court at the prior session in September and been denied the right of court appointed counsel because he was found able to hire his own counsel. The defendant acknowledged that to be correct. The court then said, "[s]ince that time you have had full opportunity to hire a lawyer if you wanted to, is that right?" The defendant responded that he had tried with-

out success to borrow the money to hire a lawyer. The court then asked if defendant understood that he had a right to represent himself, and defendant answered that he did. When the court further inquired if defendant desired to represent himself, defendant replied:

> I don't think that I am capable of representing myself, there are a lot of technicalities that I don't know and as far as me being guilty of the possession, yes, but of sale, no. I am guilty of possession for a reason, not for a profit, but for some other reason.

The court then said that Judge Long had found defendant able to hire his own lawyer and he had not done so, and that defendant had signed a waiver of counsel. Defendant acknowledged that the court was correct. The court then asked other routine questions and proceeded to arraign and try the defendant without counsel on the sale and delivery charge.

G.S. 15A-942 provides:

> If the defendant appears *at the arraignment* without counsel, the court must inform the defendant of his right to counsel, must accord the defendant opportunity to exercise that right, and must take any action necessary to effectuate the right. (Emphasis supplied.)

The North Carolina Supreme Court in *State v. Sanders*, 294 N.C. 337, 240 S.E.2d 788 (1978) held that the defendant there was entitled to a new trial because of the trial court's failure to comply with the mandates of this statute, stating that "the statute made it the duty of the trial judge, *when defendant appeared at the arraignment without counsel*, to inquire into his indigency irrespective of any request by defendant." *Sanders*, 294 N.C. at 344, 240 S.E.2d at 792. (Emphasis in original.) In *Sanders*, as here, the trial court had denied defendant's request for counsel by order pre-dating by several weeks the defendant's arraignment. The Supreme Court, however, viewed the issue as being not whether the defendant was indigent at the time the prior order was entered, but whether he was indigent on the day he was arraigned and tried without counsel. The Court noted that this question could not be answered because the trial judge failed at the time of arraignment "to make the inquiries *directed* by G.S. 15A-942." *Sanders* at 345, 240 S.E.2d at 792. (Emphasis supplied.)

The decision in *Sanders* is dispositive of this appeal. The record here does not indicate that the trial court at any time during the arraignment proceedings made inquiry into the question of defendant's indigency or non-indigency at that time. This it was required to do by G.S. 15A-942 as interpreted and applied in the *Sanders* decision.

The opinion in *Sanders* does not indicate whether or not the defendant there executed a waiver of his right to assigned counsel. Assuming, *arguendo*, that he did not, the only factual basis for conceivably distinguishing this case from *Sanders* is that here the defendant had signed a waiver of his right to assigned counsel on 28 March 1979. In view of subsequent developments, however, defendant's waiver did not remove the duty of the trial court to make the inquiry of indigency at the time of arraignment. This Court stated in *State v. Watson*, 21 N.C. App. 374, 379, 204 S.E.2d 537, 540-541 (1974):

> The waiver in writing once given was good and sufficient until the proceeding finally terminated, unless the defendant himself makes known to the court that he desires to withdraw the waiver and have counsel assigned to him. The burden of showing the change in the desire of the defendant for counsel rests upon the defendant.

Here, by filing an affidavit of indigency some six months subsequent to executing the waiver, defendant clearly carried this burden of informing the court of his desire to withdraw the waiver and have counsel appointed to represent him.

Moreover, the trial court's determination that defendant was not indigent some three weeks before arraignment cannot reasonably be determinative of his capacity to retain counsel at the time of arraignment. Supervening events could well have rendered defendant's financial status very different on 17 October 1979 from what it was on 26 September 1979. It appears from defendant's affidavit of indigency that loss of employment alone could have altered his status from non-indigent to indigent. Without the required inquiry by the trial court at the time of arraignment, however, this Court has no means to determine whether defendant's financial status at that critical juncture merited the appointment of counsel.

The defendant must therefore have a new trial at which his entitlement to appointed counsel should be determined at the time of arraignment.

New trial.

Judges HEDRICK and HILL concur.

STATE OF NORTH CAROLINA v. BOBBY WADE PRINCE

No. 8010SC276

(Filed 7 October 1980)

1. **Forgery § 2– elements of crime omitted from final mandate — convictions reversed**

Defendant's convictions for forgery must be reversed where the trial court, in its final mandate to the jury, omitted two essential elements of forgery: (1) the false making of an instrument, and (2) the appearance of the instrument as genuine.

2. **Criminal Law § 101.4– forgery case — taking checks into jury room — error not prejudicial**

The trial court in a forgery prosecution erred in allowing the jury, without defendant's consent, to take into the jury room during deliberations checks which had been introduced into evidence, but defendant failed to show that such error was prejudicial to him. G.S. 15A-1233(b).

3. **Forgery § 2.2– exact date of forgery not shown — defendant not prejudiced**

The trial court did not err in failing to dismiss one of the indictments for forgery and uttering because the indictment charged the crimes were committed on 25 April 1979 but the State could not prove the exact date of the forgery and uttering, since time is not of the essence in the crimes of forgery and uttering a forged check, and since defendant did not demonstrate any prejudice to him by the absence of proof of the exact date.

4. **Forgery § 2.2– sufficiency of circumstantial evidence**

Evidence that two checks had been forged and that defendant cashed them was sufficient circumstantial evidence for the jury to find that defendant forged the checks, even without eyewitness testimony that defendant wrote the checks and without expert testimony that it was his handwriting on the checks.

APPEAL by defendant from *Lane, Judge*. Judgment entered 7 November 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 27 August 1980.

Defendant was indicted on two counts of forgery and two counts of uttering a forged check. The charges were consolidated for trial without objection. Algernon Burton and Fred Weston Ray, Jr. each testified he had cashed a check at his place of business for $20.00 purportedly drawn to the order of Bobby Prince and signed by Della Potter. Each also identified the person who presented a check to him as the defendant. Della Potter identified the checks as her personal checks and testified that she did not sign either one of them.

The defendant testified he was in South Carolina at the times the checks were cashed.

The defendant was convicted on all counts. He was sentenced to not less than five nor more than eight years on one of the forgery charges consolidated for judgment with an uttering charge. He was sentenced to not less than eight nor more than ten years on the other forgery charge which was consolidated for judgment with an uttering charge. The sentences were to run consecutively. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

Brenton D. Adams for defendant appellant.

WEBB, Judge.

[1] The defendant's first assignment of error pertains to the charge. The court correctly charged the jury as to what the State had to prove in order for the jury to find the defendant guilty of forgery. Then in the final mandate it charged as follows:

> "So I charge if you find from the evidence beyond a reasonable doubt that on or about the 25th day of April, 1979, the defendant, Bobby Wayne Prince, intending to defraud and intending to suggest that the checks identified by State's Exhibit 1 and 2 were genuine, it would be your duty to return a verdict of guilty as charged."

Two essential elements of forgery are the false making of an instrument and the appearance of the instrument as genuine. *See State v. McAllister*, 287 N.C. 178, 214 S.E. 2d 75 (1975). Both these elements were omitted from the mandate. Although the

court correctly charged the jury at one point as to the elements of forgery, we hold that the error in the final mandate requires that the convictions for forgery be reversed. *See State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974) for a case which holds that a reversal is required if there is error in the final mandate even if proper instructions are given at another place in the charge.

[2] Defendant also assigns as error the court's allowing the jury during its deliberations to take into the jury room, without the consent of the defendant, the checks which had been introduced into evidence. G.S. 15A-1233(b) provides:

> 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.

It was error for the court to allow the checks to be taken into the jury room without the consent of the defendant. However, we hold that the defendant has not demonstrated the error was prejudicial. *See State v. Jolly*, 297 N.C. 121, 254 S.E. 2d 1 (1979). After a review of the record, we cannot hold that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached" as required by G.S. 15A-1443(a) in order to reverse.

[3] The defendant next contends it was error not to dismiss one of the indictments for forgery and uttering because the indictment charged the crimes were committed on 25 April 1979 and the State could not prove the exact date of the forgery and uttering. Fred Weston Ray, Jr. testified: "I do not know the exact date that I received the check. . . . It had to be around the time the check was wrote." Time is not of the essence in the crimes of forgery and uttering a forged check. *State v. Raynor*, 19 N.C. App. 191, 198 S.E. 2d 198 (1973). The defendant has not demonstrated any prejudice to him by the witness's not being able to remember the exact day on which he received the check. Defendant relies on *State v. White*, 3 N.C. App. 31, 164 S.E. 2d 36 (1968). In that case the defendant was tried on a warrant which charged him with committing a traffic offense in June. The evidence showed that any offense that may have been committed occurred in November. We believe the case sub judice is clearly distinguishable. This assignment of error is overruled.

The defendant's fourth assignment of error is to the court's failure to quash the bill of indictments for forgery. The indictments alleged the defendant forged the checks. Defendant contends they should have averred he was alleged to have forged the checks. This assignment of error is overruled. *See State v. McAllister, supra.*

[4] The defendant's last assignment of error is to the overruling of his motion to dismiss both forgery charges. He contends there is no eyewitness testimony that the defendant wrote the checks and no expert testimony that it was his handwriting on the checks. There was evidence that the checks had been forged. There was also evidence that the defendant cashed the two checks. We hold this was circumstantial evidence sufficient for the jury to find that the defendant forged the checks.

Defendant was sentenced to from five to eight years on one charge of forgery consolidated for judgment with a charge of uttering a forged instrument. He was sentenced to from eight to ten years on the other charge of forgery consolidated for judgment with a charge of uttering a forged check. The second sentence is to commence at the expiration of the first. For reasons stated in this opinion, we reverse the convictions of forgery and hold there was no error in the convictions of uttering forged checks. G.S. 15A-1447(e) provides:

> If the appellate court affirms one or more of the charges, but not all of them, and makes a finding that the sentence is sustained by the charge or charges which are affirmed and is appropriate, the court may affirm the sentence.

The sentences for the charges of uttering the forged checks are sustained by the charges. *See* G.S. 14-120. On this record we cannot find the sentences were appropriate. *See State v. Boone,* 297 N.C. 652, 256 S.E. 2d 683 (1979). For this reason, we remand the cases involving the charges for uttering forged instruments to the superior court for resentencing.

In both cases of forgery, new trial.

In both cases of uttering a forged check, remanded for resentencing.

Judges VAUGHN and MARTIN (Robert M.) concur.

FOOD TOWN STORES, INC., PETITIONER v. BOARD OF ALCOHOLIC CONTROL OF THE STATE OF NORTH CAROLINA, RESPONDENT

No. 8010SC238

(Filed 7 October 1980)

Intoxicating Liquor § 2.8– retail wine permit — stocking of shelves by wholesaler — no violation of regulation

Evidence that employees of a wine wholesaler restocked the shelves in petitioner wine permittee's store was insufficient to support a finding that petitioner violated a retail wine regulation providing that no permittee "shall *require* by agreement or otherwise" any wholesaler to give services, money, equipment, fixtures, free products or other things of value, including stocking and pricing of merchandise.

APPEAL by petitioner from *Canaday, Judge.* Judgment entered 20 December 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 11 September 1980.

Notice was received by petitioner to appear before the hearing officer of the North Carolina Board of Alcoholic Control to show cause why its Retail Beer and Wine permits should not be suspended or revoked for the alleged following violation:

> 1. Inducement of services, requiring by agreement or otherwise from a wholesaler "Blue Ridge Wholesale Wine Co., Inc., 2220 Thrift Road, Charlotte, N.C." things of value with which the business of said retailer is or may be conducted (stocking of merchandise) upon your licensed premises on or about August 28, 1978, 11:35 p.m. in violation of Retail Wine Regulation 4 NCAC 2J .0106(H)(1).

Evidence presented at the hearing was as follows: State and federal alcohol enforcement agents set up a surveillance of a Food Town in Charlotte on 28 August 1978. Around 10:45 p.m., they saw the general manager of Blue Ridge distributors, a Blue Ridge salesman, and two other men standing in the wine section. The manager, William Ronemus, and the salesman were cleaning shelves and putting wine bottles on the shelves. The agents entered the store and the two unidentified men turned out to be another Blue Ridge salesman and the Food Town assistant manager. Diagrams of shelving arrangements found in Ronemus' notebook and photographs of the scene were introduced. Ronemus admitted to two different agents that

they had caught him and asked what would happen. The agent who had investigated Ronemus' application for a permit thought that he was honest and trustworthy.

Petitioner presented evidence that Ronemus had approached the area supervisor for Food Town, Evans, to propose a rearrangement of the wine shelves. Food Town had been grouping the wines by distributors, and Blue Ridge felt that a grouping by the type of wine would produce more sales. Food Town had not requested the information and did not suggest that Blue Ridge rearrange the bottles. No distributor would gain or lose shelf footage, but Blue Ridge would lose its prominent location on the display. Ronemus was sure, however, that sales of all wine would improve. Food Town approved the new display for one store, and Evans and Ronemus agreed to rearrange the shelves after closing. Evans planned to do the work, but felt that he did not know enough about wines and wanted Ronemus present for advice. The Blue Ridge personnel arrived at the store and waited for Evans, but he was detained by personal problems and did not arrive. Ronemus was eager to show that the new grouping would improve sales, so he and his co-workers went ahead with the work. Food Town had not requested that they do the work and had offered them no inducements. Ronemus was fired soon after this incident because his company was concerned with obeying regulations.

Based on this evidence the hearing officer found that petitioner had violated regulations in that petitioner "did ..., induce the services of the Blue Ridge Wholesale Wine Company by agreeing and otherwise allowing the said wholesaler ... to stock and reshelve merchandise ... in violation of Retail Wine Regulation 4 NCAC 2J .0106(H)(1)." The State Board of Alcoholic Control adopted the hearing officer's findings and suspended petitioner's ABC permits for 15 days.

Upon appeal to the Wake County Superior Court the Board's decision was affirmed but enforcement of the order was stayed pending appeal.

Attorney General Edmisten, by Special Deputy Attorney General David S. Crump, for the State.

Thomas M. Caddell for petitioner appellant.

ARNOLD, Judge.

The respondent, in an excellent brief and argument by the Special Deputy Attorney General, points out that there is no dispute that employees of Blue Ridge restocked the shelves in petitioner's store, and that an agreement may be inferred from the conduct of the parties.

We are constrained, however, to look at the regulation which petitioner is alleged to have violated, Retail Wine Regulation 4 NCAC 2 J .0106(h)(1). That regulation is as follows:

> (h) Services and Inducements Prohibited. No retail wine permitee shall require by agreement or otherwise, any wholesaler, importer, manufacturer, winery or bottler to give or loan any money, services, equipment, furniture, fixtures, free wine products, or other things of value with which the business of said retailer is or may be conducted. For the purposes of this Regulation, 'things of value' include, but are not limited to:
>
> > (1) free services such as installation, repair, and maintenance of equipment, installation, of outdoor signs, stocking and pricing of merchandise, ...

The regulation provides that no permittee "shall require by agreement or otherwise" any wholesaler to give services, money, equipment, furniture, fixtures, free products or other things of value.

A review of the record indicates no evidence which could support a finding that petitioner *required* that Blue Ridge furnish services or anything of value. As petitioner points out it was not charged with violation of another regulation which prohibits permittees from accepting services from wholesalers.

It is unnecessary to discuss petitioner's remaining contentions since the judgment of the Superior Court of Wake County is

Reversed.

Judges ERWIN and WELLS concur.

RAYMOND CONNOLLY AND WIFE, MARY CONNOLLY v. BETTY RICH SHARPE AND HUSBAND, CHARLES SHARPE

No. 8022SC196

(Filed 7 October 1980)

1. **Attachment § 1– prejudgment attachment – constitutionality of statutes**

G.S. 1-440.1 et seq., which permits prejudgment attachment without prior notice and opportunity to be heard, does not violate federal and state constitutions.

2. **Attachment § 2– unrelated fraudulent act alleged in affidavit – insufficiency of affidavit to support attachment**

Plaintiffs' mere suspicion alleged in their affidavit that defendants had committed the possibly unrelated fraudulent act of burning their house one week after obtaining a $5000 increase in insurance coverage would not support prejudgment attachment to prevent another anticipated fraudulent act, and the trial court erred in failing to make findings of fact when it upheld the attachment.

APPEAL by defendants from *Walker, Judge.* Order entered 3 December 1979 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 9 September 1980.

The clerk of court for Alexander County issued an order for attachment of defendants' property in Caldwell County on 16 July 1979. The clerk denied defendants' motion to dismiss the order. Defendants appealed to Superior Court where the attachment was upheld by the order of 3 December 1979.

Plaintiffs have filed a complaint in Alexander County seeking substantial damages in the amount of $108,170.00 from defendants for malicious prosecution arising out of five separate arrests. Plaintiffs applied for an order of prejudgment attachment by posting a bond for $1000.00 and filing an affidavit as required by G.S. 1-440.10 and 1-440.11. The clerk ordered the attachment, and the sheriff of Caldwell County attached two real estate lots owned by defendants in Caldwell County which have a tax value of $16,730.00.

Defendants are residents of North Carolina. They made a motion to the clerk to dismiss the attachment, increase the amount of plaintiffs' bond to $500,000.00 and order judgment against plaintiffs in the amount of $50,000.00 for abuse of process. The clerk denied defendants' motion because "it

[appeared] to the court from the evidence presented that the said attachment was properly ordered." On appeal, the Superior Court upheld the attachment but in its order increased plaintiffs' bond to $5000.00. The judge made no findings of fact concerning the basis of plaintiffs' allegations in the affidavit supporting the attachment. The parties stipulated that the only evidence was the record itself and that no other evidence was introduced at either hearing before the clerk or the judge.

Martin L. Kesler, Jr., for plaintiff appellees.

W.P. Burkhimer, for defendant appellants.

VAUGHN, Judge.

Though defendants bring several assignments of error, there are only two basic issues. The first is whether G.S. 1-440.1 et seq., which permits prejudgment attachment, without prior notice and opportunity to be heard, violates the federal and state constitutions. We must affirm the constitutionality of the statute. The second is whether prejudgment attachment may be issued without supporting factual evidence that defendants had attempted to defraud any creditor. We hold it was prejudicial error to order attachment upon plaintiffs' bare affidavit in this case and reverse.

[1] We need not present a detailed constitutional analysis of the attachment statute here. The question defendants seek to raise has already been answered adversely to their contentions. *Supply Service v. Thompson*, 35 N.C. App. 406, 241 S.E. 2d 364 (1978). The statute complies with procedural due process as required by the federal constitution. *Hutchinson v. Bank of North Carolina*, 392 F. Supp. 888 (M.D.N.C. 1975). Also, it has withstood attack under our state constitution. *Properties, Inc. v. Ko-Ko Mart, Inc.*, 28 N.C. App. 532, 222 S.E. 2d 267, *cert. den.*, 289 N.C. 615, 223 S.E. 2d 392 (1976).

[2] Nevertheless, plaintiffs were required to submit an affidavit meeting statutory requirements before attachment could be ordered. *Whitaker v. Wade*, 229 N.C. 327, 49 S.E. 2d 627 (1948). Plaintiffs' affidavit recited the elements of G.S. 1-440.11(a)(1) and in pertinent part stated:

> 3. That the ground for attachment in this action is that the defendant is:

x A person or a domestic corporation which, with intent to defraud his or its creditors,

x Has removed, or is about to remove, property from this State, or

x Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property.

4. That the facts and circumstances supporting allegations or acts committed with intent to defraud creditors are as follows: Defendants, Betty and Charles Sharpe, are believed to have destroyed a house belonging to them in Alexander County, by fire, one week after obtaining a $5,000.00 increase in insurance coverage on that property.

Plaintiffs presented no evidence other than the affidavit at the hearing upon defendants' motion to dismiss the attachment. We conclude that plaintiffs' affidavit was insufficient to support prejudgment attachment.

Attachment is a statutory remedy which must be strictly construed; however, substantial compliance with the statutory requirements will suffice. *Bethell v. Lee*, 200 N.C. 755, 158 S.E. 493 (1931). Attachment against resident defendants must be based on an affidavit setting forth the facts and circumstances supporting allegations that they have done or are about to do any act with intent to defraud their creditors. G.S. 1-440.11(a)(2)(b); *Howard Co. v. Baer*, 203 N.C. 355, 166 S.E. 77 (1932). Failure to set forth supporting facts and circumstances in a definite and distinct manner causes the attachment affidavit to be fatally defective. *Finch v. Slater*, 152 N.C. 155, 67 S.E. 264 (1910).

Plaintiffs requested the extraordinary remedy of prejudgment attachment relying only on a belief that defendants had destroyed their house one week after obtaining a $5000.00 increase in insurance coverage. No further facts were ever given to establish a justification for this belief. Plaintiffs did not even provide the date on which defendants allegedly destroyed their house. We cannot tell whether the timing of the destruction was a motivating factor in plaintiffs' request for protection by the attachment process. We are compelled, however, to agree with defendants that the attachment appears to have been "issued on the basis of no more than a rumor, with no evidence offered

at any time, in the affidavit or at the hearings, to support the rumor." The affidavit should have stated more particulars concerning defendants' destruction of their house enabling the court to determine whether there had been a fraudulent disposition of property. *Hughes v. Person*, 63 N.C. 548 (1869).

The rule is best stated in *Judd v. Mining Co.*:

> When the affidavit is that the defendants are "about to assign or dispose of their property with intent to defraud the plaintiffs," that being not the assertion of a fact, but necessarily of a belief merely, the grounds upon which such belief is founded must be set out that the court may adjudge if they are sufficient.

120 N.C. 397, 399, 27 S.E. 81 (1897); *Brown v. Hawkins*, 64 N.C. 645 (1871). Thus, it is generally held that an affidavit made on belief as to the ground of attachment must give the sources of information and recite positive facts reasonably supporting the belief. *Annot.*, 86 A.L.R. 588 (1933). *See also Annot.*, 8 A.L.R. 2d 578 (1949). Clearly, plaintiffs' mere suspicion that defendants committed a possibly unrelated fraudulent act will not support prejudgment attachment to prevent another anticipated fraudulent act.

Finally, we must note that G.S. 1-440.36(c) provides that "[e]ither the clerk or the judge hearing and determining the motion to dissolve the order of attachment shall find the facts upon which his ruling thereon is based." In the record before us, the trial court made no findings of fact when it upheld the attachment on 3 December 1979. The burden was upon plaintiffs to come forward with evidence in support of the bare allegations of the affidavit. They failed to do so. There was, therefore, no evidence that would have supported findings sufficient to sustain the order of attachment. The motion to dismiss the attachment should have been allowed.

The order appealed from is reversed.

Reversed.

Judges MARTIN (Robert M.) and WEBB concur.

Gibson v. Gibson

ROBERT WYLIE GIBSON, JR. v. NANCY JANE RANDALL GIBSON

No. 8028DC76

(Filed 7 October 1980)

Divorce and Alimony § 21; Husband and Wife § 13– alimony provisions of separation agreement – specific performance pending trial on merits

The trial court had authority to grant specific performance of the alimony provisions of a separation agreement in order to preserve the status quo pending final determination of the merits of an action on the agreement.

APPEAL by plaintiff from *Styles, Judge.* Judgment and Order entered 5 September 1979 in District Court, BUNCOMBE County. Heard in the Court of Appeals at Waynesville on 27 August 1980.

The parties entered into a separation agreement on 16 November 1977, which provided, among other things, that defendant was to have primary custody, care, and control of the two minor children. The agreement further provided that a move by the defendant wife to a place where the husband could not conveniently visit with the children at frequent intervals would constitute a substantial change of circumstances and either party could initiate a proceeding to determine visitation rights.

The wife, whose support payments terminate 1 November 1980, moved to Carrboro and entered the University of North Carolina at Chapel Hill on 15 June 1979. Plaintiff husband then brought this action seeking custody of the children. Defendant answered, asking for specific performance of the contract embodied in the separation agreement. The trial judge entered a judgment allowing joint custody of the children, ordering each party to share in transportation costs for visitation, and requiring plaintiff husband to comply with the child support provisions of the separation agreement. No exceptions were taken to this judgment.

In addition, the court entered a separate order finding as fact that the parties had entered into a separation agreement which provided for support payments, finding that plaintiff father had not made the monthly alimony payments for June and July 1979 and previously had said that he will make no further payments. The court then concluded that the move by

defendant to Carrboro did not constitute a breach of the separation agreement and specifically ordered plaintiff to comply with the alimony provisions of the separation agreement pending final trial of the case on its merits. Plaintiff appealed.

Riddle, Shackelford & Hyler, by Robert E. Riddle, for plaintiff appellant.

Meyressa H. Schoonmaker for defendant appellee.

HILL, Judge.

Our Supreme Court has concluded that a decree of specific performance is appropriate in an action for the enforcement of a separation agreement not incorporated into a judicial decree of divorce. *Moore v. Moore*, 297 N.C. 14, 252 S.E. 2d 735 (1979). We are now faced with the question of whether *Moore* authorizes the trial judge to grant specific performance of a separation agreement in order to preserve the status quo pending final determination of the merits at trial. We conclude that *Moore* applies in this situation, and that the grant of specific performance was appropriate.

Justice Brock, in Moore, citing *Bell v. Smith Concrete Products, Inc.*, 263 N.C. 389, 139 S.E. 2d 629 (1965), as authority, stated that the equitable remedy of specific enforcement of a contract is available only when the plaintiff can establish that an adequate remedy at law does not exist.

Plaintiff husband urges that an adequate remedy does exist, and that a marital separation agreement is generally subject to the same rules of law with respect to enforcement as any other contract. *See Stanley v. Stanley*, 226 N.C. 129, 133, 37 S.E. 2d 118 (1946). Plaintiff then attempts to distinguish *Moore* from the present case by pointing to the defendant's offensive acts in *Moore* by which he attempted to circumvent his former wife's ability to collect the support payments and effectively rendered himself judgment proof.

In the case before us, plaintiff contends there is no evidence before the court which would indicate that the controversy involves more than a simple breach of contract wherein the opposing party exercises a position of rescission. Plaintiff points out that defendant wife has made no effort to enforce her rights before seeking an order to enforce specific performance.

The Court, in *Moore*, indicated that it considered a separation agreement more than a contract to pay money. It is rather a contract to provide maintenance for a dependent spouse on a regular basis. In *Moore* the Court recognized that to require a servient spouse to wait until support payments come due, then enter suit on each payment, await trial, and possibly be delayed through an execution sale does not provide an adequate remedy at law.

> An adequate remedy is not a partial remedy. It is a full and complete remedy and one that is accommodated to the wrong which is to be redressed by it. *It is not enough that there is some remedy at law; it must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.*

Moore, at p. 16; *Sumner v. Staton*, 151 N.C. 198, 201, 65 S.E. 902, 904 (1909).

This Court has held that an interlocutory injunction ordering specific performance of a contract pending final trial may be an appropriate ruling. *Resources, Inc. v. Insurance Co.*, 15 N.C. App. 634, 190 S.E. 2d 729 (1972). In a society such as ours, when bills come due on given dates, a dependent spouse must have cash in hand. Requiring successive lawsuits to recover in a piecemeal fashion the sums due can hardly be called an adequate remedy.

Finally, it should be stressed that the separation agreement does not prohibit the defendant's moving; it only gives the plaintiff the right to bring an action for custody if the defendant does move. This situation is admitted by both parties and does not require a jury determination.

We have examined the record and conclude the defendant has met the statutory requirements for a grant of injunctive relief. G.S. 1A-1; Rule 65. We are not impressed with the appellant's argument that the order of the trial judge effectively blocked a jury determination of the issue.

The judgment entered in the trial court is

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

NATIONAL HERITAGE CORPORATION, GREENLAWN MEMORIAL PARK, INC., FOREST HILL MEMORIAL PARK, INC., RANDOLPH MEMORIAL PARK, INC., CUMBERLAND MEMORIAL GARDENS, INC., PINELAWN MEMORIAL PARK, INC., AND MEMORIAL CONSULTANTS OF CLINTON, NORTH CAROLINA, INC., PETITIONERS v. NORTH CAROLINA CEMETERY COMMISSION, RESPONDENT

No. 8010SC186

(Filed 7 October 1980)

Cemeteries § 1– sale of conditional sales contracts to finance companies – funds not required to be placed in trust

Former G.S. 65-66 did not require plaintiff cemetery companies to place in trust a portion of funds received from the sales to finance companies of conditional sales contracts for burial goods and services, since the statute did not require plaintiffs to put funds in trust before customers made payments.

APPEAL by plaintiffs from *Hobgood, (Hamilton H.), Judge.* Judgment entered 11 October 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 28 August 1980.

This is an appeal by National Heritage Corporation and the other plaintiffs which are wholly owned subsidiaries of the National Heritage Corporation. The plaintiffs are in the cemetery business. As a part of their business, they sell concrete vaults, bronze memorials, granite bases for the bronze memorials, and other associated cemetery merchandise to individual consumers. These sales are made prior to the deaths of the consumers, and some of them are purchased by the use of installment contracts. In 1977, the plaintiffs sold certain of these installment contracts to two separate finance companies. The defendant made a ruling in which it held that a part of the receipts from the sale of these contracts was required to be placed in trust pursuant to G.S. 65-66 prior to its 1979 amendment. The plaintiffs petitioned the superior court for review pursuant to G.S. 150A-43 et seq. The superior court affirmed the ruling of the defendant Cemetery Commission. Plaintiffs appealed.

Joslin, Culbertson, Sedberry and Houck, by William Joslin, for plaintiff appellants.

Attorney General Edmisten, by Assistant Attorney General Norma S. Harrell, for defendant appellee.

WEBB, Judge.

This appeal requires an interpretation of G.S. 65-66 prior to its amendment in 1979. At that time, the statute, in pertinent part, provided as follows:

> Receipts from sale of personal property or services; trust fund; penalties. — (a) It shall be deemed contrary to public policy if any person or legal entity receives, holds, controls or manages funds or proceeds received from the sale of, or from a contract to sell, personal property or services which may be used in a cemetery in connection with the burial of or the commemoration of the memory of a deceased human being, where payments for the same are made either outright or on an installment basis prior to the demise of the person or persons so purchasing them, or for whom they are so purchased, unless such person or legal entity holds, controls or manages said funds, subject to the limitations and regulations prescribed in this section ....
>
> (b) Any cemetery company or other entity entering into a contract for the sale of personal property or services, to be used in a cemetery in connection with disposing of, or commemorating the memory of, a deceased human being wherein the use of the personal property or the furnishing of the services is not immediately requested or required, shall deposit proceeds received on the contract as follows:
>
> (1) Into a trust fund administered by a corporate trustee in accordance with a written trust instrument.
>
> (2) Seventy-five percent (75%) of all proceeds received on such contracts shall be deposited until the amount deposited equals seventy-five percent (75%) of the actual sale price of the property or services so sold.
>
> (3) The deposit herein required shall be made into the trust fund so established on or before the tenth day of the month following receipt by the cemetery company or other entity from the purchaser.

The question posed by this appeal is whether this section of the statute required the plaintiffs to place funds in trust which were received from the sale to finance companies of conditional

sales contracts for burial goods and services. The statute was amended in 1979 to make it clear that from that time such funds would have to be placed in trust. The appellee concedes that, read literally, the statute did not cover the situation in the case sub judice. It contends that the obvious intention of the General Assembly was to focus on the receipt of funds by a cemetery company whether from a customer or a finance company. The appellee argues that in order to protect the public, the statute should be read to require the plaintiffs to place these funds in trust. The difficulty with the defendant's argument is that we must interpret the statute as it is written. Subsection (a) provides that funds "received from the sale of, or from a contract to sell, personal property or services ... where payments for the same are made either outright or on an installment basis" shall be subject to the section. This language speaks of funds received "from a contract" and might be interpreted to mean funds received from the sale of a contract to a third party. The statute is not clear as to this, however. Subsection (b) provides "[a]ny cemetery company ... shall deposit proceeds received on the contract ... (3) ... on or before the tenth day of the month following receipt by the cemetery company or other entity from the purchaser." This subsection is clear that the funds must be placed in trust when customers make their payments. We believe that under a fair reading of the statute, the plain language did not require the plaintiffs to put funds in trust before customers had made payments. However desirable the result may be, we do not believe we should, on the basis of public policy, read something into the statute which was not enacted by the General Assembly. We hold it was error to require the plaintiffs to place funds in trust which were received by the plaintiffs from the sale of the installment contracts.

We reverse and remand for a judgment consistent with this opinion.

Reversed and remanded.

Chief Judge MORRIS and Judge HEDRICK concur.

C.C. DOBY v. ROBERT FOWLER AND JANE McCANLESS FOWLER

No. 8019DC390

(Filed 7 October 1980)

Trial § 13– taking exhibit into jury room — defendants' lack of consent

The trial court erred in allowing the jury to take plaintiff's exhibit into the jury room during deliberations where defendants did not consent to this procedure, and defendants' clear indication of lack of consent sufficiently stated their objection to the trial court.

APPEAL by defendants from *Montgomery, Judge.* Judgment entered 8 February 1980 in District Court, ROWAN County. Heard in the Court of Appeals 10 September 1980.

Plaintiff instituted this action to recover on a contract to repair the roof, install gutters, and repair boxing on defendants' residence. Defendants answered, alleging nonperformance and negligent performance as defenses, and counterclaiming for water damage to their residence allegedly resulting from plaintiff's work.

Plaintiff's evidence showed that he entered the contract with defendants and that he did the best he could to complete the job as agreed upon. Because the roof was in very bad condition plaintiff told defendants that he could not guarantee his work. After the work was completed, plaintiff sent defendants a bill for $2,471.81 which they have refused to pay. Three exhibits were introduced in evidence without objection. Exhibit number one was the $2,471.81 bill sent to the defendants. The other two exhibits were bills for materials which plaintiff used in his work on defendants' residence. Defendants did not deny the contract. Their evidence tended to show that they were unsatisfied with plaintiff's work and that the roof continued to leak.

The jury answered issues finding that plaintiff had substantially performed on the contract, that plaintiff was entitled to recover $2,471.81 from defendants, and that defendants were not entitled to recover on their counterclaim. Judgment was entered and defendants have appealed.

Burke, Donaldson and Holshouser, by George L. Burke, Jr., for plaintiff.

Kluttz & Hamlin, by Malcolm B. Blankenship, Jr., for defendants.

WELLS, Judge.

During its deliberations, the jury requested that they be allowed to reexamine and take plaintiff's exhibit number one into the jury room. Plaintiff's counsel did not object to this procedure. Defendants' counsel expressed his unwillingness to consent to this procedure. The trial court granted the request and allowed the jurors to take the exhibit into the jury room during further deliberations. Defendants' sole assignment of error is to this action by the trial court.

In *State v. Stephenson*, 218 N.C. 258, 265, 10 S.E. 2d 819, 824 (1940), our Supreme Court stated the principle that without consent of parties it is error to permit the jury to take such exhibits into the jury room and to retain them while in its deliberations. *See also, Brown v. Buchanan*, 194 N.C. 675, 140 S.E. 749 (1927); *Nicholson v. Lumber Co.*, 156 N.C. 59, 72 S.E. 86 (1911); *but see In Re Will of Hall*, 252 N.C. 70, 87, 113 S.E. 2d 1, 13 (1960); 89 C.J.S. Trial § 466. Two of the cases cited in *Stephenson* explain the reason for the rule. In *State v. Caldwell*, 181 N.C. 519, 527, 106 S.E. 139, 143 (1921), the Court approved of trial court's refusal to give exhibits to the jury, stating that "unless by consent and in certain restricted instances allowed by statute, the jury must determine the cause on the evidence as it is heard by them, or as presented in open court, and is not allowed to take with them documentary or other evidence for their private inspection [citations omitted]." In *Watson v. Davis*, 52 N.C. 178, 181 (1859), the Court explained the rule as follows:

> The jury ought to make up their verdict upon evidence offered to their senses, *i.e.*, what they see and hear in the presence of the court, and should not be allowed to take papers, which have been received as competent evidence, into the jury-room, so as to make a comparison of handwriting, or draw any other inference which their imaginations may suggest, because the opposite party ought to have an opportunity to reply to any suggestion of an inference contrary to what was made in open court.

The rule as to jury use of exhibits in criminal trials has been codified in G.S. 15A-1233(b) as follows:

> 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.

For a recent decision dealing with the provisions of G.S. 15A-1233(b), *see State v. Grogan*, 40 N.C. App. 371, 253 S.E. 2d 20 (1979).

Defendants did not give their consent in the case now before us and it was reversible error for the trial court to allow the jury to have the exhibit during its deliberations.

Plaintiff argues that because defendants' "unwillingness to consent" is not an objection or exception as judged by the standard of G.S. 1A-1, Rule 46(b), defendants' statement should be held inadequate to support their assignment of error. Rule 46(b) deals with rulings on matters other than evidence and provides that "it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court his objection to the action of the court or makes known the action which he desires the court to take and his ground therefor . . . ." Initially, we question whether this broadly stated rule should control here where specific consent is required. Even if applicable, the rule should not be applied "in a ritualistic fashion." 9 Wright & Miller, Federal Practice and Procedure: Civil § 2472. A general objection will suffice if the ground therefor is manifest. *Id.* § 2473. In this case, we hold that defendants' clear indication of lack of consent sufficiently stated their objection to the trial court.

During argument on plaintiff's post-verdict motion for a new trial, defense counsel revealed that at the time of the trial court's ruling about which he now complains, he was aware of the rule stated in *Stephenson*. Plaintiff argues that counsel waived defendants' objection by failing to then apprise the trial court of his knowledge of the law. We know of no authority

requiring counsel to argue case law to the trial court at the risk of otherwise losing the benefit of an objection. Rule 46(b), if applicable, would only require a statement of the grounds for an objection, not the case law in support thereof. We find no waiver in these circumstances.

New trial.

Judges ARNOLD and ERWIN concur.

IN THE MATTER OF DANIEL PAUL RICH, JUVENILE

No. 8029DC373

(Filed 7 October 1980)

Criminal Law § 9.2; Infants § 18– juvenile hearing – aiding and abetting in assault by car

The evidence in a juvenile hearing was sufficient to prove beyond a reasonable doubt that respondent committed the criminal offense of aiding and abetting an assault with a deadly weapon where it tended to show that respondent, age 14, took his father's car; the next day another boy was driving the car and respondent was sitting on the passenger side; a sheriff pursued the car and the driver caused the car to strike the sheriff's vehicle several times; and a loaded pistol was lying between respondent and the driver, since (1) the respondent was in constructive possession of the car used as the assault weapon, (2) respondent gave tacit approval to the assaults and ratified them for the purpose of effecting a joint escape for the boys' mutual benefit by failing to object or to attempt to leave the car, and (3) the pistol was easily accessible to either boy and respondent could not have been afraid that the other boy would use the pistol against him.

APPEAL by juvenile from *Guice, Judge.* Order entered 5 December 1979 in District Court, POLK County. Heard in the Court of Appeals at Waynesville on 28 August 1980.

This is a juvenile hearing held in accordance with G.S. 7A-285 initiated upon a petition alleging that Daniel Paul Rich is a delinquent child, and that on 4 December 1979 he aided and abetted Carroll Maynard Downs in an assault with a deadly weapon, to wit: an automobile, upon Boyce Carswell, Sheriff of Polk County. From an order adjudicating respondent Daniel Paul Rich a delinquent and imposing juvenile probation, the respondent appealed.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

Lee Atkins for respondent appellant.

HILL, Judge.

The sole question presented is whether the evidence was sufficient to prove beyond a reasonable doubt that the respondent committed the criminal offense of aiding and abetting an assault with a deadly weapon.

The trial judge made findings of fact, conclusions of law and adjudicated the respondent a delinquent. Pertinent parts of the findings of fact show that Rich, age 14, took his father's car on 3 December 1979; that on 4 December 1979 Downs was driving the car and Rich was sitting on the passenger side of the car; that the sheriff of Polk County in response to a radio call on 4 December pursued the Rich car driven by Downs; and that Downs caused the Rich vehicle to strike the sheriff's vehicle several times. A loaded .22 caliber pistol was lying between Downs and Rich. The two boys stated they had plans to go out of the State.

Rich moved that the proceeding against him be dismissed for failure by the State to meet its burden of proof. Rich contends the only evidence against him is his presence at the scene of the crime. He argues that such evidence is not sufficient and that it shows only that he, as accused, was either only aware of the crime, or made no effort to prevent it, or silently acquiesced. Rich contends that in order for him to be characterized as an aider and abettor, the State must show that he gave active encouragement to the perpetrator or made known his intention to render aid.

The law with respect to aiding and abetting is well established in our State:

> 'An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime. [citations] To render one who does not actually participate in the commission of a crime guilty of the offense committed there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary. [citation]'

State v. Dawson, 281 N.C. 645, 655, 190 S.E. 2d 196 (1972).

"[T]he guilt of an accused as an aider and abettor may be established by circumstantial evidence." (Citations omitted.) *State v. Redfern*, 246 N.C. 293, 297, 98 S.E. 2d 322 (1957). Hence, communication of an intent to aid does not have to be shown by the express words of the defendant, but may be inferred from his actions and from his relation to the actual perpetrator. "'When the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement.'" *State v. Rankin*, 284 N.C. 219, 223, 200 S.E. 2d 182 (1973), *citing* Wharton, Criminal Law, 12th ed. § 246.

In a general fashion, the Supreme Court in *State v. Birchfield*, 235 N.C. 410, 414, 70 S.E. 2d 5 (1952), sets forth some of the facts and circumstances to be considered in determining whether individuals have aided or abetted a principal in the commission of a crime. "Their relationship to the actual perpetrator of the crime, the motives tempting them to assist in the crime, their presence at the time and place of the crime, and their conduct before and after the crime are circumstances to be considered. . . ." In *State v. Allison*, 200 N.C. 190, 195, 156 S.E. 547 (1931), the Court held that a person may aid and abet in the commission of an offense [homicide] "by concert of action."

Fair inferences from the record reflect that respondent Rich was more than a mere bystander and in fact "encouraged" Carroll Maynard Downs in the assault upon Sheriff Carswell.

First, the respondent was in constructive possession of the assault weapon. The car belonged to respondent's father, and thus Downs was operating it with the implied permission and subject to the dominion and control of the respondent. The respondent was sitting in the front seat of the vehicle without apparent restraint, and thus of his own volition.

Second, the sheriff had been alerted to be on the lookout for the vehicle, and when he turned on his blue light, the respondent's vehicle attempted to elude him. The chase resulted in a series of assaults upon Sheriff Carswell, each without apparent objection by the respondent. Thus, Rich can be said to have given tacit approval to the assaults, and ratified them, for the purpose of effecting a joint escape for the boys' mutual benefit.

The respondent never attempted to alight from the vehicle, although it backed up and reversed its direction a few times.

Third, the respondent could not have been afraid that Downs would use the pistol against him, for it was lying on the seat between the two boys, readily accessible to either.

For these reasons the action of the trial judge in entering the order of probation is

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

REVIS SAND AND STONE, INC., PLAINTIFF v. HUBERT G. KING, JR., DEFENDANT, AND JOAN P. WHITMIRE AND HUSBAND, WALTER C. WHITMIRE, THIRD PARTY DEFENDANTS.

No. 8029DC85

(Filed 7 October 1980)

1. **Contracts § 6.1– contract to build house for $30,000 – defendant unlicensed contractor – no recovery for construction**

Defendant builder was not entitled to recover from third party defendants for the construction of a house either upon the parties' contract or in quantum meruit, since defendant was not a licensed contractor at the time he entered into the contract with third party defendants, and there was no merit to defendants' contention that the contract must *exceed* $30,000 before he was required to be licensed.

2. **Contracts § 6.1– licensing of contractor – cost of building determinative**

The cost of a building, which is usually the contract price, as opposed to the total completed cost, determines whether the $30,000 limit of G.S. 87-1 has been violated and thus whether the contractor must be licensed.

APPEAL by defendant King from *Gash, Judge.* Judgment filed 16 October 1979 in District Court, HENDERSON County. Heard in the Court of Appeals 27 August 1980, at Waynesville, North Carolina.

Plaintiff brought this action to recover the cost of building materials sold to defendant King for use in the construction of a home for Joan P. Whitmire and Walter C. Whitmire, third party defendants. King admitted plaintiff's allegations and instituted a third party action against the Whitmires, alleging that

he had not been paid the balance due for labor and materials used in construction of the home.

On 30 September 1978 King and Mrs. Whitmire executed a construction contract, which was entered as an exhibit. King, who was not licensed as a contractor pursuant to North Carolina statutory requirements at that time, agreed to construct a dwelling for Mrs. Whitmire for $30,000. The evidence tended to show that during construction Mrs. Whitmire requested and King provided materials and labor, aggregating over $7,000, for additions and changes to the dwelling. The Whitmires paid King $26,700 on the original contract and refused to pay the balance of the sum King alleged was due him.

At trial without a jury, King admitted liability to plaintiff and judgment was entered in the amount requested. At the conclusion of defendant's evidence against third party defendants, the latter's motion for involuntary dismissal under Rule 41(b), North Carolina Rules of Civil Procedure, was granted on grounds that defendant was not a licensed contractor at the time the contract was entered into. Defendant appeals from the dismissal.

Redden, Redden & Redden, by Monroe M. Redden, for defendant appellant.

Prince, Youngblood, Massagee & Creekman, by Boyd B. Massagee, Jr., for third party defendant appellees.

MARTIN (Harry C.), Judge.

[1] Defendant argues that although he was not a licensed contractor, he was not subject to the licensing requirements of Chapter 87 of the General Statutes of North Carolina and that the contract he entered into with defendants is therefore valid. He also urges that he is entitled to compensation in *quantum meruit* for the additional expenditures ordered by third party defendants which exceeded the contractual amount. We agree with the trial court that defendant is not entitled to recovery based either upon contract or *quantum meruit*.

N.C.G.S. 87-1 defines a "general contractor" as:

> [O]ne who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct any building ... or any improvement or structure where the cost of the undertak-

> ing is *thirty thousand dollars ($30,000) or more* and anyone who shall bid upon or engage in constructing any undertakings or improvements above mentioned in the State of North Carolina costing *thirty thousand dollars ($30,000) or more* shall be deemed and held to have engaged in the business of general contracting in the State of North Carolina. (Emphasis added.)

One who acts as a general contractor must be licensed pursuant to N.C.G.S. 87-10. N.C.G.S. 87-13 provides for a criminal penalty for violation of the licensing requirement:

> Any person, firm or corporation not being duly authorized who shall contract for or bid upon the construction of any of the projects or works enumerated in G.S. 87-1, without having first complied with the provisions hereof, or who shall attempt to practice general contracting in this State ... shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than five hundred dollars ($500.00) or imprisonment of three months, or both ....

[1,2] Defendant has admitted he was not licensed at the time he entered into the contract. Although defendant also concedes that the contract in question was for $30,000, he would have us interpret the statute to apply only if the amount of the contract exceeds $30,000, citing *Fulton v. Rice*, 12 N.C. App. 669, 184 S.E. 2d 421 (1971), as authority for his position. In *Fulton* the original estimate was for an amount less than the statutory limit, which at that time was $20,000. This Court held that the statute must be strictly construed because of the criminal penalties imposed. The cost of the undertaking, which would usually be the contract price, as opposed to the total completed cost, determines whether the statutory limit has been violated and thus whether the contractor must be licensed. *Id.* The contractual cost in the present case is exactly that stated in the statute. To accept defendant's argument that the contractual amount is within the limit if it does not exceed $30,000 would be to contradict the plain statutory language. *See also Vogel v. Supply Co.*, 277 N.C. 119, 177 S.E. 2d 273 (1970).

The purpose of N.C.G.S. 87-1 "is to protect the public from incompetent builders." *Builders Supply v. Midyette*, 274 N.C.

264, 270, 162 S.E. 2d 507, 511 (1968). For this reason our courts have consistently held that one who violates the licensing requirement for general contractors not only subjects himself to criminal sanctions but may not recover on the contract itself.

> When, in disregard of such a protective statute, an unlicensed person contracts with an owner to erect a building costing more than the minimum sum specified in the statute, he may not recover for the owner's breach of that contract. This is true even though the statute does not expressly forbid such suits.

Id. at 270, 162 S.E. 2d at 511. *See also Vogel, supra.*

The same policy applies to an action in *quantum meruit* or unjust enrichment:

> The same rule which prevents an unlicensed person from recovering damages for the breach of a construction contract has generally been held also to deny recovery where the cause of action is based on *quantum meruit* or unjust enrichment. ... To deny an unlicensed person the right to recover damages for breach of the contract, which it was unlawful for him to make, but to allow him to recover the value of work and services furnished under that contract would defeat the legislative purpose of protecting the public from incompetent contractors. ... The importance of deterring unlicensed persons from engaging in the construction business outweighs any harshness between the parties and precludes consideration for unjust enrichment.

Builders Supply, supra at 273, 162 S.E. 2d at 512-13. *See also Helms v. Dawkins*, 32 N.C. App. 453, 232 S.E. 2d 710 (1977); *Furniture Mart v. Burns*, 31 N.C. App. 626, 230 S.E. 2d 609 (1976).

Substantive law precludes defendant from any recovery. For this reason we must affirm the trial court's dismissal of King's third party action.

Affirmed.

Judges CLARK and HILL concur.

PACIFIC SOUTHBAY INDUSTRIES, INC. v. SURE-FIRE DISTRIBUTING, INC.

No. 8028SC294

(Filed 7 October 1980)

Accounts § 2; Contracts § 26.2; Principal and Agent § 5 – action on account stated – more extensive contract with agent alleged – authority of agent – evidence improperly excluded

In an action to recover the balance due for recreational vehicle seats manufactured by plaintiff and sold to defendant where plaintiff characterized the balance due as an account stated, the trial court erred in excluding defendant's evidence of a more extensive warehousing and distribution contract entered into by defendant with plaintiff's sales manager who represented that he owned plaintiff corporation, and the case is therefore remanded for a determination of whether the sales manager had authority to bind plaintiff in a warehousing and distribution contract, whether such a contract did exist between the parties and, if so, what its terms were, whether the contract was breached, defendant's damages, if any, and whether any set-off for the allegedly defective condition of some of the seats should be allowed.

APPEAL by defendant from *Gaines, Judge.* Judgment entered 24 October 1979 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals at Waynesville on 28 August 1980.

Plaintiff is a California-based corporation engaged in the business of manufacturing recreational vehicle products, primarily seats. Defendant is a North Carolina corporation which distributes accessories for recreational vehicles. During 1977 and 1978, plaintiff, pursuant to an express contract, shipped its merchandise to defendant so that by the middle of 1978 defendant owed plaintiff a balance of $7,473.89. Plaintiff filed this action to collect the balance, characterizing it as an account stated. Defendant answered, admitting the debt with certain set-offs, and counterclaimed for damages. From a judgment granting plaintiff a directed verdict on the account stated and dismissing with prejudice defendant's counterclaim, defendant appealed.

Wesley F. Talman Jr. for plaintiff appellee.

Riddle, Shackelford & Hyler, by George B. Hyler Jr., for defendant appellant.

HILL, Judge.

Appellant failed to file the record on appeal within 150 days of his notice of appeal in violation of App. R. 12(a), but did file within 150 days from the date the judgment was signed. At oral argument, appellant moved the Court to consider the appeal as a petition for writ of certiorari and subsequently filed a written petition. This Court, in its discretion and pursuant to App. R. 21(a), allows the motion. Furthermore, pursuant to App. R. 2, the Court suspends App. R. 28 for purposes of this appeal.

Defendant's counterclaim alleges that it entered into a more extensive contract with plaintiff than is evidenced by the account stated. Defendant's officers stated to the Court, out of the presence of the jury, that they were contacted by Bill Haynes in September 1977. Haynes was plaintiff's sales manager and allegedly represented himself as the owner of plaintiff corporation. The officers testified that they agreed with Haynes that defendant would serve as the southeastern warehouse for plaintiff and provide 6,000 square feet for the storage of plaintiff's products. Defendant's officers stated the contract allowed defendant to sell plaintiff's seats on a demand basis and that pursuant to the contract defendant published two full pages in its catalog showing plaintiff's products.

The trial court did not allow defendant's officers to testify before the jury about their alleged conversations with Haynes. The court stated that "[a]ny misrepresentation Haynes made is not through his agency or his authority." Defendant excepted.

We agree with defendant that testimony regarding the alleged contract should have been admitted. The issue for our determination is not whether a contract as extensive as defendant alleges existed between the parties. The issue is whether there was enough evidence to go to the jury on the issue of whether Bill Haynes had apparent authority as plaintiff's agent to enter into such a contract.

> [W]here there is no evidence presented tending to establish an agency relationship the alleged principal is entitled to a directed verdict. (Citation omitted.)

Smith v. VonCannon, 17 N.C. App. 438, 439, 194 S.E. 2d 362 *affirmed* 283 N.C. 656, 197 S.E. 2d 524 (1973). But where, as in this case, evidence is presented, "[a]gency is a fact to be proved as any other . . . ." *Smith, supra.* "Once the existence of the

agency and the extent of the authority is established ... the burden devolves upon the principal to show that he thereafter terminated the agency or limited the authority ... ." *Harvel's Inc. v. Eggleston*, 268 N.C. 388, 394, 150 S.E. 2d 786 (1966).

Apparent authority "is that authority which the principal ... has permitted the agent to represent that he possesses." *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 31, 209 S.E. 2d 795 (1974). The determination of plaintiff's liability must be determined by what authority defendant, in the exercise of reasonable care, was justified in believing that plaintiff had conferred upon Haynes. *Zimmerman, supra.*

According to defendant's officers' statements to the trial court, Haynes, the admitted sales manager of plaintiff, called defendant and identified himself as the owner of plaintiff Southbay. Haynes allegedly told defendant's officers he wanted defendant to market plaintiff's products and serve as an east coast warehouse and distribution center.

Pursuant to the alleged conversations, photographs and art work were promptly sent to defendant so that it could include plaintiff's products in the catalog it was preparing for the next year. Furthermore, fabric samples, price lists and inventory were sent to defendant. Haynes' activities, although consistent with the functions of a sales manager, were also consistent with the actions of the owner of a small manufacturer who desired to open a market a continent away. It would be important to such an owner to establish an eastern warehouse, get its product into defendant's new catalog and have an inventory in defendant's warehouse by the time the catalog was sent out. Haynes did all of these things. The trial court erred when it excluded defendant's testimony.

Defendant also excepted to the trial court's action allowing plaintiff's motion for a directed verdict and dismissing defendant's counterclaim. In light of our finding that defendant should have been allowed to introduce testimony concerning its alleged contract with plaintiff and the damages which arose from its alleged breach, the trial court's action in dismissing the counterclaim was improper. In addition, defendant alleged in its answer and counterclaim that certain set-offs were due on the outstanding balance that it admitted to, and introduced

evidence supporting the allegation. Whether the set-offs should be allowed presents an issue of fact for jury determination.

Defendant excepts finally to the trial court's action in allowing plaintiff to amend its prayer for relief to ask for six per cent interest from the date all of the invoices became due and payable. The trial court acted properly. Upon remand, any damages that defendant can prove must be subtracted from the amounts that it has admitted it owes plaintiff.

For the reasons stated above, the case is remanded for a determination of whether Bill Haynes had authority to bind plaintiff in a warehousing and distribution contract; whether such a contract did in fact exist between the parties; if so, what the contract's terms were; and if the contract was breached, what defendant's damages are. A further determination must be made of whether any set-off for the allegedly defective condition of some of the seats should be allowed.

The directed verdict for the plaintiff at the close of all the evidence is affirmed. The directed verdict against the defendant on his counterclaim is reversed, and the cause is remanded to the superior court for further proceedings consistent with this opinion.

Affirmed in part, Reversed and Remanded.

Judges CLARK and MARTIN (Harry C.) concur.

IN RE THE MATTER OF THE IMPRISONMENT OF RONALD ARMSTRONG

No. 808SC290

(Filed 7 October 1980)

Extradition § 1– demand for extradition – information supported by affidavits – when affidavits executed

The provision of G.S. 15A-723 requiring a demand for extradition to be accompanied by "information supported by affidavit in the state having jurisdiction of the crime" does not require that the "supporting" affidavits be dated prior to or contemporaneous with the information, and in this case the trial information, the bench warrant, and the fugitive warrant, coupled

with affidavits dated subsequent to the information, gave adequate assurance that the person sought was "substantially charged" with a crime in the demanding state as required by G.S. 15A-723.

ON certiorari to review the order of *Rouse, Judge* entered on 3 December 1979 in Superior Court, WAYNE County. Heard in the Court of Appeals on 9 September 1980.

On 29 January 1980, this Court issued its writ of certiorari to review an order of Judge Rouse entered in a habeas corpus proceeding requiring the release of the applicant, Ronald Armstrong, who was being held on a Governor's Warrant pursuant to a demand for extradition by the State of Iowa.

The following facts are not controverted. On 3 October 1979, the Scott County, Iowa, District Court filed a trial information charging applicant and another person with breaking and entering an occupied structure in violation of Iowa law. The trial information was supported by the statements of Gail A. Ramer, Todd Hendricks, Clark Feller, and Pamela Joe Wiese and a bench warrant for the arrest of applicant was included therein. On 22 October 1979, based on information received by Iowa authorities, the deputy clerk for Wayne County Superior Court issued a warrant for the arrest of applicant as a fugitive charged with crime in another state. Applicant was incarcerated in the Wayne County jail the same day.

An application for requisition was made by Iowa authorities to the Governor of the State of Iowa on 25 October 1979; the application was accompanied by the trial information and affidavits of Ramer and Hendricks dated 25 October 1979. A demand for extradition, alleging that the applicant was in Iowa at the time the crime was committed, and that the applicant had fled that state thereafter, was made to the Governor of this State on 5 November 1979. The demand was accompanied by the application for requisition, the trial information, and the affidavits. A Governor's Warrant pursuant to the demand was issued 13 November 1979.

Applicant applied for a writ of habeas corpus on 19 November 1979. The application was heard by Judge Rouse, who issued an order on 3 December 1979 which provided in pertinent part as follows:

[T]he Court makes the following findings:

. . .

4. That the affidavits of Gail A. Ramer and Todd Hendricks which are attached to the Application for Requisition from the State of Iowa are dated October 25, 1979 and do not pre-date and are not simultaneous in date with the Criminal Information in the State of Iowa in this case.

5. That the statement of Gail A. Ramer attached to the Iowa Information does not constitute an affidavit.

Based on the foregoing findings of fact, the Court concludes:

1. That the Information filed in the State of Iowa in this cause was not supported by an affidavit as required by GS 15A-723.

2. That the affidavits of Gail A. Ramer and Todd Hendricks post-date the criminal information filed in the State of Iowa and therefore do not support the Criminal Information issued by the State of Iowa.

. . .

The defendant Ronald Armstrong is herewith ordered discharged immediately from the custody of the Sheriff of Wayne County, North Carolina.

The State then petitioned this Court for a writ of certiorari.

Attorney General Edmisten, by Associate Attorney Barry S. McNeill, for the State.

J. Thomas Brown, Jr., for defendant appellee.

HEDRICK, Judge.

G.S. § 15A-723 provides in pertinent part as follows:

No demand for the extradition of a person charged with crime in another State shall be recognized by the Governor unless in writing alleging . . . that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the State, and accompanied by . . . information supported by affidavit

> in the state having jurisdiction of the crime, ... [The] information ... must substantially charge the person demanded with having committed a crime under the law of that state; ...

The sole question presented by this appeal is whether the words "information supported by affidavit," as used in G.S. § 15A-723, require that the "supporting" affidavits be dated prior to or contemporaneous with the information. Judge Rouse held that since the affidavits were executed subsequent to the date of the information, the statute was not properly followed, and thus applicant was being illegally held. We disagree. In an extradition proceeding, once extradition has been granted by the asylum state, and the prisoner has sought to prevent extradition by way of habeas corpus, the reviewing court's inquiry is limited to the following questions: (1) whether the extradition documents on their face are in order; (2) whether the prisoner has been charged with a crime in the demanding state; (3) whether the prisoner is the person named in the request for extradition; and (4) whether the prisoner is a fugitive from the demanding state. *Michigan v. Doran*, 439 U.S. 282, 58 L.Ed.2d 521, 99 S.Ct. 530 (1978); *State v. Carter*, 42 N.C. App. 325, 256 S.E. 2d 535, *appeal denied*, 298 N.C. 301, 259 S.E. 2d 302 (1979). *See also In re Malicord*, 211 N.C. 684, 191 S.E. 730 (1937). The obvious purpose of the statute cited above is to assure that the prisoner is indeed charged with a crime in the demanding state. *See Ewing v. Waldrop*, 397 F. Supp. 509 (W.D.N.C. 1975). The trial information, the bench warrant, and the fugitive warrant, coupled with the affidavits, even though dated subsequent to the information, give adequate and overwhelming assurance that applicant here was "substantially charged" with a crime in Iowa as required by G.S. § 15A-723. Thus, the clear purpose of G.S. § 15A-723 is met here, and to allow applicant to prevail based on a meaningless and inflexible construction of the statute would violate that clear purpose.

In the present case, we think that what was done constitutes sufficient compliance with G.S. § 15A-723, and that the court below erred in giving the applicant his release.

Reversed and remanded for further proceedings.

Judges HILL and WHICHARD concur.

EMPLOYERS INSURANCE OF WAUSAU v. WADE HALL

No. 8028DC218

(Filed 7 October 1980)

Criminal Law § 101; Torts § 1– civil damages for crime of embracery

A person who commits a criminal act of embracery is liable in civil damages to one who is damaged thereby, and the trial court properly entered a judgment of $1,820 for plaintiff insurer against defendant for damages caused by defendant's act of embracery where the evidence tended to show that plaintiff provided liability insurance coverage for a hospital; a suit was brought against the hospital and plaintiff provided it with a defense; during the trial defendant, an attorney, personally contacted a juror and attempted to influence her verdict in the case; a mistrial was declared; defendant thereafter pled guilty to the common law felony of embracery and was sentenced to prison; by reason of defendant's conduct, plaintiff lost the value of the time its attorneys spent in defending the lawsuit; and plaintiff's attorneys charged $45 per hour and worked approximately 54 hours on the case.

APPEAL by defendant from *Israel, Judge.* Judgment entered 29 August 1979 in District Count, BUNCOMBE County. Heard in the Court of Appeals 28 August 1980, at Waynesville, North Carolina.

Plaintiff insurance company issued a policy providing Memorial Mission Hospital of Western North Carolina, Inc. with liability insurance coverage, which included the obligation to defend claims brought against the hospital. James D. Caldwell sued the hospital and plaintiff undertook to defend it under the terms of the policy.

After six and one-half days of trial in Superior Court of Buncombe County before a jury, the presiding judge declared a mistrial. The mistrial resulted from the conduct of defendant Hall and others, who were not parties to the lawsuit, in contacting a juror serving on the case and attempting to influence the juror's verdict.

Plaintiff now brings this suit to recover legal expenses allegedly incurred by reason of defendant's acts. After trial without jury, the court made findings of fact and conclusions of law, and entered judgment for plaintiff in the amount of $1,820. Defendant Hall appeals.

Morris, Golding, Blue & Phillips, by James N. Golding, for plaintiff appellee.

Swain & Stevenson, by Joel B. Stevenson, for defendant appellant.

MARTIN (Harry C.), Judge.

On appeal, defendant argues the court erred in awarding substantial damages to plaintiff when all the evidence showed that the tortious act of defendant did not result in any monetary loss to plaintiff.

This case was tried by the judge without a jury. Defendant made no exceptions to any of the court's findings of fact or conclusions of law. Therefore, the findings of fact are deemed to be supported by competent substantial evidence and are conclusive upon appeal. *Brown v. Board of Education*, 269 N.C. 667, 153 S.E. 2d 335 (1967); *In re Vinson*, 42 N.C. App. 28, 255 S.E. 2d 644 (1979); *Ply-Marts, Inc. v. Phileman*, 40 N.C. App. 767, 253 S.E.2d 494 (1979). Defendant argues that the evidence is insufficient to sustain the findings of fact. Because of his failure to except to any of the findings, this question is not before us. *Brown v. Board of Education, supra.*

By his exception to the entry of the judgment, the defendant does raise the question whether the facts found support the conclusions of law and judgment entered. *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E.2d 102 (1975); *Russell v. Taylor*, 37 N.C. App. 520, 246 S.E.2d 569 (1978). We hold that they do.

The court found that plaintiff issued the policy protecting the hospital and requiring plaintiff to defend actions brought against its insured. A suit was brought against the hospital and plaintiff provided it with a defense. During the trial, defendant Hall, then an attorney of the bar of North Carolina, personally contacted a juror empanelled on the case being tried and attempted to influence her verdict in the case. Thereafter, Hall pleaded guilty to the common law felony of embracery and was sentenced to prison. His law license was subsequently suspended. By reason of Hall's unlawful conduct, plaintiff lost the value of the time its attorneys spent in defending the lawsuit. Plaintiff's attorneys charged $45 per hour and worked approximately fifty-four hours on the case. Judgment for $1,820 was entered against defendant. The court did not award any puni-

tive damages against Hall. The above findings support the judgment.

Defendant contends he is not responsible in civil damages for the act of embracery. We reject this argument and hold that a person who commits an act of embracery is liable in civil damages to one who is damaged thereby. 29A C.J.S. Embracery § 10 (1965). Surely an act so abhorrent to the fair administration of justice requires that the perpetrator pay the full measure for his acts, both to society in the form of criminal punishment and in civil damages to individuals who suffer from his actions. The crime strikes to the foundation of law and shatters the very bedrock of justice.

In North Carolina, "[E]very person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; ..." N.C. Const. art. I, § 18. Plaintiff has suffered an injury because of defendant's criminal act. Damages therefore are recoverable.

The judgment of the trial court is

Affirmed.

Judges CLARK and HILL concur.

JANIE PIGFORD PETITIONER v. THE BOARD OF ADJUSTMENT OF THE CITY OF KINSTON, NORTH CAROLINA, AND J.P. CHERRY, SR., AND J.P. CHERRY, JR., T/A CHERRY OIL COMPANY, INC., RESPONDENTS

No. 808SC257

(Filed 7 October 1980)

Municipal Corporations § 31.1– order of board of adjustment – petitioner not aggrieved – no judicial review

Where it did not appear in the record that petitioner was the owner of property affected by a ruling of defendant board, petitioner was not an aggrieved party entitled to judicial review, and proceedings in the superior court were therefore nullities.

APPEAL by petitioner and respondents J.P. Cherry, Sr. and J.P. Cherry, Jr., t/a Cherry Oil Company, Inc., from *Bruce, Judge.* Order entered 30 November 1979 in Superior Court,

LENOIR County. Heard in the Court of Appeals on 16 September 1980.

This is an appeal from an order of the superior court affirming in part and reversing and remanding in part the decision of the Board of Adjustment for the City of Kinston, North Carolina, which affirmed the decision of the city building inspector to issue three building permits to respondents "for the state purpose of 'moving store back off State Right-of-Way' at the intersection of J.P. Harrison Blvd. and East Washington Street; 'to renovate existing building to meet all codes'; and 'to bury 4,000 gallon gas tank' respectively."

Beech and Pollock, by Paul L. Jones, for petitioner appellant and appellee.

White, Allen, Hooten, Hodges and Hines, by John M. Martin for respondent appellants and appellees.

HEDRICK, Judge.

Section 24-60 of the Zoning Ordinance of the City of Kinston reads as follows: "Appeals from the decisions of the Building Inspector shall be made to the Board of Adjustment. Appeals made from the Board of Adjustment shall be made to the Lenoir County Superior Court."

G.S. § 160A-388(b) in pertinent part provides:

> The Board of Adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this Part. An appeal may be taken by any person aggrieved or by an officer, department, board, or bureau of the city.

G.S. § 160A-388(e) in pertinent part provides: "Every decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari."

Any aggrieved party may appeal from a ruling of the city building inspector to the board of adjustment, and such an aggrieved party may then appeal from the board to superior court by way of certiorari. *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E.2d 128 (1946). This necessarily means that the appealing party must have some interest in the property

affected. *Lee v. Board of Adjustment, supra. See also Deffet Rentals, Inc. v. City of Burlington*, 27 N.C. App. 361, 219 S.E.2d 223 (1975); *In re Coleman*, 11 N.C. App. 124, 180 S.E. 2d 439 (1971). *In Humble Oil & Refining Co. v. Board of Aldermen*, 20 N.C. App. 675, 678, 202 S.E.2d 806, 808, *rev'd on other grounds*, 286 N.C. 170, 209 S.E.2d 447 (1974), Judge Morris (now Chief Judge) stated for this Court: "Appellate review of the order of a municipal board of adjustment is available only to the owner of the property affected by the ruling ..." The petition to the superior court for a writ of certiorari in the present case describes the petitioner, Janie Pigford, as a "citizen and resident of the City of Kinston, North Carolina, and the applicant of record for an interpretation of sections 24-8 *a* and *b* on Nonconforming uses of the Kinston Zoning Ordinance ..." and as a resident of "1714 East Washington Street as an aggrieved party ...." In the record before us there is no allegation or evidence that the petitioner is the owner of property affected by the board's ruling. Nowhere in the record before us does it appear that the petitioner is a party aggrieved by the ruling and entitled to judicial review. Thus, the proceedings in the superior court, including the order entered 30 November 1979, are nullities.

For the reasons stated, the order appealed from is vacated, and the matter is remanded to the superior court for the entry of an order (1) dismissing the petition for a writ of certiorari filed 28 July 1979; (2) vacating the writ of certiorari granted 20 August 1979; and (3) reinstating the decision of the board of adjustment dated 11 July 1979. The petitioner and respondents on the appeal to this Court will be taxed one-half (1/2) each of the costs of the appeal.

Vacated and remanded.

Chief Judge MORRIS and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. RICKY ALAN WILLIAMS

No. 805SC350

(Filed 7 October 1980)

Searches and Seizures § 24– affidavit for search warrant – credibility of informant – time when narcotics observed

An officer's statement in an affidavit to obtain a search warrant that a reliable and confidential informant who furnished information to him "has been used by [another named officer] in the past and information given by the source has proven correct in all cases" met the minimum standard for setting forth the circumstances from which the affiant concluded that the informant was reliable. Furthermore, the officer's statement in the affidavit that the confidential informant had contacted the officer within the past 36 to 48 hours and told the officer that he had personally observed a large quantity of hashish in defendant's apartment and that part of the original quantity had already been disposed of furnished a reasonable basis for the issuing magistrate to conclude that the informant observed the hashish so recently that reasonable cause existed to believe that hashish could be found in defendant's apartment at the time of the issuance of the warrant.

APPEAL by the State pursuant to G.S. 15A-979(c) from *Llewellyn, Judge.* Order entered 9 January 1980 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 11 September 1980.

Defendant was indicted for possession of hashish with intent to sell. He moved to suppress evidence seized during a search of his apartment pursuant to a search warrant, alleging that the warrant had been issued on an affidavit which did not state that the affiant knew the informant, which did not include sufficient detail to provide corroboration, which contained only conclusory information, and which contained no details from which the magistrate could conclude that the information was not stale.

Defendant's motion was allowed. The State appealed pursuant to G.S. 15A-979(c).

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Harry E. Payne, Jr., for defendant appellee.

ERWIN, Judge.

The State contends that the presiding judge erred in allowing defendant's motion to suppress the evidence seized from his premises pursuant to a search warrant. The trial court allowed defendant's motion on two grounds: (1) The search warrant is conclusory, in that sufficient information as to the reliability of the informant was not contained in the affidavit. (2) The time period wherein the alleged contraband was to be in existence in the residence was not sufficiently identified. For the reasons that follow, the order suppressing the evidence seized from defendant's premises is reversed.

The affidavit in the case *sub judice* states:

> "That on or about 10/26/79, the Affiant was advised by Det. G.H. Deitz of the New Hanover Sheriff Dept. that within the past 36 to 48 hrs., a confidential and reliable source had contacted him in reference to the above residence. The source has been used by Det. Deitz in the past and information given by the source has proven correct in all cases. The source related to Det. Deitz that he had personally observed a large quantity of a substance known to him as Hashish in the apartment occupied by one Ricky Williams at 313 Greenville Ave., Wilmington, NC. The source further stated that part of the original quantity had already been disposed of."

In *State v. Altman*, 15 N.C. App. 257, 189 S.E. 2d 793 (1972), *cert. denied*, 281 N.C. 759, 191 S.E. 2d 362 (1973), this Court held that a statement in an affidavit to obtain a search warrant that a confidential informant "has proven reliable and credible in the past" meets the minimum standard for setting forth the circumstances from which the affiant concluded that the informant was reliable. "The statement that the informant has proven reliable in the past is a statement of fact and not a mere conclusion." *Id.* at 259, 189 S.E. 2d at 795. This court held in *State v. Brown*, 20 N.C. App. 413, 415, 201 S.E. 2d 527, 529 (1974), *appeal dismissed*, 285 N.C. 87, 204 S.E. 2d 21 (1974), that "'[t]he affiant received information from a reliable informant who in the past has provided reliable information concerning the drug traffic in Greenville . . .'" was sufficient for the issuance of a search warrant. *See also State v. Eller*, 36 N.C. App. 624, 244 S.E. 2d 496 (1978); *State v. Caldwell*, 25 N.C. App. 269, 212 S.E. 2d 669

(1975). We hold that the affidavit in question meets the minimum requirements from which the affiant concluded that the informant was reliable.

In his motion to suppress, defendant alleged that the affidavit was insufficient, because the affiant in this case did not state that he personally had used the informant in the past and found his information to be reliable. We hold that inasmuch as another sheriff department officer had found this informant to be reliable in the past was sufficient for the affiant to rely on him. *See State v. Ellington*, 284 N.C. 198, 200 S.E. 2d 177 (1973).

The second ground upon which the trial court concluded that the warrant was not issued upon probable cause rested upon the fact that the affidavit did not state the date that the informant allegedly observed hashish in defendant's apartment. This contention was answered by this Court in *State v. Cobb*, 21 N.C. App. 66, 69, 202 S.E. 2d 801, 804 (1974), *cert. denied*, 285 N.C. 374, 205 S.E. 2d 99 (1974), wherein Judge Vaughn wrote for the Court:

> "Defendant contends that the affidavit does not disclose when the informer observed the activities referred to in the affidavit and that they could have occurred several years prior to the issuance of the warrant. It is true, of course, that one component in the concept of probable cause is the time of the happening of the facts relied upon. Here the magistrate could realistically and reasonably conclude from the affidavit that the informer observed the events so recently that reasonable cause existed to believe that the illegal activities were occurring at the time of the issuance of the warrant. When the affidavit is considered in the light of common sense, the existence of probable cause for issuance of the warrant is clear and this and defendant's other objections are dispelled."

The order suppressing the evidence seized in this case is reversed and the case is remanded for trial.

Remanded for trial.

Judges ARNOLD and WELLS concur.

CITICORP PERSON-TO-PERSON FINANCIAL CENTER, INC. v. STALLINGS 601 SALES, INC. AND BORG-WARNER ACCEPTANCE CORPORATION v. STALLINGS 601 SALES, INC.

No. 8019SC301
No. 8019SC302

(Filed 7 October 1980)

1. **Venue § 9– motion for change of venue pending – ruling on other motion proper**

The trial court was not required to rule on defendant's motion for change of venue prior to granting plaintiffs' motions for possession of collateral, since an ancillary order of attachment had already been entered and granting possession of the collateral to plaintiffs did not affect defendant's ultimate rights, and since the motion for change of venue involved a change within the district.

2. **Appeal and Error § 6.2– appeal from interlocutory order dismissed**

The trial court's order giving to plaintiffs immediate possession of collateral as described in certain orders of attachment previously issued was an interlocutory order which did not affect a substantial right of defendant, and defendant's appeal is therefore dismissed.

APPEAL by defendant from *Albright, Judge.* Orders entered 21 January 1980 in Superior Court, ROWAN County. Heard in the Court of Appeals 18 September 1980.

Plaintiffs instituted these actions in accord with Rule 3 of the North Carolina Rules of Civil Procedure. Orders extending time to file complaints were entered, and, in addition, orders of attachment of certain personal property were entered pursuant to plaintiffs' application. Thereafter plaintiffs filed their complaints alleging that defendant had executed a "Recreational Vehicle Dealer Agreement without Recourse" along with security agreements in which plaintiffs agreed to finance defendant's inventory, and that defendant breached the agreement and refused to surrender possession of the secured property. Plaintiffs sued for money damages and immediate possession of the collateral, the personal property attached by the Sheriff of Cabarrus County. Simultaneously with their complaints plaintiffs filed motions pursuant to N.C.R.C.P. 64 and the U.C.C. seeking immediate possession of the collateral. Three days later defendant filed a motion for change of venue and a motion for stay of proceedings pending determination of the motion for change of venue.

On 21 January the trial court entered orders giving each plaintiff immediate possession of the collateral, and on 24 January the court allowed defendant's motion to change venue from Cabarrus to Rowan County.

Defendant appeals from the orders granting plaintiffs immediate possession of the collateral.

Wesley B. Grant, by Randell F. Hastings, for defendant appellant.

Larry E. Harris for plaintiff Borg-Warner Acceptance Corporation.

Woodson, Hudson, Busby & Sayers, by Benjamin H. Bridges, III, for plaintiff Citicorp Person-To-Person Financial Center, Inc.

ARNOLD, Judge.

Although these two cases were considered separately by the trial court they are consolidated for our appraisal on appeal.

[1] First, we reject defendant's argument that the judge was required first to rule on its motion for change of venue (under Rule 12(b) (3)) and that by allowing that motion the court was then without authority to grant plaintiffs' motions for immediate possession of the collateral. Relying on *Little v. Little*, 12 N.C. App. 353, 183 S.E. 2d 278 (1971), defendant asserts that once a motion for change of venue is aptly made the court cannot thereafter enter any order affecting the rights of the parties until the venue motion is determined.

The record reveals that the trial judge granted plaintiffs' motions for possession on 21 January, prior to allowing defendant's motion for change of venue. Allowing plaintiffs' motions in no way affected any substantive rights of defendant. An ancillary order of attachment already had been entered, and granting possession of this collateral to plaintiffs does not affect defendant's ultimate rights. Moreover, we note that Cabarrus County and Rowan County are in the same judicial district. The motion for change of venue involved a change within the district, unlike the *Little* case, and we call attention to the limited holding as stated in *Little v. Little, supra*, at pp. 354, 355.

[2] Finally, there is no appeal from an interlocutory ruling of a trial court unless such ruling deprives the appellant of a substantial right which he would otherwise lose unless the ruling is reviewed on appeal prior to final judgment. G.S. 7A-27 and G.S. 1-277; *Funderburk v. Justice*, 25 N.C. App. 655, 214 S.E. 2d 310 (1975).

The trial court found that the plaintiffs were entitled, pursuant to the Uniform Commercial Code as enacted in this State, to immediate possession of the collateral as described in the certain orders of attachment previously issued. This Court will not hear appeals from interlocutory orders which do not affect a substantial right. *Wachovia Bank & Trust Co. v. Smith*, 24 N.C. App. 133, 210 S.E. 2d 212 (1974), *cert. denied* 286 N.C. 420, 211 S.E. 2d 801 (1975). The interlocutory order giving immediate possession of the collateral to plaintiffs has affected no substantial right of defendant. The appeal is therefore

Dismissed.

Judges ERWIN and WELLS concur.

IN THE MATTER OF: RACHEL M. HODGES, APPELLEE, AND AMERICAN COMPONENTS, INC. HAYESVILLE, NORTH CAROLINA 28904, EMPLOYER, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, APPELLANT

No. 8030SC100

(Filed 7 October 1980)

Master and Servant § 108– unemployment compensation – profanity and horseplay by co-worker – safe place to work

The Employment Security Commission's conclusion that claimant quit her job without good cause attributable to her employer and thus was not entitled to unemployment compensation was supported by findings that a co-worker used profane language in claimant's presence and claimant became involved in a verbal dispute with her, the co-worker at another time threw a cup of water while engaging in "horseplay" and part of it struck claimant, claimant became very upset and the employer attempted to mediate the dispute, and claimant then quit her employment, since such findings do not show that claimant was not provided a safe place to work.

In re Hodges

APPEAL by Employment Security Commission of North Carolina from *Riddle, Judge.* Judgment signed 31 October 1979 in Superior Court, CLAY County. Heard in the Court of Appeals 27 August 1980, at Waynesville, North Carolina.

On 12 April 1979, the Employment Security Commission entered its Decision No. 8935 disallowing Rachel M. Hodges's claim for benefits, for the reason that she voluntarily quit her job with American Components, Incorporated, without good cause attributable to her employer. Upon appeal, the superior court reversed. From this judgment, the Employment Security Commission of North Carolina appeals.

Gail C. Arneke, Staff Attorney, for appellant.

Rachel M. Hodges, appellee, in propria persona.

MARTIN (Harry C.), Judge.

Rachel M. Hodges appears in these proceedings without counsel. Although she did not file a brief, this Court, in its discretion, allowed her to present oral argument on appeal. No exceptions were made to the findings of fact or conclusions of the Commission; therefore, they are deemed to be supported by competent evidence and are conclusive upon appeal. *Schloss v. Jamison,* 258 N.C. 271, 128 S.E. 2d 590 (1962); *Ply-Marts, Inc. v. Phileman,* 40 N.C. App. 767, 253 S.E. 2d 494 (1979).

The superior court sits as an appellate court on review of employment security cases. *In re Enoch,* 36 N.C. App. 255, 243 S.E. 2d 388 (1978). Therefore, the only question remaining in this case is whether the findings of fact sustain the conclusions of law and the decision of the Commission. *Id.*

The essence of the findings of fact is that a co-worker used profane language in claimant's presence and claimant became involved in a verbal dispute with her. At another time, the co-worker, engaging in "horseplay" threw a cup of water and some of it struck claimant. Mrs. Hodges became very upset and the company attempted to mediate the dispute. This all happened over the period from 21 September 1978 to 4 October 1978, when claimant quit her employment.

The findings support the Commission's conclusion that claimant quit her job without good cause attributable to her employer. Claimant has the burden of proof on this issue. *In re*

Steelman, 219 N.C. 306, 13 S.E. 2d 544 (1941); *In re Vinson*, 42 N.C. App. 28, 255 S.E. 2d 644 (1979). This she failed to do.

The trial court's conclusion that claimant was *entitled* to a safe place to work is not tantamount to a finding that she did not have a safe place to work. Although the co-worker's behavior may have been disagreeable to Mrs. Hodges, and may have created an unpleasant atmosphere, there is no indication that the events made the workplace in any way unsafe. The findings do not support a conclusion that claimant did not have a safe place to work.

We hold the Commission properly applied the law to the findings of fact, and that its conclusion that claimant left her job without good cause attributable to her employer should have been affirmed.

For these reasons, the judgment of the superior court is reversed and the cause is remanded to the Superior Court of Clay County for the entry of a judgment affirming the decision of the Employment Security Commission.

Reversed and remanded.

Judges CLARK and HILL concur.

THOMAS EDWARDS, EMPLOYEE, PLAINTIFF v. JOHN SMITH & SONS, EMPLOYER, AND AETNA CASUALTY & SURETY CO., CARRIER, DEFENDANTS

No. 8010IC206

(Filed 7 October 1980)

Master and Servant § 77.1– workers' compensation – no change of condition

A conclusion by the Industrial Commission that plaintiff experienced a change of condition within the meaning of G.S. 97-47 since the time of an original award of permanent partial disability and is now entitled to compensation for total disability was not supported by findings that plaintiff is suffering from a continuing inability to work caused by the same injury and symptoms which formed the basis of the original award and that the psychological basis for plaintiff's disability was not discovered until after the original award, since a continued incapacity of the same kind and character and for the same injury is not a change of condition, and delayed discovery of the cause or basis of symptoms and disability does not constitute a change in the character of the incapacity.

Edwards v. Smith & Sons

APPEAL by defendants from the North Carolina Industrial Commission. Award filed 7 December 1979 by the Full Commission. Heard in the Court of Appeals 28 August 1980.

Plaintiff was injured 26 May 1972 in an accident arising out of and in the course of his employment. He was injured at work when he jumped from a scaffold to a cement floor escaping from smoke and fumes emitted by a pump. Plaintiff suffered injuries to his head and the right side of his body. Plaintiff has not returned to work since the injury.

Following a hearing in January, 1976, Deputy Commissioner Denson awarded plaintiff temporary total disability compensation from 14 February to 21 May 1975 and compensation for permanent partial disability due to back injuries and loss of hearing. Plaintiff filed an application for rehearing based on a change of condition and on 7 June 1979 Deputy Commissioner Roney awarded plaintiff total disability compensation. The Full Industrial Commission affirmed the award of Deputy Commissioner Roney from which defendants Smith & Sons, Employer, and Aetna Casualty, Carrier, appealed to the Court of Appeals.

C. Orville Light for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr. and William L. Young, for defendant appellants.

HEDRICK, Judge.

Defendants do not question the sufficiency of the evidence to support the findings of fact, but rather the sufficiency of the findings of fact to support the conclusion of law that plaintiff has experienced a change of condition under N.C.G.S. 97-47 from the time of Deputy Commissioner Denson's original award on 27 January 1976.

N.C.G.S. 97-47 authorized the Industrial Commission to review and, in its discretion, modify previous awards on the grounds of a change of condition. As stated in *Gaddy v. Kern*, 32 N.C. App. 671, 673, 233 S.E. 2d 609, 611 (1977), a change of condition "... refers to a substantial change, after a final award of compensation, or (sic) the injured employee's *physical capacity to earn* and in some cases, of his earnings," quoting *Swaney v. Construction Co.*, 5 N.C. App. 520, 526, 169 S.E. 2d 90,

94-95 (1969). The leading case of *Pratt v. Upholstery Co.*, 252 N.C. 716, 722, 115 S.E. 2d 27, 33 (1960), makes clear that change of condition under N.C.G.S. 97-47 occurs where conditions are "different from those existent when the award was made; and a continued incapacity of the same kind and character and for the same injury is not a change of condition . . . the change must be actual, and not a mere change of opinion with respect to a pre-existing condition."

Deputy Commissioner Roney's Findings of Fact filed 7 June 1979 indicated that plaintiff is suffering from a *continuing* inability to work caused by the same injury that formed the basis of the 27 January 1976 award manifest by the same symptoms. Finding of Fact #8 states: "Claimant's physical condition as it existed during January 1976 had *not* changed for the worse by January 1977." (Emphasis added.) These findings fail to support the Commissioner's award of additional compensation based on a change of condition.

The only factual finding even remotely supportive of the legal conclusion that plaintiff experienced a change of condition is #11 which states: "The psychological basis for this disability was not discovered until the 7 January 1977 hospitalization at Duke University Medical Center." This observation does not fall within the clear definition of changed conditions as set out in *Pratt, supra.* Delayed discovery of the cause or basis of symptoms and disability does not equal a change in the character of the incapacity. *Id.*

Under these circumstances, we find no evidence in the record to support a change of condition. The conclusions of law that a change of condition exists and that plaintiff is entitled to modification of the January 1976 award are not supported by the Commissioner's findings of fact. The opinion and award of the Full Commission is therefore

Reversed.

Judges ERWIN and WELLS concur.

State v. Brown

STATE OF NORTH CAROLINA v. KENNETH CHARLES BROWN

No. 8023SC400

(Filed 7 October 1980)

Bastards §§ 6, 7– sufficiency of evidence of paternity – instructions on illegitimacy not required

In a prosecution of defendant for failing to support his illegitimate child, evidence that defendant knew the mother of the child and had had sexual intercourse with her was sufficient to raise an inference that defendant was the father of the child, and the trial court did not err in not instructing the jury that it had to find that the child was "illegitimate" before it could answer the issue of paternity in the affirmative.

APPEAL by defendant from *McConnell, Judge.* Judgment entered 19 December 1979 in Superior Court, WILKES County. Heard in the Court of Appeals on 17 September 1980.

Defendant was charged in a proper warrant with failing to support his illegitimate child, Jason Lee Matthews, born of Linda Gail Matthews on 21 March 1979. Defendant was first tried in the District Court, Wilkes County, and appealed to Superior Court for trial *de novo* from the judgment entered on 24 August 1979.

In the Superior Court, the jury found that defendant was "the father of Jason Lee Matthews, born of the body of Linda Gail Matthews on March 21, 1979" but defendant was found not guilty of "wilful neglect or refusal to provide adequate support and maintain his illegitimate child."

From the finding on the issue of paternity, defendant appealed pursuant to G.S. § 49-7.

Attorney General Edmisten, by Associate Attorney Sarah C. Young, for the State.

Brewer and Freeman, by Joe O. Brewer, for the defendant appellant.

HEDRICK, Judge.

Defendant, by his two assignments of error, contends that the evidence was not sufficient to allow submission of the case to the jury or to support the jury's verdict on the issue of

paternity and that the court erred in its instructions as to the issue of paternity. Defendant argues that the State failed to offer evidence that the child, Jason Lee Matthews, was "illegitimate," and that the court erred in not instructing the jury that it must find that the child was "illegitimate" before it could answer the issue of paternity as to defendant.

Defendant cites nothing in support of his rather fatuous argument. The sixteen-year-old mother of the child, Miss Linda Gail Matthews, testified that she met defendant in April 1978 while both of them were attending North Wilkes High School, and that she "started going" with defendant about 22 April 1978. Miss Matthews stated she had "sexual intercourse with him the night I went out with him and probably every time he come up." She also referred to defendant as her "boyfriend." Miss Matthews further testified that she became pregnant about 1 June 1978, and that she was "not going with any other boy or having sexual intercourse with any boy or male person other than the defendant" at that time.

Defendant testified that he met Miss Matthews at school and that he first dated Miss Matthews in February 1978. Defendant admitted having sexual intercourse with Miss Matthews twice in February, but he denied having sexual intercourse with her at any time thereafter. Defendant also testified that he and Miss Matthews "never went together."

In our opinion, the evidence is clearly sufficient to raise an inference that defendant is the father of the illegitimate child born of Linda Gail Matthews on 21 March 1979. Furthermore, the court did not err in not instructing the jury that it had to find that the child Jason Lee Matthews was "illegitimate" before it could answer the issue of paternity in the affirmative.

Defendant had a fair trial on the issue of paternity, and the finding appealed from is

Affirmed.

Chief Judge MORRIS and Judge WHICHARD concur.

AARON HAMLIN AND VERONICA C. HAMLIN v. CHARLES AUSTIN, BETHIA AUSTIN, PAUL S. MEEKER, EDNA MEEKER, JOHN E. POWELL, JOE POWELL

No. 8028DC182

(Filed 7 October 1980)

1. **Rules of Civil Procedure § 59– motion to amend judgment – discretion of court**

A motion to amend a judgment pursuant to G.S. 1A-1, Rule 59(e) is addressed to the sound discretion of the trial court.

2. **Appeal and Error § 14– appeal from denial of motion to amend judgment – no appeal from judgment**

Plaintiffs' appeal from an order denying their motion to amend the judgment did not constitute an appeal from the judgment itself.

APPEAL by plaintiffs from *Fowler, Judge.* Order entered 5 November 1979 in District Court, BUNCOMBE County. Heard in the Court of Appeals in Waynesville on 28 August 1980.

Plaintiffs seek the removal of obstructions from a portion of Holly Street in the Stradley Mountain Park subdivision of Asheville. Plaintiffs own lots in the subdivision. Defendants who also own lots in the subdivision, answer that the disputed portion of Holly Street has never been opened and claim ownership by adverse possession. After trial without a jury, the court entered judgment dismissing the action on grounds that plaintiffs failed to offer evidence of the location of the disputed area and denying defendants' claim of adverse possession. Plaintiffs moved the court pursuant to Rule 59 of the Rules of Civil Procedure for an amendment to the judgment because the conclusion of law therein was erroneous. From the order denying plaintiffs' motion for amendment of judgment, plaintiffs appeal.

Stephen Barnwell for plaintiff appellants.

Michael D. Meeker for defendant appellees, Paul S. Meeker and Edna W. Meeker.

CLARK, Judge.

[1] Plaintiffs' assignments of error, their exceptions, and their arguments in their brief, all relate to alleged errors in the judgment of the trial court entered 10 October 1979. This appeal, however, was taken from the trial court's order entered

5 November 1979 denying plaintiffs' motion to amend the judgment pursuant to N.C. Rules Civ. P. 59(e), G.S. 1A-1. A motion under Rule 59(a) is "addressed to the sound discretion of the trial judge, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal. *Glen Forest Corp. v. Bensch,* 9 N.C. App. 587, 176 S.E. 2d 851 (1970)." *In re Brown* 23 N.C. App. 109, 110, 208 S.E. 2d 282, 283 (1974). We hold that a motion under Rule 59(e) is similarly addressed to the court's discretion. Plaintiffs' brief did not address the issue of abuse of discretion, neither does such abuse appear on the face of the record.

[2] We note that under App. R 3(c) the filing of plaintiffs' motion to amend the judgment tolled the running of plaintiffs' time for serving notice of appeal. Plaintiffs had exactly the same period of time to file an appeal from the judgment as from the order: ten days from the denial of the motion to amend. Plaintiffs chose to appeal the order and not the judgment. We cannot permit defendants' 59(e) motion to substitute for a direct appeal from the judgment of the trial court.

Affirmed.

Judges MARTIN (Harry C.) and HILL concur.

STATE OF NORTH CAROLINA v. WILLIE JAMES MYERS

No. 805SC418

(Filed 7 October 1980)

Assault and Battery § 15.7– right to evict person from one's home – force permissible – instructions not required

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in failing to charge the jury on defendant's right to evict the prosecuting witness from defendant's home and in failing to define the force which could have been used to accomplish such eviction, since defendant did not present any evidence that he tried to remove the victim by a "gentle laying on of hands" prior to the shooting, nor was there any evidence that the victim ever threatened or used deadly physical force upon defendant.

APPEAL by defendant from *Bruce, Judge.* Judgment entered 15 October 1979 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 18 September 1980.

State v. Myers

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury and was convicted of assault with a deadly weapon inflicting serious injury. From a sentence of active imprisonment of five years, defendant appealed.

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

Addison Hewlett, Jr., for defendant appellant.

ERWIN, Judge.

STATE'S EVIDENCE

At trial, a tape-recorded statement made by defendant to a law enforcement officer was introduced into evidence, which tended to show that defendant's stepson, Wilbert Clinton, was at defendant's home when an argument ensued between defendant and Clinton, because Clinton had not visited his mother while she was hospitalized. Defendant accused Clinton of being "no good" and slapped him. Clinton slapped defendant. Defendant asked Clinton several times to get out of the house. Clinton did not leave but simply stood or "dragged" around the house. Prior to the argument, Clinton had asked Annie Ruth, Clinton's fiancee, to hand him his gun; however, defendant did not believe that Clinton had a gun or was not "definite [sic] sure that he had a gun or not." Defendant stood up, went to his bedroom, got his pistol, fired a warning shot in the floor, and told Clinton to get out. Then he shot Clinton one time. Clinton's testimony of the events was substantially similar to defendant's statement except Clinton testified that he and defendant were talking, not arguing. Clinton did not testify about asking Annie Ruth for a gun. Clinton was shot in the head and was temporarily paralyzed in his right arm and legs.

DEFENDANT'S EVIDENCE

Defendant testified that he had invited Clinton into his house; that he questioned him about not seeing his mother; that he slapped Clinton, and Clinton slapped him back; that he told Clinton to get out of his house; that he got his gun to try to make Clinton leave, because he was sick and was not man enough to throw Clinton out; that he did not know why the gun

went off the second time; and that he just wanted Clinton to leave, but did not intend to hurt him.

QUESTION PRESENTED

Did the trial court commit error in failing to charge the jury of defendant's right to evict the prosecuting witness from defendant's home and in failing to define the force that could have been used to accomplish such eviction? For the following stated reasons, we find no error in the trial of defendant.

Defendant relies on *State v. Spruill*, 225 N.C. 356, 358, 34 S.E. 2d 142, 143 (1945), wherein our Supreme Court stated:

> "Hence, when in the trial of a criminal action charging an assault, or other kindred crime, there is evidence from which it may be inferred as in this case that the force used by defendant was in defending his home from attack by another, he is entitled to have evidence considered in the light of applicable principles of law. In such event, and to that end, it becomes the duty of the court to declare and explain the law arising thereon, G.S., 1-180, formerly C.S., 564, and failure of the court to so instruct the jury on such substantive feature, as in this case, is prejudicial. This is true even though there be no special prayer for instruction to that effect." (Citations omitted.)

Our research leads us to *State v. McCombs*, 297 N.C. 151, 157, 253 S.E. 2d 906, 911 (1979), where Justice Branch (now Chief Justice) stated for the Court:

> "Likewise, when a trespasser invades the premises of another, the latter has the right to remove him, and the law requires that he should first request him to leave, and if he does not do so, he should lay his hands gently upon him, and if he resists, he may use sufficient force to remove him, taking care, however, to use no more force than is necessary to accomplish that object. *State v. Crook*, 133 N.C. 672, 45 S.E. 564 (1903); *State v. Taylor*, 82 N.C. 554 (1880)."

In the case *sub judice*, defendant did not present any evidence of a "gentle laying of hands" upon the victim, Clinton, prior to the shooting, nor was there any evidence that Clinton ever threatened or used deadly physical force upon defendant. Defendant testified:

"So he said, 'Annie Ruth, hand me my gun,' You know, that was before we started arguing, you know. So I said I don't believe he got no gun. I reckon, because the way it looked like to me, she didn't have no pocketbook, so I didn't definite [sic] sure that he had a gun or not. So, when I stood up and went in my room and came out I shot the floor one time and told him to get out, and he didn't run. He just dragged around, you know, just like a guy drag around, he wasn't in no hurry, so I shot the first time, and the next time I point at him. I must have shot him, and that was it."

The presence of evidence is the determinative factor of the instructions that the trial court should give. Here, the evidence did not require or suggest that the instruction complained of should have been given by the court.

In the trial of defendant, we find

No error.

Judges ARNOLD and WELLS concur.

UNITED STATES OF AMERICA v. CHARLES A. HARRISON, JR., TRADING AS CRAFT MART HOMES, INC., AND BARBARA M. McLEAR (REDDING)

No. 8027SC457

(Filed 7 October 1980)

APPEAL by defendant, Charles A. Harrison, Jr., trading as Craft Mart Homes, Inc., from *Kirby, Judge.* Judgment entered 25 January 1980 in Superior Court, GASTON County. Heard in the Court of Appeals 9 September 1980.

This is an interpleader action under the provisions of Rule 22 of the North Carolina Rules of Civil Procedure, G.S. 1A-1, wherein the plaintiff, the United States of America, deposited its check in the sum of $7,783.85 with the Court, asking the Court to determine the respective rights of the defendant Charles A. Harrison, Jr., trading as Craft Mart Homes, Inc., (hereafter Harrison) and the defendant Barbara M. McLear (Redding) (hereafter McLear) to the said funds. The complaint

for interpleader alleges that on 16 December 1977 the defendant McLear became indebted to the United States of America, acting through the Farmers Home Administration, United States Department of Agriculture, as the result of a $25,500.00 loan made to her by that agency. It further alleges that the defendant McLear contracted with defendant Harrison for the construction of a residence at a contract price of $23,800.00; that the defendant Harrison began construction pursuant to the contract, but after he proceeded for several months beyond the agreed upon completion date, defendant McLear terminated his right to proceed under the contract; that defendant McLear then hired a new contractor who completed the work at a cost to her of $16,893.00; that defendant Harrison filed an action against defendant McLear seeking to recover under the aforesaid contract, in which the jury found that the defendant McLear had not breached her contract with the defendant Harrison by failing to authorize payments of sums due under the contract, and in which judgment was entered that Harrison should take nothing from McLear. The plaintiff admits that it owes one of the defendants the sum of $7,783.85 which represents the undisbursed balance of the construction loan proceeds, but alleges that because of the adverse claims which may be made upon it by the defendants, it could not make payment to either of the defendants without being subjected to possible multiple liability. The prayer for relief asks that each defendant be cited to appear and answer, setting up his or her claims to the funds, and that judgment be entered that plaintiff, having deposited the sum of $7,783.85 with the Court, be forever discharged from liability with repect to the fund and the defendants.

The defendant McLear answered the complaint alleging that since the money was loaned to her, the remaining funds should be paid to her. She prayed for judgment on the pleadings to that effect. The defendant Harrison moved for summary judgment on the ground that he was entitled to judgment as a matter of law.

From a judgment ordering the plaintiff to pay the said sum of $7,783.85 plus interest to the defendant McLear and discharging the plaintiff from further liability upon such payment, the defendant Harrison appealed.

Lloyd T. Kelso for defendant appellant (Charles T. Harrison, Jr., trading as Craft Mart Homes, Inc.).

Robert H. Forbes for defendant appellee (Barbara M. McLear [Redding]).

WHICHARD, Judge.

The judgment in the prior action between the defendant appellant Harrison and the defendant appellee McLear that Harrison should take nothing from McLear formed the basis for the judgment in this action ordering the plaintiff to pay to defendant McLear the undisbursed construction loan proceeds in the sum of $7,783.85. This Court has vacated the judgment entered in that action and remanded the cause to the superior court for a new trial. *Harrison v. McLear*, 49 N.C. App. 121, 270 S.E. 2d 577 (1980).

Entitlement to the funds here in question necessarily must remain uncertain until that action is either settled or resolved by a new trial free from prejudicial error. Consequently, the judgment here must be vacated and the cause remanded for further proceedings consistent with the final resolution of that action.

Our decision should not be construed to prohibit the trial court from discharging the plaintiff from its liability with respect to the defendants in this action at such time as it finds the plaintiff to have complied with the procedures requisite to such discharge.

Vacated and remanded.

Judges HEDRICK and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 OCTOBER 1980

AUSTIN v. AUSTIN No. 805DC203	New Hanover (77CVD1801)	Affirmed
FOWLER v. FARLOW No. 8020DC385	Moore (79CVD231)	Affirmed
IN RE ALLISON KNITTING v. ADDISON & ESC No. 8029SC158	McDowell (79CVS145)	Affirmed
IN RE BLOSSOM No. 8012DC344	Cumberland (79J859)	Affirmed
IN RE MATTHEWS No. 8012DC379	Cumberland (79J859)	Affirmed
MOSS v. MOSS No. 8014DC378	Durham (79CVD350)	Affirmed in part, Vacated in part, and Remanded
PENLAND v. CAMERON BROWN No. 8028SC346	Buncombe (79CVS1025)	Dismissed
PHILLIPS v. PHILLIPS No. 8014DC262	Durham (79CVD1251)	Affirmed in part, Vacated and Remanded in part
SPICER v. SPECTOR FREIGHT No. 7923SC432	Wilkes (77CVS582)	Reversed & Remanded
STATE v. ALEXANDER No. 8026SC410	Mecklenburg (79CRS32446) (79CRS32665) (79CRS32666)	No Error
STATE v. BROCK No. 8012SC292	Cumberland (78CRS59821)	No Error
STATE v. BRUTON No. 808SC425	Lenoir (79CRS10263)	No Error
STATE v. CONNER No. 8027SC415	Gaston (79CRS8370)	No Error

STATE v. CUNYON No. 8018SC358	Guilford (79CRS22128) (79CRS22126) (79CRS22127) (79CRS21665) (79CRS21666) (79CRS21667)	No Error
STATE v. DAVIS No. 804SC322	Sampson (79CRS9707) (79CRS9701) (79CRS9705)	New Trial
STATE v. GARDNER No. 8026SC381	Mecklenburg (74CRS11971)	No Error
STATE v. GILCHRIST No. 8018SC293	Guilford (79CRS7281)	No Error
STATE v. GRAY No. 8012SC420	Cumberland (79CRS27445)	No Error
STATE v. GREEN No. 8030SC325	Cherokee (78CRS2420) (78CRS784)	Appeal Dismissed
STATE v. HASSAN & JOHNSON No. 8012SC437	Cumberland (79CRS22140) (79CRS22650)	Dismissed
STATE v. HAUSER No. 8021SC258	Forsyth (79CRS43157) (79CRS43158) (79CRS43248) (79CRS43247)	No Error
STATE v. HICKS No. 8017SC332	Surry (79CRS3816) (79CRS3817) (79CRS3818)	No Error
STATE v. HINES No. 807SC239	Wilson (79CRS4616)	No Error
STATE v. PHILLIPS No. 8028SC315	Buncombe (79CRS13502) (79CRS13503) (79CRS13504) (79CRS13539) (79CRS16804)	No Error

STATE v. PIERCE No. 801SC451	Chowan (79CRS2209)	No Error
STATE v. RAMSEY No. 809SC277	Person (79CRS1837)	No Error
STATE v. TILLMAN No. 8026SC409	Mecklenburg (79CR55532)	No Error
STATE v. TOWNSEND No. 8025SC408	Caldwell (76CRS6901)	No Error
TAYLOR v. CP&L No. 803DC221	Carteret (78CVD340)	Affirmed
THORPE v. UTICA INSURANCE No. 8029SC147	Transylvania (77CVS12)	Plaintiff's appeal— Dismissed Defendant's cross-appeal Modified and Remanded

STATE OF NORTH CAROLINA, EX REL. HIS EXCELLENCY, JAMES B. HUNT, JR., GOVERNOR OF THE STATE OF NORTH CAROLINA; STATE OF NORTH CAROLINA, EX REL. THE HONORABLE JOHN R. INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA; AND STATE OF NORTH CAROLINA, EX REL. THE HONORABLE RUFUS L. EDMISTEN, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; PLAINTIFFS v. NORTH CAROLINA REINSURANCE FACILITY, NORTH CAROLINA RATE BUREAU, ALLIANZ INSURANCE COMPANY, ALLSTATE INDEMNITY COMPANY, ALLSTATE INSURANCE COMPANY, AMERICAN AGRICULTURAL INSURANCE CO., AMERICAN AUTOMOBILE INS. CO., AMERICAN BANKERS INS. CO. OF FLA., AMERICAN CASUALTY CO. OF READING, AMERICAN DRUGGISTS' INS. CO., THE AETNA CASUALTY AND SURETY CO., THE AETNA FIRE UNDERWRITERS INS. CO., AETNA INS. CO., AFFILIATED F M INS. CO., AGRICULTURAL INSURANCE COMPANY, AIU INSURANCE COMPANY, ALLIANCE ASSURANCE CO., LIMITED, AMERICAN ECONOMY INSURANCE CO., AMERICAN EMPLOYERS' INS. CO., AMERICAN FIDELITY FIRE INS. CO., AMERICAN FIRE & CASUALTY CO., AMERICAN & FOREIGN INS. CO., AMERICAN GUARANTEE & LIABILITY INS. CO., AMERICAN HARDWARE MUTUAL INS. CO., AMERICAN HOME ASSURANCE COMPANY, AMERICAN INDEMNITY COMPANY, AMERICAN INS. CO., AMERICAN MFGR'S MUTUAL INS. CO. ILL., AMERICAN MOTORISTS INSURANCE CO., AMERICAN MUTUAL FIRE INSURANCE CO., AMERICAN MUTUAL INS., CO. OF BOSTON, AMERICAN MUTUAL LIABILITY INS. CO., AMERICAN NATIONAL FIRE INS. CO., AMERICAN PROTECTION INSURANCE CO., AMERICAN RE-INSURANCE CO. OF DEL., AMERICAN SECURITY INS. CO., AMERICAN STATES INSURANCE COMPANY, AMERICAN UNIVERSAL INS. CO., AMICA MUTUAL INSURANCE COMPANY, ARGONAUT INS. CO., ASSOCIATED GENERAL INSURANCE CO., ASSOCIATED INDEMNITY CORP., ASSURANCE COMPANY OF AMERICA, ATLANTIC INS. CO., ATLANTIC MUTUAL INS. CO., ATLAS ASSURANCE COMPANY OF AMERICA, AUTOMOBILE CLUB INSURANCE COMPANY, AUTOMOBILE INS. CO. OF HARTFORD, BALBOA INSURANCE COMPANY, BANKERS AND SHIPPERS INS. CO. OF NEW YORK, BANKERS STANDARD INSURANCE CO., BELLEFONTE UNDERWRITERS INS. CO., BEACON INSURANCE COMPANY, BIRMINGHAM FIRE INS. CO. OF PA., BITUMINOUS CASUALTY CORP., BITUMINOUS FIRE & MARINE INS. CO., BOSTON-OLD COLONY INS. CO., CALVERT FIRE INSURANCE COMPANY, CANAL INS. CO., CAROLINA CASUALTY INS. CO., CARRIERS INS. CO., CAVALIER INS. CORP., CENTENNIAL INS. CO., CENTRAL MUTUAL INS. CO., CENTRAL NAT'L INS. CO. OF OMAHA, CENTURY INDEMNITY CO., CHARTER OAK FIRE INS. CO., CHICAGO INSURANCE COMPANY, CHURCH MUTUAL INSURANCE COMPANY, CIMARRON INS. CO., INC., CINCINNATI INSURANCE COMPANY, COLONIAL PENN FRANKLIN INS. CO., COLONIAL PENN INSURANCE COMPANY, COMMERCE & INDUSTRY INS. CO., COMMERCIAL INS. CO. OF NEWARK, N.J., COMMERCIAL UNION INSURANCE CO., THE CONNECTICUT INDEMNITY CO., CONSOLIDATED AMERICAN INS. CO., CONTINENTAL CASUALTY CO., CONTINENTAL INS. CO., CONTINENTAL REINSUR-

ANCE CORP. COTTON STATES MUTUAL INS. CO., COVINGTON MUTUAL INSURANCE COMPANY, CRITERION INSURANCE COMPANY, CUMIS INSURANCE SOCIETY, INC., DRAKE INSURANCE COMPANY OF N.Y., ELECTRIC INSURANCE COMPANY, ELECTRIC MUTUAL LIABILITY INS. CO., EMCASCO INSURANCE COMPANY, EMMCO INSURANCE COMPANY, EMPIRE FIRE & MARINE INS. CO., EMPLOYERS CASUALTY COMPANY, EMPLOYERS FIRE INS. CO., EMPLOYERS MUTUAL CASUALTY CO., EMPLOYERS MUTUAL LIABILITY INS. CO. OF WIS., EMPLOYERS REINSURANCE CORP., EQUITABLE FIRE INSURANCE CO., EQUITABLE GENERAL INSURANCE CO., EXCALIBUR INSURANCE COMPANY, FARMERS INS. EXCHANGE, FEDERAL INSURANCE COMPANY, FEDERAL KEMPER INSURANCE COMPANY, FEDERATED MUTUAL INSURANCE CO., FIDELITY & CASUALTY CO. OF NEW YORK, FIDELITY AND GUARANTY INS. CO., FIDELITY & GUARANTY INS. UNDERWRITERS, INC., FIREMAN'S FUND INSURANCE COMPANY, FIREMAN'S INS. CO. OF NEWARK, N.J., FIRST GENERAL INSURANCE COMPANY, FIRST OF GEORGIA INSURANCE CO., FIRST NAT'L INS. CO. OF AMERICA, FOREMOST INS. CO. GRAND RAPIDS MICH., FORUM INSURANCE COMPANY, GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORP., LTD., GENERAL INS. CO. OF AMERICA, GENERAL REINSURANCE CORPORATION, THE GLENS FALLS INSURANCE CO., GLOBE INDEMNITY CO., GOVERNMENT EMPLOYEES INS. CO., GRAIN DEALERS MUTUAL INS. CO., GRANITE STATE INS. CO., GREAT AMERICAN INSURANCE COMPANY, GREATER NEW YORK MUTUAL INS. CO., GREAT WEST CASUALTY COMPANY, GULF INSURANCE COMPANY, HANOVER INSURANCE COMPANY, N.H., HANSECO INSURANCE COMPANY, HARBOR INSURANCE COMPANY, HARCO NATIONAL INSURANCE COMPANY, HARFORD MUTUAL INS. CO., HARLEYSVILLE MUTUAL INS. CO., HARTFORD ACCIDENT & INDEMNITY CO., HARTFORD CASUALTY INSURANCE CO., HIGHLANDS INS. CO., HOLYOKE MUTUAL INS. CO. IN SALEM, HOME INDEMNITY COMPANY, HOME INS. CO., INS. CO. OF NORTH AMERICA, THE INSURANCE CO. OF THE STATE OF PENNSYLVANIA, INTEGON GENERAL INSURANCE CORP., INTEGON INDEMNITY CORPORATION, INTEGRITY INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, IOWA MUTUAL INS. CO., IOWA NAT'L MUTUAL INS. CO., HORACE MANN INSURANCE COMPANY, IDEAL MUTUAL INS. CO., INA REINSURANCE COMPANY, INA UNDERWRITERS INSURANCE CO., INDEMNITY INS. CO. OF NORTH AMERICA, INDIANA LUMBERMENS MUTUAL INS. CO., INDUSTRIAL INDEMNITY CO., JEFFERSON INSURANCE COMPANY OF N.Y., JEFFERSON PILOT FIRE & CAS. CO., JOHN DEERE INSURANCE COMPANY, KANSAS CITY FIRE & MARINE INS. CO., KEMPER SECURITY INSURANCE CO., LIBERTY MUTUAL FIRE INS. CO., LIBERTY MUTUAL INS. CO., LONDON GUARANTEE & ACC. CO. N.Y., LUMBERMENS UNDERWRITING ALLIANCE, LUMBERMENS MUTUAL CASUALTY CO., LUMBERMENS MUTUAL INS. CO., MARYLAND CASUALTY CO., MASSACHUSETTS BAY INS. CO., MERCHANTS MUTUAL INS. CO., METROPOLITAN PROPERTY AND LIABILITY INS. CO., MICHIGAN MILLERS

MUTUAL INS. CO., MICHIGAN MUTUAL INSURANCE COMPANY, MIDDLESEX INSURANCE COMPANY, MIDLAND INSURANCE COMPANY, MEAD REINSURANCE CORPORATION, MIDWEST MUTUAL INS. CO., MILLERS NATIONAL INS. CO., MINNEHOMA INSURANCE COMPANY, MISSION INSURANCE COMPANY, MONARCH INS. CO. OF OHIO, MONTGOMERY MUTUAL INSURANCE CO., MOTOR CLUB OF AMERICA INS. CO., MOTORS INS. CORP., NATIONAL AM. INSURANCE CO. OF N.Y., NAT'L BEN FRANKLIN INS. CO. OF ILL., NATIONAL FIRE INS. CO. OF HARTFORD, NATIONAL GENERAL INSURANCE COMPANY, NAT'L INDEMNITY CO., NATIONAL INSURANCE UNDERWRITERS, NATIONAL SURETY CORPORATION, NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA., NATIONWIDE MUTUAL FIRE INS. CO., NATIONWIDE MUTUAL INSURANCE CO., NEWARK INS. CO., NEW HAMPSHIRE INS. CO., NEW SOUTH INS. CO., NEW YORK UNDERWRITERS INS. CO., NIAGARA FIRE INS. CO., NORTHBROOK PROPERTY AND CASUALTY INSURANCE CO., N.C. FARM BUREAU MUTUAL INS. CO., NORTH RIVER INSURANCE COMPANY, NORTHERN ASSURANCE CO. OF AMERICA, NORTHERN INS. CO. OF NEW YORK, NORTHWESTERN NAT'L CASUALTY CO., NORTHWESTERN NATIONAL INS. CO., OCCIDENTAL FIRE & CAS. CO. OF N.C., OHIO CASUALTY INS. CO., OHIO FARMERS INSURANCE COMPANY, OLD GENERAL INSURANCE COMPANY, OLD REPUBLIC INS. CO., OMAHA INDEMNITY COMPANY, PACIFIC EMPLOYERS INS. CO., PACIFIC INDEMNITY COMPANY, PEERLESS INS. CO., PENINSULAR FIRE INSURANCE COMPANY, PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, PENNSYLVANIA MILLERS MUT. INS. CO., PENNSYLVANIA NAT'L MUT. CASUALTY INS. CO., PETROLEUM CASUALTY COMPANY, PHOENIX ASSURANCE CO. OF NEW YORK, PHOENIX INSURANCE CO., PLANET INS. CO., POTOMAC INS. CO., PREFERRED INSURANCE COMPANY, PREMIER INSURANCE COMPANY, PROGRESSIVE CASUALTY INSURANCE COMPANY, PROPRIETORS' INSURANCE COMPANY, PROTECTIVE INS. CO., PROVIDENCE WASHINGTON INS. CO., PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, PUBLIC SERVICE MUTUAL INS. CO., PURITAN INSURANCE COMPANY, RELIANCE INS. CO., ROYAL GLOBE INSURANCE COMPANY, ROYAL INDEMNITY CO., SAFECO INS. CO. OF AMERICA, SAFEGUARD INS. CO., ST. PAUL FIRE & MARINE INS. CO., ST. PAUL GUARDIAN INSURANCE CO., ST. PAUL MERCURY INS. CO., THE SEA INSURANCE COMPANY, LTD, SECURITY INS. CO. OF HARTFORD, SECURITY MUTUAL CASUALTY COMPANY, SELECT INSURANCE COMPANY, SENTRY INDEMNITY COMPANY, SENTRY INSURANCE A MUTUAL CO., SHELBY MUTUAL INSURANCE OF SHELBY, OHIO, SHIELD INSURANCE COMPANY, SOUTH CAROLINA INS. CO., SOUTHERN FIRE & CASUALTY CO., TENN., SOUTHERN HOME INS. CO., STANDARD FIRE INS. CO., STANDARD GUARANTY INSURANCE CO., STATE AUTOMOBILE MUTUAL INS. CO., STATE CAPITAL INS. CO., STATE FARM FIRE & CASUALTY CO., STATE FARM MUTUAL AUTOMOBILE INS. CO., SUN INSURANCE OFFICE, LTD., SUPERIOR INSURANCE COMPANY, SUBSCRIBERS AT CASUALTY RECIPROCAL EXCHANGE, TEACHERS INSUR-

ANCE COMPANY, TOKIO MARINE AND FIRE INS. CO., LTD., TRANSAMERICA INSURANCE COMPANY, TRANS-CONTINENTAL INS. CO., TRANSIT CASUALTY COMPANY, TRANSPORT INDEMNITY CO., TRANSPORT INS. CO., TRANSPORTATION INSURANCE COMPANY, TRAVELERS INDEMNITY CO., TRAVELERS INDEMNITY CO. OF AM., TRAVELERS INDEMNITY CO. OF R.I., TRAVELERS INSURANCE CO., TWIN CITY FIRE INS. CO., TRUCK INS. EXCHANGE, UNIGARD INDEMNITY COMPANY, UNIGARD INSURANCE COMPANY, UNIGARD MUTUAL INSURANCE CO., UNITED PACIFIC INSURANCE COMPANY, UNITED STATES FIDELITY & GUARANTY, UNITED STATES FIRE INS. CO., UNITED STATES LIABILITY INS. CO., UNIVERSAL UNDERWRITERS INS. CO., USAA CASUALTY INSURANCE COMPANY, UNITED SERVICES AUTOMOBILE ASSN., UTICA MUTUAL INS. CO., VALIANT INSURANCE COMPANY, VALLEY FORGE INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, VIRGINIA MUTUAL INS. CO., VIRGINIA SURETY COMPANY, INC., WAUSAU UNDERWRITERS INS. CO., WEST AMERICAN INSURANCE COMPANY, WESTCHESTER FIRE INS. CO., THE WESTERN CASUALTY & SURETY CO., THE WESTERN FIRE INSURANCE CO., WESTFIELD INS. CO., YOSEMITE INSURANCE COMPANY, ZURICH INSURANCE COMPANY, DEFENDANTS

No. 8010SC422
(Filed 21 October 1980)

1. **Declaratory Judgments § 4.3; Insurance § 79.1– imposition of surcharges on automobile insurance – standing of Governor to seek declaratory judgment**

The Governor had standing to seek a declaratory judgment as to the legality of action by the Board of Governors of the N.C. Reinsurance Facility imposing surcharges on automobile liability insurance coverages ceded to the Reinsurance Facility to recoup past Facility losses and on all automobile liability coverages to recoup anticipated losses on ceded "clean risks" without filing such surcharges with the Commissioner of Insurance pursuant to G.S. 58-124.20.

2. **Insurance § 79.1– automobile liability insurance – recoupment surcharges – rates – necessity for filing – preliminary injunction**

Surcharges on automobile liability insurance coverages ceded to the N.C. Reinsurance Facility to recoup past Facility losses and on all automobile liability coverages to recoup anticipated losses on ceded "clean risks" constituted rates which were subject to the filing and review requirements of G.S. 58-124.20 and G.S. 58-124.21; furthermore, plaintiffs were entitled to a preliminary injunction requiring the N.C. Reinsurance Facility, the N.C. Rate Bureau, and all member companies to file such surcharges with the Commissioner of Insurance pursuant to G.S. 58-124.20 since, if the surcharges are not so filed and reviewed, persons who pay the surcharges will be denied the protection of the laws, may not be able to recover any excessive charges paid by them, and will therefore suffer irreparable loss should plaintiffs prevail on the merits.

Judge HEDRICK dissenting.

APPEAL by plaintiffs from *Braswell, Judge.* Order entered 26 February 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 28 August 1980.

Plaintiffs, the Governor, the Commissioner of Insurance and the Attorney General of North Carolina, brought an action for a declaratory judgment against the North Carolina Reinsurance Facility, the North Carolina Rate Bureau and all member insurance companies, alleging the illegality of defendants' plan to charge and collect from motor vehicle insurance policyholders premium surcharges in addition to the regular insurance premiums. Pending final judgment on the merits, plaintiffs moved for a preliminary injunction to restrain defendants from collecting the premium surcharges. It is the trial court's denial of this motion for a preliminary injunction that plaintiffs have appealed to this Court.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., and Hunter, Wharton & Howell, by Lane Wharton, Jr., for the plaintiffs.

Allen, Steed and Allen, P.A., by Arch T. Allen, III, and Charles D. Case, for defendants Hartford Accident and Indemnity Company, Hartford Casualty Insurance Company, New York Underwriters Insurance Company, and Twin City Fire Insurance Company.

Bailey, Dixon, Wooten, McDonald & Fountain, by J. Ruffin Bailey and Gary S. Parsons, for defendants American Automobile Insurance Company, American Insurance Company, Associated Indemnity Corporation, Fireman's Fund Insurance Company, and National Security Corporation.

Broughton, Wilkins & Crampton, by J. Melville Broughton, Jr., and Charles P. Wilkins, for defendants Nationwide Mutual Fire Insurance Company, Nationwide Mutual Insurance Company, and N.C. Farm Bureau Mutual Insurance Company.

Johnson, Patterson, Dilthey & Clay, by Grady S. Patterson, Jr., and D. James Jones, Jr., for defendants American Fire and Casualty Company, Ohio Casualty Company, Utica Mutual Insurance Company, Virginia Mutual Insurance Company, Carolina Casualty Insurance Company, and West American Insurance Company.

Jordan Law Offices, by John R. Jordan, Jr., and Robert R. Price, for defendants American Manufacturers Mutual Insurance Company, American Motorists Insurance Company, American Protection Insurance, Federal Kemper Insurance Company, Kemper Security Insurance Company, and Lumbermens Mutual Casualty Company.

Manning, Fulton & Skinner, by Howard E. Manning and John B. McMillan, for defendants Allstate Indemnity Company, Allstate Insurance Company, Northbrook Fire and Casualty Company, State Farm Fire and Casualty Company, State Farm Mutual Automobile Insurance Company.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Henry A. Mitchell, Jr., and R. Marks Arnold, for defendants The Aetna Casualty and Surety Company, Automobile Insurance Company of Hartford, Bankers Standard Insurance Company, The Connecticut Indemnity Company, Horace Mann Insurance Company, Insurance Company of North America, INA Reinsurance Company, INA Underwriters Insurance Company, Indemnity Insurance Company of North America, Pacific Employers Insurance Company, Security Insurance Company of Hartford, Standard Fire Insurance Company, and Teachers Insurance Company.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Walter L. Hannah, for defendant Peerless Insurance Company.

Hudson, Petree, Stockton, Stockton & Robinson, by James H. Kelly, Jr., for defendant First General Insurance Company.

Young, Moore, Henderson & Alvis, by Charles H. Young, Jr., for remaining defendant insurance companies.

WELLS, Judge.

The factual context of this case centers around the statutory requirement for liability insurance coverage for all licensed motor vehicles (The Vehicle Financial Responsibility Act of 1957, G.S. 20-309) and the insurance industry's reluctance to insure all drivers. The North Carolina Reinsurance Facility (hereinafter Facility) was created to provide motor vehicle insurance to those eligible risk applicants that insurance companies would not voluntarily insure. *See* Article 25A of Chapter 58 of the General Statutes. When an insurance company agent

determines that an applicant for insurance is an unacceptable risk, the agent will "cede" the risk to the Facility. G.S. 58-248.31(a) mandates that all insurance companies that write motor vehicle insurance in North Carolina must be members of the Facility and must share equitably the cost of the Facility. "Cession" transfers the risk of loss from the individual insurer to all insurers through the operation of the Facility. G.S. 58-248.26(1). The decision to cede an applicant is made unilaterally by each insurance company. G.S. 58-248.35. *See Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547 (1980).

The trial court found that the Facility has lost substantial amounts of money. The statutory scheme allows the Facility to set rates "on an actuarially sound basis . . . calculated, insofar as is possible, to produce neither a profit nor a loss." G.S. 58-248.33(1). Pursuant to the statute, Facility losses are potential losses to the member insurance companies. G.S. 58-248.26(1) provides that the risk of loss for ceded insureds is transferred to all insurers, and G.S. 58-248.34(e) requires that the Facility's plan of operation shall provide for "the preliminary assessment of all members for initial expenses necessary to commence operations . . . [and] the assessment of members if necessary to defray losses and expenses . . . [and for] the recoupment of losses sustained by the Facility . . . ." Regarding such losses, G.S. 58-248.34(f) provides that "every member shall, following payment of any pro rata assessment, commence recoupment of that assessment by way of an identifiable surcharge on motor vehicle insurance policies issued by that member or through the Facility until the assessment has been recouped."

Within this statutory framework, the defendants Facility and Rate Bureau determined that an 18.6 percent surcharge applied to Facility insureds was necessary to recoup the past Facility losses and that a 1.1 percent surcharge applied to all insureds, ceded and nonceded, was necessary to recover anticipated losses due to the artificially low rates required by statute for ceded "clean risks". G.S. 58-248.33(1). The genesis of the action before us was the order of the Board of Governors of the Facility for the defendant companies to charge and collect the two recoupment surcharges as part of the cost of motor vehicle insurance coverage, without filing the surcharges and supplemental information with the Commissioner of Insurance.

North Carolina's file and use system of insurance rate-making allows the Rate Bureau (G.S. 58-124.17) and the Facility (G.S. 58-248.33(1)) to establish rates based on specified factors. G.S. 58-124.19; Note, 56 N.C.L. Rev. 1084 (1978). Although such rates are effective immediately, the rates and supplemental information must be filed with the Commissioner of Insurance within ninety days (G.S. 58-124.20) to enable the Commissioner to review the rate's compliance with the applicable statutes (G.S. 58-124.21). Plaintiffs brought this action to establish that recoupment surcharges are not exempted from the filing requirements, and to prevent defendants from charging such surcharges in violation of statutory procedures for rate-setting.

[1] At the threshold, defendants challenge the standing of the Governor as a real party in interest in this action and have cross-appealed from the trial court's denial of their motion to dismiss the Governor as a party plaintiff. Defendants do not challenge the standing of the Commissioner of Insurance or of the Attorney General as parties.

Since the original enactment of the Declaratory Judgment Act, G.S. 1-253, *et seq.*, our appellate courts have declared repeatedly that it is to be given a liberal and generous application. The touchstone of the Act is the presence of a justiciable controversy, where the pleadings demonstrate a real controversy and the need for a declaration of rights. Whether the plaintiff is necessarily the person entitled to the declaration or whether the plaintiff is entitled to the declaration in accordance with his theory is not the determinative factor in resolving the question as to whether the action may be prosecuted. *Walker v. Charlotte*, 268 N.C. 345, 347-48, 150 S.E. 2d 493, 495 (1966). There is no question that in the case *sub judice* the complaint sets out a justiciable controversy. We believe that the Governor's constitutional powers, duties, and obligations to the people of North Carolina generally — obviously including that significant class of citizens who are compelled to obtain automobile liability insurance in order to use the public roads and highways of the State — constitutes significant interest in the controversy generated by the action of the Board of Governors of the Facility sufficient to give the Governor standing to seek a declaration as to the legality of their action. *See Kornegay v. City of*

Raleigh, 269 N.C. 155, 152 S.E. 2d 186 (1967); *Shaw v. City of Asheville*, 269 N.C. 90, 152 S.E. 2d 139 (1967).

[2] We now consider whether plaintiffs have established that they are entitled to injunctive relief. In order for plaintiffs to establish their right to a preliminary injunction, they must show (1) a likelihood of success on the merits of their case, and (2) that they are likely to sustain irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect plaintiffs' rights during the litigation. *Investor's, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E. 2d 566, 574 (1977); *Waff Bros., Inc. v. Bank*, 289 N.C. 198, 204-5, 221 S.E. 2d 273, 277 (1976); *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E. 2d 348, 351 (1975); *Williams v. Greene*, 36 N.C. App. 80, 85, 243 S.E. 2d 156, 159-60 (1978), *disc. rev. denied*, 295 N.C. 471, 246 S.E. 2d 12 (1978). The purpose of a preliminary injunction is to preserve the *status quo* of the subject matter involved until a trial can be had on the merits. The trial court cannot go further and determine the final rights of the parties, which must be reserved for final trial of the action. *Pruitt v. Williams, supra*, at 372.

In passing on the validity of the order of the trial court denying plaintiffs' injunctive relief, we are not bound by the findings of the trial court, but we may review the evidence and make our own findings. *Pruitt v. Williams, supra*, at 373, and cases cited therein. Our review of the evidence before the trial court convinces us that plaintiffs are entitled to limited injunctive relief in this case. We do not agree with plaintiffs' position that defendants should be enjoined from collecting the surcharges pending final determination on the merits. We do agree with plaintiffs' position that defendants should be required to file the surcharges in order that they may be reviewed by the Commissioner, and if appropriate by the courts, as is required under the provisions of G.S. 58-248.33(1) and G.S. 248.34(d). If the surcharges are not so filed and reviewed, it is our opinion, and we so hold, that those persons who pay the surcharges would be denied the protection of the laws, may not be able to recover any excessive charges paid by them and would therefore suffer irreparable loss should plaintiffs prevail on the merits.

We are also of the opinion that to this extent — *i.e.*, that the surcharges must be filed — plaintiffs are likely to succeed on the merits. The key question in this respect is whether the surcharges are rates, as that term is commonly understood and is used throughout Chapter 58 of the General Statutes. We believe that question should be answered in the affirmative. Defendants' argument to the contrary, adopted by the trial court, is hinged upon a single sentence found at the end of G.S. 58-248.34(f). Subsection (f) provides for a scheme of recoupment by member companies of assessments paid by them to the Facility under the plan of operations. The disputed sentence is as follows: "The amount of recoupment shall not be considered or treated as premium for any purpose." Defendants argue that this sentence means that the surcharges, being the companies' instruments of recoupment of assessment paid, are not rates, and hence not subject to the provisions of G.S. 58-248.33(1) and 58-248.34(d). As we read the entire enactment, it is clear that the General Assembly intended that all rates and charges promulgated by the Rate Bureau or the Facility would be subject to the filing and review requirements of the statute. In the context of the entire scheme, recoupment surcharges are to be based on premiums charged in policies reinsured by the Facility, and the disputed sentence therefore serves the purpose of keeping the surcharges separate and apart — in a separate pot — from the premiums themselves, and no more.

We hold that plaintiffs are entitled to an order of the trial court requiring the defendants to file the disputed surcharges with the Commissioner for his review pending the final determination of this action on the merits. That portion of the trial court's order denying plaintiffs' motion to enjoin the collection of the disputed surcharges *pendente lite* is affirmed. That portion of the trial court's order denying plaintiffs' motion that defendants be required to file the disputed surcharges with the Commissioner of Insurance is reversed. The order of the trial court is so modified and this action is remanded for an order consistent with this opinion.

Modified and remanded.

Judge ERWIN concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting:

In my opinion, the appeal should be dismissed since it is from the denial of a preliminary injunction, and no substantial right of the plaintiffs' will be lost if the appeal is not determined before a final hearing on the merits. *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348 (1975).

ROBERT TAYLOR v. R.L. BAILEY

No. 8028SC41

(Filed 21 October 1980)

Vendor and Purchaser § 5– contract to convey land – wife's refusal to join in conveyance – specific performance required with abatement for wife's interest

Where defendant contracted to convey a "good and sufficient deed, in fee simple . . . free from all liens and encumbrances," but his wife refused to join in the conveyance, thereby releasing her marital interest in the property, plaintiff was entitled to specific performance on the contract to convey the property, with an abatement in the purchase price for the value of defendant's wife's interest and for rents and profits for the period he was denied possession.

Judge HILL concurring in result.

Judge CLARK dissenting.

APPEAL by defendant from *Gaines, Judge*. Judgment signed 23 October 1979 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 27 August 1980, at Waynesville, North Carolina.

This is an action for breach of a contract to convey real property. On 3 October 1975, plaintiff Taylor and defendant Bailey entered into a contract in which Taylor agreed to purchase and Bailey agreed to sell a certain parcel of land in Buncombe County, for $28,000. The contract provided:

> That the Seller agrees and binds their, themselves [*sic*] heirs, executors or administrators, upon the payment of the purchase price as hereinbefore provided, to execute and deliver to the Purchaser, or assignee, a good and sufficient deed, in fee simple, conveying said land and premises,

free from all liens and encumbrances, except as herein provided and taxes for the year 1975 to be prorated at closing.

The only condition of the contract was that it was "[s]ubject to facts revealed by Attorneys Title Opinion and survey of property."

Defendant failed to tender a deed in compliance with the contract, and plaintiff instituted a suit for specific performance. Bailey defended that suit on grounds that the instrument was void because the description of the property was inadequate and that, if not void, Taylor's failure to perform by the date required by the contract nullified the agreement because time was of the essence. On 26 August 1976, Judge Griffin concluded that plaintiff was entitled to a warranty deed according to the terms of the contract. He ordered defendant to deliver such a deed and to specifically perform all the other terms and conditions of the contract. Defendant appealed, and this Court affirmed the decision in *Taylor v. Bailey*, 34 N.C. App. 290, 237 S.E. 2d 918 (1977).

On 17 February 1979 plaintiff cited defendant for contempt for refusal to deliver the deed as ordered. Judge Ferrell denied plaintiff's motion to show cause, concluding that defendant was unable to perform because his wife, Norma Bailey, refused to join in the conveyance.

The evidence tends to show that at the time of the execution of the contract, both parties were aware that Norma Bailey would have to join in the execution of the deed, as she had a marital interest which encumbered the property. Norma Bailey was not a party to the contract. Plaintiff refused to accept a deed without the wife's signature. The parties agree that a fee simple title cannot be conveyed without Norma Bailey's signature. Both parties had many years' experience in the real estate business in the locality.

On 18 August 1978 plaintiff instituted this action for damages he incurred by defendant's failure to convey a deed signed by both defendant and his wife. In his answer defendant pled the affirmative defense of election of remedies. His motion for summary judgment upon his plea in bar was denied. At trial, defendant's motions for involuntary dismissal were denied. The

issue of damages was submitted to the jury and judgment was entered granting the plaintiff $4,750 in damages. Defendant appeals from this judgment, and plaintiff cross appeals from the trial court's refusal to grant interest on the damage award from the date of the breach of contract.

Jeff P. Hunt for plaintiff appellee.

S. Thomas Walton for defendant appellant.

MARTIN (Harry C.), Judge.

Although the defendant's deed to the property in question has not been made part of the record on appeal, and the defect in the title defendant was prepared to tender is not clear, it appears from plaintiff's brief and exhibits that the only marital interest in the property held by defendant's wife is a dower interest. The statute providing for dower, N.C.G.S. 30-11 to 30-14, was repealed by Chapter 879, Section 14, 1959 Session Laws. The act repealing these sections inserted the new Chapter 29 entitled "Intestate Succession." Article 8 of that chapter provides:

> § 29-30. *Election of surviving spouse to take life interest in lieu of intestate share provided.* — (a) In lieu of the share provided in G.S. 29-14 [share of surviving spouse] or 29-21 [share of surviving spouse of illegitimate intestate], the surviving spouse of an intestate or the surviving spouse who dissents from the will of a testator shall be entitled to take as his or her intestate share a life estate in one third in value of all the real estate of which the deceased spouse was seised and possessed of an estate of inheritance at any time during coverture, except that real estate as to which the surviving spouse:
>
> (1) Has waived his or her rights by joining with the other spouse in a conveyance thereof, or
>
> (2) Has released or quitclaimed his or her interest therein in accordance with G.S. 52-10, or
>
> (3) Was not required by law to join in conveyance thereof in order to bar the elective life estate, or
>
> (4) Is otherwise not legally entitled to the election provided in this section.

This section preserves to a surviving spouse the benefits that were formerly available as dower and curtesy. *Smith v. Smith*, 265 N.C. 18, 143 S.E. 2d 300 (1965); *Heller v. Heller*, 7 N.C. App. 120, 171 S.E. 2d 335 (1969). A surviving spouse is given this election so as not to be rendered penniless and would elect this option when the estate is small or insolvent. *Smith, supra.* The statute limits the right of a married person to convey his or her real property free from the elective life estate provided by this section. *Heller, supra.* Thus, Norma Bailey's dower interest in the property would become effective only if she were to survive defendant and make an affirmative election to take this option rather than her intestate share or her share as provided by his will.

An inchoate dower interest is not an estate in land nor a vested interest, but, nevertheless, it acts as an encumbrance upon real property. *Blower Company v. MacKenzie*, 197 N.C. 152, 147 S.E. 829 (1929).

> A vendor, who has a wife living at the time, cannot alone convey a marketable title to the land, since in such case there would be outstanding the inchoate right of dower in the wife. To enable the vendee to raise the objection of an outstanding right of dower, there need be no express stipulation in the contract, for the vendor does not comply with the express or implied condition of a contract to convey land, that he shall convey a good title free from encumbrances, where the title is encumbered by an outstanding right of dower.

Annot., 57 A.L.R. 1253, 1399-1400 (1928). This principle has been long recognized in North Carolina. *Bethell v. McKinney*, 164 N.C. 71, 80 S.E. 162 (1913); *Rodman v. Robinson*, 134 N.C. 503, 47 S.E. 19 (1904); *Fortune v. Watkins*, 94 N.C. 304 (1886).

In *Bethell, supra*, the Court was presented with a situation similar to that in the instant case. Defendants executed a contract to sell a farm to plaintiff, stipulating "the deed to be executed to said Bethell is to contain the usual covenants of warranty and the property relieved of any and all encumbrances now subsisting." *Id.* at 72, 80 S.E. at 162. In an action by plaintiff for specific performance, one defendant, Ivie, alleged that he was willing to execute a fee simple warranty deed but

plaintiff refused to accept the deed because Ivie's wife was unwilling to join in the conveyance. As in the present case, plaintiff knew at the time of the contract that Ivie was married, that his wife was entitled to contingent dower, and that the contract did not stipulate for the wife's joinder in the deed. The trial court ordered defendants to execute a "good and sufficient deed in fee simple to the lands described in the contract, with the usual covenants, and relieved of all encumbrances thereon," upon the plaintiff's paying the contract price less an abatement for "the present value of the inchoate right of dower of the wife ... as damages or equitable compensation for failure of title to that extent, unless defendant Ivie shall in the meantime procure said deed to be executed by his wife ...." *Id.* at 73, 80 S.E. at 162-63. The court further ordered Ivie to make reasonable efforts to procure his wife to join him in the execution of the deed. If he were unable to do so, the case was to be submitted to a jury for determination of the present value of the inchoate dower right and the value of rents and profits of the land from the time the sale was to have been completed. The Supreme Court agreed with this portion of the decision, recognizing that although the wife could not be compelled to join in the conveyance, the vendee could enforce the contract and take such title as the vendor could give, with an abatement of the contract price for the right of dower outstanding, the value of which could be calculated. *See also Colwell v. O'Brien*, 196 N.C. 508, 146 S.E. 142 (1929).

In *Flowe v. Hartwick*, 167 N.C. 448, 451-52, 83 S.E. 841, 843 (1914), the Court stated:

> Our authorities also sustain the position, very generally recognized, that when the vendor's title proves to be defective in some particular or his estate is different from that which he agreed to convey, unless the defects are of a kind and extent to change the nature of the entire agreement and affect its validity, the vendee may, at his election, compel a conveyance of such title or interests as the vendor may have and allow the vendee a pecuniary compensation or abatement of the price proportioned to the amount and value of the defect in title or deficiency in the subject-matter ....

See also Goldstein v. Trust Co., 241 N.C. 583, 86 S.E. 2d 84 (1955).

The principle behind allowing an abatement of the purchase price in addition to specific performance is that "it is unjust to allow the vendor to take advantage of his own wrong, default, or misdescription." Annot., 46 A.L.R. 748, 748 (1927). "The obligations of a contract, except in certain specified and very restricted instances, are imperative, and, when they are wrongfully broken, neither inability to perform nor ignorance of conditions may ordinarily avail as protection against an award of damages." *Warren v. Dail*, 170 N.C. 406, 411, 87 S.E. 126, 128 (1915).

This is precisely the situation in the present case. Plaintiff brought his suit for specific performance and obtained a judgment of record ordering defendant to perform the contract. Thereafter, he brought the present action for damages. Six months after commencing this action, plaintiff cited the defendant for contempt for failing to comply with the judgment of specific performance. Defendant tendered plaintiff a deed, without his wife's joinder, and upon hearing, the court found defendant could not compel his wife to sign the deed, and dismissed the contempt charge. Plaintiff still relied upon the specific performance judgment even after this case was begun. He has not abandoned that lawsuit, nor cancelled the judgment he recovered. Where plaintiff seeks both specific performance and damages, as plaintiff here does, he is limited in damages to the abatement in the purchase price for the present value of the wife's dower interest. *Flowe v. Hartwick, supra.* The situation is analogous to a buyer suing for specific performance of land encumbered by a lien or deed of trust; he is entitled to an abatement of the purchase price in the amount of the encumbrance. *See Nugent v. Beckham*, 43 N.C. App. 703, 260 S.E. 2d 172 (1979); *Passmore v. Woodard*, 37 N.C. App. 535, 246 S.E. 2d 795 (1978); 71 Am. Jur. 2d Specific Performance §§ 134-36 (1973).

Thus it seems clear that plaintiff in the present case remains entitled to specific performance on the contract to convey the property, with an abatement in the purchase price for the value of defendant's wife's dower interest and for rents and profits for the period he was denied possession. The trial court's 1976 order for specific performance was granted in that court's sound discretion, with a view toward serving the ends of justice. *See Knott v. Cutler*, 224 N.C. 427, 31 S.E. 2d 359 (1944). The sole

function of specific performance "is to compel a party to do precisely what he ought to have done without being coerced by the court." *McLean v. Keith*, 236 N.C. 59, 71, 72 S.E. 2d 44, 53 (1952). Defendant contracted to convey a "good and sufficient deed, in fee simple ... free from all liens and encumbrances." How he intended to do so was not the concern of plaintiff, nor of the court. "Equity can only compel the performance of a contract in the precise terms agreed on. It cannot make a new or different contract for the parties simply because the one made by the parties proves ineffectual." *Id.* at 71, 72 S.E. 2d at 53.

In affirming the decree for specific performance as the appropriate remedy, Judge Morris, now Chief Judge, noted that if defendant "cannot, or does not [execute and deliver a good and sufficient deed], the question of damages is the subject of another lawsuit." *Taylor v. Bailey*, 34 N.C. App. 290, 295, 237 S.E. 2d 918, 921 (1977). Clearly the issue of election of remedies, as propounded by defendant, is no problem, because that issue generally arises in cases where a party seeks both to affirm and deny a contract. *See, e.g., Redmond v. Lilly*, 273 N.C. 446, 160 S.E. 2d 287 (1968); *Richardson v. Richardson*, 261 N.C. 521, 135 S.E. 2d 532 (1964); *Bruton v. Bland*, 260 N.C. 429, 132 S.E. 2d 910 (1963); *Surratt v. Insurance Agency*, 244 N.C. 121, 93 S.E. 2d 72 (1956); *Dennis v. Dixon*, 209 N.C. 199, 183 S.E. 360 (1936). *See generally*, 25 Am. Jur. 2d Election of Remedies §§ 8-13 (1966); 28 C.J.S. Election of Remedies §§ 1-7 (1941). Plaintiff has at all times sought enforcement of a contract which has been declared valid and binding; it was defendant who first denied its validity and who now wishes to affirm it in order to avoid payment of damages.

Although plaintiff might have effectively brought this claim for damages in the same action as his original suit for specific performance, he had no indication at that time that defendant would not or could not deliver a satisfactory deed. Defendant at that time tried to disaffirm the contract. Only upon his 1977 appeal did defendant indicate that he might not be able to obtain his wife's signature upon the deed. If he thought he might still be able to avoid the transfer completely, he had little incentive to attempt diligently to procure her joinder.

Because the record on appeal does not include the trial court's charge to the jury regarding the method of computation of damages, we have no basis on which to determine whether the correct formula was employed. Plaintiff's evidence on damages was in support of his allegation that he was entitled to recover the difference in the fair market value of the property and the contract price. If plaintiff had not obtained a prior judgment for specific performance of the contract, plaintiff's allegations of damages would be correct. Where a buyer sues only for damages for breach of contract to convey land, that is the proper rule for the measurement of damages. *Lane v. Coe*, 262 N.C. 8, 136 S.E. 2d 269 (1964). It is well to note that where a buyer does sue for damages he cannot thereafter bring an action for specific performance of the contract to convey realty. *Dennis v. Dixon, supra.* By the same token, we must conclude that where one has obtained a judgment for specific performance, he cannot thereafter obtain damages for breach of the contract measured by the difference in the fair market value of the land at the time of the breach and the contract price. It is not the correct rule for the measurement of damages in this case. Here, plaintiff seeks both specific performance of the contract and damages. The proper measure of damages is an abatement of the purchase price by the worth of Norma Bailey's dower interest, reduced to its present value. *Bethell v. McKinney, supra.* Computation of this value is possible by the use of established actuarial methods. *See Blower Company v. MacKenzie, supra.* Plaintiff is also entitled to the rents and profits from the land for the period he was wrongfully denied the use and occupation of the property. *See Nugent v. Beckman, supra;* N.C. Gen. Stat. 1-292. Therefore, the jury will be presented with two issues:

1. What is the worth of Norma Bailey's dower interest in the property, reduced to its present value?

   ANSWER:

2. What is the fair market value of rents and profits from the property for the period plaintiff was denied the use and possession of the property?

   ANSWER:

We note that the record indicates that defendant and his wife were estranged at some of the times relevant to this action. If defendant and Norma Bailey are no longer husband and wife, the question of abatement for the dower interest would obviously be moot.

This action must be remanded to the trial court for a new trial on the issue of damages consistent with this opinion. As the question on the issue of interest may not arise on retrial, we decline to discuss plaintiff's cross appeal.

New trial.

Judge HILL concurs in the result.

Judge CLARK dissents.

Judge HILL concurring in the result:

I must concur because the principle laid down in *Bethell v. McKinney*, 164 N.C. 71, 80 S.E. 162 (1913), appears controlling at this time. However, that case was written at a time when ours was an agrarian society, and land usage was not so diverse. Likewise, land values were more stable because of more limited use, and inflation was not taking its toll as it is now. Were it not for *Bethell, supra*, I would not restrict the election of remedies imposed on plaintiff by our decision in this case.

Judge CLARK dissenting:

Plaintiff in his first action (34 N.C. App. 290, 237 S.E. 2d 918 (1977)), sought specific performance of the contract for sale of land requiring defendant to deliver "a good and sufficient deed, in fee simple, conveying said land and premises, free from all liens and encumbrances . . . ." Though defendant's wife was not a party to the contract, defendant was obligated to deliver such deed free of encumbrance, which required defendant to have the deed executed by his wife to convey her dower interest. There was nothing in the first action to indicate the defendant was unable to perform the contract. This is clear from the statement (quoted by the majority) made by Judge Morris at the conclusion of this court's opinion in the first case.

Only after the determination of the first action on appeal to this Court did the plaintiff determine that defendant could not perform because of his wife's refusal to execute a deed con-

veying her dower interest. In my opinion plaintiff could then elect as follows: (1) for specific performance and execution of a deed by defendant alone plus the cash value of the inchoate right of dower of the wife; or, (2) for breach of contract and damages consisting of the difference in the contract price and the market value of the land.

I do not agree with the majority that plaintiff still relied upon specific performance after the second action was begun. The purpose of the contempt citation was to establish the breach by defendant before proceeding further with breach of contract action. Plaintiff does not seek both specific performance and damages for the breach. He seeks only damages for the breach after determining that specific performance was impossible.

The majority would require prevision on the part of the plaintiff, a burden rarely imposed by law. Too, it repudiates the quoted comment of this Court in its opinion that if defendant "cannot, or does not [execute and deliver a good and sufficient deed], the question of damages is the subject of another lawsuit." Nor do I agree that the case before us is controlled by *Bethell v. McKinney, supra.* Bethell established the right of the vendee to enforce the contract, take such title as the vendor could give, and have an abatement of the purchase money for the right of dower left outstanding, but that opinion did not hold that such was the vendee's exclusive right.

My colleagues of the majority are mountain men. The land in question is located in the mountains. It is possible that their opinion is based on "mountain law," a body of law peculiar to western North Carolina which permeates the innermost recesses of the minds of those who live in that rarefied atmosphere and which may not be fully dispelled from the minds of some mountaineers despite exposure to law of general application throughout the State.

CAROLYN LEDFORD v. GILMER LEDFORD

No. 7930DC1148

(Filed 21 October 1980)

1. **Divorce and Alimony § 13.1– divorce based on year's separation – sexual activity and association negating separation**

A couple cannot be granted a divorce on the ground of one year's separation if there has been sexual activity between the parties or if there has been such association between the parties as to induce others to regard them as living together.

2. **Divorce and Alimony § 13.5– divorce based on year's separation – issue as to living separate and apart – summary judgment improper**

In an action for divorce based on a year's separation the trial court erred in entering summary judgment for defendant, since there was disputed testimony as to whether the parties had engaged in sexual intercourse during the period of separation, and since evidence that the parties had driven around town, eaten in restaurants and been to church together, and evidence that plaintiff visited the former marital home and cooked and cleaned up while there and that she set up a Christmas tree in the home amounted to evidence only of casual and isolated social acts which would not reasonably induce others to regard the parties as living together.

3. **Divorce and Alimony § 2.1; Rules of Civil Procedure §15– one year's separation – amendment of complaint to change date of separation – denial improper**

In an action for divorce based on one year's separation where plaintiff sought to amend her complaint to change the date of the original separation, the trial court abused its discretion in denying the motion to amend, since no justifying reason was given for the denial; there was no showing of prejudice to defendant; and the denial was apparently based on a misapprehension of the law.

APPEAL by plaintiff from *Leatherwood, Judge.* Judgment and Order entered 17 July 1979 in District Court, MACON County. Heard in the Court of Appeals in Waynesville on 26 August 1980.

Plaintiff seeks an absolute divorce on the grounds of one year's separation beginning on 9 December 1977. Defendant's answer alleges that after 9 December 1977, the plaintiff continued carrying out her marital obligations by cleaning the house, preparing and cooking meals for the defendant, and washing his clothes; and that by going to restaurants together, and otherwise going out in public together they held themselves out as husband and wife. As a further defense, defendant alleges that the parties had sexual relations on 29 December

and 30 December 1977. Defendant filed a motion for summary judgment.

In support of his motion defendant in his affidavit avers that on 29 December and 30 December 1977, he and the plaintiff spent the night together in their home and had sexual relations. Further, the parties had sexual relations in June 1978 and October 1978. Defendant also states that for about ten months during the alleged period of separation, plaintiff came to their home two or three times per week to clean the house, prepare the defendant's meals, wash his laundry, and occasionally eat with him. The parties also ate together in public, visited neighbors and relatives in Georgia together, and otherwise held themselves out in public as husband and wife.

In plaintiff's affidavit and her deposition, both of which were considered by the trial judge on the summary judgment motion, she denies having sexual intercourse with her husband on 29 December or 30 December 1977, although she admits spending the night at their home because defendant was afraid he was having a heart attack. Plaintiff also denies that the parties had sexual relations in June or October 1978 as alleged by defendant in his affidavit. Plaintiff admits going to their house once or twice a month to clean, to cook for the defendant, and to wash his clothes. However, plaintiff maintains she performed these tasks because defendant promised he would move out of the house and allow her to live in it and she did not want to move into a dirty house. Moreover, after the parties' separation in December 1977, she continuously lived in her own apartment. Plaintiff acknowledges that she ate meals in restaurants with defendant on three occasions, that they took a trip to Georgia to visit his relatives, and that they attended a play at their church during the Christmas season of 1978, at which time defendant introduced the plaintiff to the pastor as his wife. Plaintiff also set up a Christmas tree and presents in their former marital home. Nevertheless, plaintiff asserts that during the period of the separation she never displayed any affection toward the defendant in public.

Before the hearing on summary judgment motion, plaintiff filed a motion to amend her complaint by changing the date of separation to 1 January 1978. The trial judge entered an order denying plaintiff's motion to amend her complaint and entering

summary judgment in defendant's favor, thereby dismissing plaintiff's suit with prejudice.

Downs & Henning by James U. Downs for plaintiff appellant.

Louis Wilson for defendant appellee.

CLARK, Judge.

The challenged ruling of the trial court in granting summary judgment for the defendant-husband should be affirmed on appeal only if the defendant in his supporting affidavit established as a matter of law that he and plaintiff-wife did not live separate and apart for one year as required by G.S. 50-6. Stated another way, the test is whether the defendant presented materials which would require a directed verdict in his favor if presented at the trial. W. Shuford, N.C. Civil Practice and Procedure § 56–7 (1975).

The facts as presented to the court in defendant's affidavit on the one hand and as presented in plaintiff's affidavit and deposition on the other hand are conflicting. Only if these questions of fact are immaterial would summary judgment be appropriate, because summary judgment is warranted only where no genuine issue of material fact exists. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); *Fitzgerald v. Wolf*, 40 N.C. App. 197, 252 S.E. 2d 523 (1979); G.S. 1A-1, Rule 56. In making this determination, the Court must view the evidence in the light most favorable to the non-movant. *Brice v. Moore*, 30 N.C. App. 365, 226 S.E. 2d 882 (1976).

[1] G.S. 50-6 allows the granting of a divorce on the basis of one year's separation. To grant defendant's motion, the trial judge must have concluded that the parties did not as a matter of law live separate and apart as the statute contemplates. Our case law delineates two circumstances under which the law will hold spouses to have failed to satisfy the requirements of a valid separation: first, sexual activity between the parties, *Murphy v. Murphy*, 295 N.C. 390, 245 S.E. 2d 693 (1978); and, second, such association between the parties as to induce others to regard them as living together, *In re Estate of Adamee*, 291 N.C. 386, 230 S.E. 2d 541 (1976).

Though both *Murphy* and *Adamee, supra,* deal with the validity of a separation agreement and not with the tolling of the period of separation required in G.S. 50-6, we believe that the following language in the *Adamee* opinion forestalls any doubt that the cases should apply as well to the "live separate and apart" words in G.S. 50-6:

> "The same public policy which will not permit spouses to continue to live together in the same home — holding themselves out to the public as husband and wife — to sue each other for an absolute divorce on the ground of separation or to base the period of separation required for a divorce on any time they live together, will also nullify a separation agreement if the parties resume marital cohabitation. Whether used in a separation agreement or a divorce statute, the words 'live separate and apart' have the same meaning. The cessation of cohabitation which provides grounds for divorce and the resumption of cohabitation which will abrogate a separation agreement are defined in the same terms."

291 N.C. at 391, 230 S.E. 2d at 545 (dictum).

[2] The *first circumstance* which would support the judge's granting of summary judgment in this case would be *undisputed* evidence of sexual activity between the parties. *Murphy v. Murphy*, 295 N.C. 390, 245 S.E. 2d 693 (1978). *See* Note, *Separation Agreements: Effect of Resumed Marital Relations*, 1 Campbell L. Rev. 131 (1979) [hereinafter *Separation Agreements*]; Survey, *Developments in North Carolina Law, 1978*, 57 N.C. L. Rev. 827, 1095-98 (1979); Note, *Isolated Acts of Sexual Intercourse Void Separation Agreements*, 16 Wake Forest L. Rev. 137 (1980) [hereinafter *Isolated Acts*]. In *Murphy, supra,* Justice Sharp wrote for the Court that "severance of marital relations by a separation agreement and continued sexual intercourse between the parties are essentially antagonistic and irreconcilable notions." *Murphy v. Murphy*, 295 N.C. at 397, 245 S.E. 2d at 698. In light of the foregoing quote from *Adamee,* it is to be expected that the trial judge would understand the *Murphy* rationale to suggest that acts of sexual intercourse would not only void a separation agreement but would also toll the statutory period for divorce. *See* Note, *Separation Agreements*, 1 Campbell L. Rev. at 139-40; Note, *Isolated Acts*, 16 Wake Forest

L. Rev. at 149. The testimony of the plaintiff, however, was that no intercourse occurred between her and her husband during the period of separation. A jury might well believe her testimony. Indeed, the judge was required to believe this testimony for the purpose of ruling on the motion for summary judgment. *Brice v. Moore, supra.* Absent sexual intercourse, the *Murphy* rationale has no applicability to this case and reliance upon sexual intercourse between the parties as grounds for summary judgment, in light of plaintiff's evidence to the contrary, would be error by the trial judge.

The *second circumstance* which would support the granting of the summary judgment would be an association between the parties "of such character as to induce others who observe them to regard them as living together in the ordinary acceptation of that descriptive phrase." *In re Estate of Adamee, supra; Dudley v. Dudley,* 225 N.C. 83, 33 S.E. 2d 489 (1945). The *Adamee* court, per Justice Sharp, stated:

> "We hold that when separated spouses who have executed a separation agreement resume living together in the home which they occupied before the separation, they hold themselves out as man and wife 'in the ordinary acceptation of the descriptive phrase.'"

Adamee, 291 N.C. at 392, 230 S.E. 2d at 546. Under this second approach the summary judgment would be warranted if all the evidence considered in the light most favorable to plaintiff established as a matter of law that sometime after the separation of the parties they resumed living together or in some manner "held themselves out as husband and wife living together." *Adamee, supra; Dudley v. Dudley, supra.*

The affidavit and deposition of the plaintiff tend to show that over the course of more than a year plaintiff:

(1) Drove around town with defendant on a few occasions;

(2) Drove to Georgia with defendant on two occasions;

(3) Approximately twice a month, during half of this period (May to November 1978), visited defendant at their former marital home and while at the house cleaned up and cooked;

(4) Ate at restaurants with defendant on three occasions;

(5) Set up a Christmas tree in the former marital home during December 1978;

(6) On one occasion attended the Prentiss Baptist Church with defendant;

(7) While leaving the church on that occasion failed to protest when defendant referred to her as his wife;

(8) Slept with defendant on the night of 29 December 1977, although they did not engage in sexual activity.

The trial judge apparently viewed these facts as establishing as a matter of law that the parties had not lived "separate and apart" in that they held themselves out to the public as husband and wife.

Considering the first seven of the above listed activities, we see nothing that would warrant finding as a matter of law that the parties held themselves out as man and wife. The acts listed appear to be isolated or occasional and not of a character to be inconsistent with the parties' status as separated spouses. It is true that *Murphy* held sexual intercourse between the parties to be inconsistent with the notion of separation "whether the resumption of sexual relations be 'casual', 'isolated', or otherwise," *Murphy v. Murphy*, 295 N.C. at 397, 245 S.E. 2d at 698; but we believe that casual and isolated social acts together must be viewed differently. As pointed out in *Murphy*, to allow sexual activity outside the cloak of marriage would be to "'sanction and approve, for all practical purposes, illicit intercourse and promiscuous assignation.'" *Id.*, quoting *State v. Gossett*, 203 N.C. 641, 644, 166 S.E. 754, 755 (1932). There is nothing illicit, however, about casual social intercourse between separated spouses. Indeed, in a state which "recognize[s] and adhere [s] ... to a policy which within reason favor[s] maintenance of ... marriage[s]," *Gardner v. Gardner*, 294 N.C. 172, 180, 240 S.E. 2d 399, 405 (1978), it would appear beneficial to encourage the sorts of social contact which are necessary for spouses to reconcile their differences and effect a meaningful reconciliation. In light of the nature of these activities and their relative infrequency over an extended period of time, we see no way they

could reasonably induce others to regard the parties as living together. We note in contrast that cases denying divorce or voiding separation agreements have uniformly required much more substantial activity to find a holding out as living together. *See In re Estate of Adamee, supra,* (wife moved back into marital domicile and lived with husband for eight months); *Dudley v. Dudley, supra,* (evidence showed spouses had slept in the same room for two and one-half to three years and in adjoining rooms in the same house for the remainder of the alleged five years' separation); *Young v. Young,* 225 N.C. 340, 34 S.E. 2d 154 (1945) (although husband was in the Navy, the parties stayed together whenever the husband was on leave or stationed near the marital home). We hold, in accord with our earlier holding in the case of *Tuttle v. Tuttle,* 36 N.C. App. 635, 244 S.E. 2d 447 (1978), that, "interruption of the statutory period should not be found ... from the mere fact of social contact between the parties." *Id.* at 636-37, 244 S.E. 2d at 448.

[3] The eighth, and only remaining, circumstance upon which the trial judge might have based his ruling for defendant on the summary judgment motion was the incident on 29 December 1977 when plaintiff and defendant spent the night together in their former marital home. Plaintiff, however, filed a timely motion to amend her complaint for the purpose of eliminating this incident and having the period of separation begin on 1 January 1978. Had this motion been granted, the night the parties spent together would have been outside the period of separation and not subject to consideration on the summary judgement motion. Plaintiff assigns as error the trial judge's denial of her motion to amend her complaint.

Rule 15(a), N.C. Rules Civ. Proc. mandates that after expiration of the time for amendment as of right, "a party may amend his pleading only by leave of court ... and leave shall be freely given when justice so requires." This language in our rule is identical to that of its federal counterpart, Fed. R. Civ. Proc. 15(a). *See* W. Shuford, N.C. Civil Practice and Procedure § 15-1 (1975). With regard to the Federal Rule, the United States Supreme Court has stated:

> "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed

> 1948), ¶¶ 15.08, 15.10. If the underlying facts or circumstances relied upon by plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

Foman v. Davis, 371 U.S. 178, 181-182, 83 S. Ct. 227, 9 L. Ed. 2d 222, 226 (1962); *see Public Relations, Inc. v. Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E. 2d 782 (1978); *Gladstein v. South Square Association*, 39 N.C. App. 171, 249 S.E. 2d 827 (1978). Just as the language in the Federal and North Carolina Rules is identical on this point, so are the policies behind the rules the same, i.e., "to insure, so far as is just to the opposing party, that every case be decided on its merits." *Gladstein, supra*, at 178, 249 S.E. 2d at 831.

In the case *sub judice* the trial court did not set out a justifying reason for denying plaintiff's motion to amend and no such reason appears in the record on appeal. The United States Supreme Court has held that the trial judge abuses his discretion when he refuses to allow an amendment unless a justifying reason is shown. *Foman v. Davis, supra.* Nor does the record reveal any attempt on the part of the defendant to show that he would be prejudiced by the amendment. The burden is on the objecting party to show that he would be prejudiced thereby. *Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977) (dictum); *Public Relations, Inc. v. Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E. 2d 782 (1978). It must be concluded that the ruling of the trial court in denying the motion to amend is based on a misapprehension of the law, that the circumstances (listed 1-7 above) were sufficient as a matter of law to warrant summary judgment for defendant rendering the amendment futile. We

conclude that the denial of the motion to amend without a justifying reason and no showing of prejudice to defendant, and apparently based on a misapprehension of the law, was an abuse of discretion and reversible error.

It should not be inferred from this ruling on the amendment question that summary judgment for defendant would have been justified solely on the admission by plaintiff that she spent the night with the defendant in the marital home on 29 December 1977. Our ruling on the amendment issue obviates the need for considering and ruling on that question.

The summary judgment for defendant and the order denying plaintiff's motion to amend are vacated and this cause is remanded for proceedings consistent with this opinion.

Vacated and Remanded.

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

LAURA MARTINEZ, GUARDIAN AD LITEM FOR J. MICHAEL MARTINEZ v. WESTERN CAROLINA UNIVERSITY

No. 8010IC296

(Filed 21 October 1980)

State § 10.2– tort claim – insufficient findings as to negligence, proximate cause – remand for proper findings

In a tort claim action to recover for injuries to plaintiff's ankle while he was participating in a summer program for gifted children at Western Carolina University, the Industrial Commission failed to make sufficient findings of fact as to whether plaintiff's counselor, his dormitory housemother or an infirmary nurse was actively negligent in failing to obtain timely and adequate examination, diagnosis and treatment of plaintiff's injuries and, if so, whether such delay was a proximate cause of plaintiff's ultimate injuries, and the cause is remanded for proper findings of fact.

APPEAL by plaintiff from a decision and order of the Full Industrial Commission. Heard in the Court of Appeals 18 September 1980.

Plaintiff instituted this action before the North Carolina Industrial Commission under the State Tort Claims Act. G.S. 143-291 *et seq.*

Plaintiff's claim was initially heard before Deputy Commissioner Ben E. Roney, Jr. The evidence tended to show that in late June 1977, when plaintiff was 14 years old, he arrived at the campus of Western Carolina University to attend a summer program for gifted children. Plaintiff stayed in Leatherwood dormitory. His counselor was Randy Turpin and the housemother for the dormitory was Miss Gibbs. At approximately 1:00 p.m. on Saturday, 2 July 1977, plaintiff slipped in a puddle of water on the floor of Leatherwood dormitory. He felt a sharp pain in his right leg just above the ankle in the area of the Achilles tendon. Thereafter plaintiff spent some time lying down in his room with an ice pack on his right foot.

Later in the afternoon on the date of the accident, plaintiff informed Mr. Turpin that he had hurt his foot and requested that he be taken to a doctor. Mr. Turpin said that Miss Gibbs was the person in charge and for plaintiff to get in touch with her. It was plaintiff's understanding that he was not allowed to go to the infirmary unless he was accompanied by a counselor or Miss Gibbs and since Miss Gibbs could not be found he wasn't allowed to go. Plaintiff spoke with Miss Gibbs at about 8:30 p.m. and requested that he be taken to the infirmary that evening. Miss Gibbs advised the plaintiff that she would take him to the infirmary the next morning at 9:30.

At 9:30 a.m. on Sunday, 3 July, plaintiff was examined by Dr. Matthews at the infirmary. At that time plaintiff's ankle was swollen and he was experiencing a throbbing pain. Conservative treatment was advised for an Achilles sprain.

Laura Martinez, plaintiff's mother, first became aware of his injury when she called him on Tuesday, 5 July, at 10:00 p.m. Immediately after speaking with plaintiff, she spoke with Randy Turpin who assured her that her son would be carried to a medical doctor the next morning. She next communicated with her son at 5:00 p.m. on Wednesday, 6 July. At that time plaintiff informed his mother that he had not seen a doctor that morning and that his foot was dragging and was painful. Mrs. Martinez immediately called Miss Gibbs and asked her to get plaintiff to a doctor and to have plaintiff call her at 9:00 p.m. to inform her of the doctor's diagnosis.

When Randy Turpin learned late Wednesday afternoon that plaintiff had not been taken to see a doctor that morning as

plaintiff's mother had been promised, he took plaintiff to the infirmary. No physician was at the infirmary and plaintiff was treated by a nurse on that occasion. Plaintiff called his mother that evening at 9:00 and told her he had been to the infirmary, had seen a nurse, and the second diagnosis was a sprain.

On Thursday, 7 July, plaintiff was allowed to participate on a hike through mountainous terrain at the Joyce Kilmer National Park with the assistance of a stick and by taking shortcuts.

On Friday 8 July Dr. O'Neal called Mrs. Martinez at work around noon and informed her that her son had a ruptured Achilles tendon. Mrs. Martinez rented an airplane and her son was flown to Florence, South Carolina, for surgery. She testified that Dr. Ervin, the surgeon, told her that "the weeks delay made his operation very difficult . . . that he did not know if he could save it [plaintiff's foot], if the child would be crippled or not due to the fact so long a time had gone by . . . [and that] he knew it [the ruptured tendon] happened approximately a week before he saw him." Dr. Ervin stated in his letter of 20 March 1979:

> Mrs. Martinez has asked me specifically whether or not the scarring on Mike's leg would have been any less extensive without this week's delay. I do not think there would have been any difference in the size or healing of the scar regardless of the time of diagnosis. However, the repair of the tendon was definitely made more difficult because of the week's delay. There, of course, is the possibility that the wait may have made the tear or rupture of the tendon a more complete rupture over the period of time that the child continued to participate in camp activities.
>
> It is sometimes quite difficult to make a diagnosis of rupture of the tendon Achilles particularly if it is a partial rupture. This could be difficult for a camp nurse for instance. However, with the amount of difficulty that the patient evidently had, I do criticize delay in proper referral to a physician for examination. These comments are, of course, based on no specific knowledge on exactly how the situation was handled at camp.

Dr. Ervin also stated in his letter of August 29, 1977 "[w]alking on the foot for a week or so with the tendon in ruptured state, undoubtedly caused more in the way of swelling and scarring in the area of the rupture."

After the hearing, Deputy Commissioner Roney awarded plaintiff $13,500.00 as damages for pain, suffering and permanent scarring.

Defendant appealed to the full commission.

The full commission vacated the decision and order filed by the Deputy Commissioner and in lieu thereof substituted the following:

FINDINGS OF FACT

1. Claimant was born on 28 December 1962. He was examined and treated by Dr. Allen on 3 June 1977 for a three-inch laceration of the right ankle over the Achilles tendon. The tendon was not involved as the laceration extended into the subcutaneous tissue only. Sutures were removed from the laceration on 13 June 1977. Claimant had made a satisfactory recovery and was discharged.

2. Claimant arrived at Western Carolina University on 19 June 1977 as an invitee for the purpose of participating in a Gifted Child Program. He was automatically invited to the 1977 program by reason of having participated therein during 1976. He was scheduled to participate in the botany program.

3. Claimant was running in the hall of the dormitory in which he resided on 2 July 1977 when he slipped in a puddle of water and fell. He experienced pain in the right posterior aspect of the right leg on the occasion of the slip and fall. Claimant was taken to the infirmary at 9:30 a.m. on 3 July 1977. He was examined on this occasion by Dr. Matthews. Conservative treatment was tendered for an Achilles sprain. He spent the remainder of 3 July 1977 (Sunday) at rest.

4. Claimant is familiar with pain due to sprained ankles by reason of past experience. He was initially of the impression that the injury consisted of a sprained ankle. He

noticed that the condition of his right leg was worsening by 5 July 1977 and began to think that the injury was worse than a sprain. He saw a nurse in the infirmary at 6:15 p.m. on 6 July 1977. The right ankle was wrapped in an ace bandage. Claimant was dragging his right foot by this time. No physician was present at the infirmary on this occasion. Alva Porter was the nurse on duty at the infirmary at 6:15 p.m. on 6 July 1977. The infirmary is open 24 hours daily. Six o'clock p.m. is after doctors' hours.

5. Claimant was allowed to participate in a hike at the Joyce Kilmer National Park on 7 July 1977 (Thursday). Claimant negotiated the hike with the assistance of a stick and by taking shortcuts. The course of the hike covered mountainous terrain.

6. Randy Turpin was a counselor in the Gifted and Talented Program sponsored by Western Carolina University during 1977. Claimant was on Randy Turpin's hall. Mr. Turpin was directly responsible for the welfare and conduct of the students assigned to him. Miss Gibbs supervised the activities of the various counselors. Randy Turpin was present during the 7 July 1977 hike at the Joyce Kilmer National Park.

7. Claimant was examined by Dr. Donald P. O'Neal in the infirmary at 9:30 a.m. on 8 July 1977. Physical examination revealed an obvious deformity at the Achilles insertion on the right lower extremity. The diagnosis was ruptured Achilles tendon on the right. Claimant was admitted to the infirmary at 10:30 a.m. on 8 July 1977. He was taken to the Asheville-Hendersonville Airport and flown to Florence, South Carolina.

8. Claimant was examined by Dr. Ervin on 8 July 1977 and admitted to the McLeod Memorial Hospital in Florence, South Carolina. Surgical repair of the ruptured right Achilles tendon was accomplished by Dr. Ervin on 9 July 1977. He was discharged from the hospital on 10 July 1977.

9. The site of the ruptured Achilles tendon that was repaired on 9 July 1977 was well above the three-inch laceration that was cleaned and sutured by Dr. Allen on 13 June 1977.

10. The cost of transporting claimant by air from the Asheville-Hendersonville Airport to Florence, South Carolina was $144.00. The total charges for treatment of the injury giving rise hereto amounted to $1,410.76.

11. Claimant was required to leave the Gifted and Talented Program sponsored by Western Carolina University one week early by reason of the ruptured Achilles tendon.

12. The defendant's employees named in plaintiff's pleading were guilty of no negligent conduct proximately causing damage to the minor, J. Michael Martinez.

Plaintiff appealed.

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

S. Thomas Walton, for the plaintiff-appellant.

MARTIN (Robert M.), Judge.

Plaintiff assigns as error the signing and entry of the order by the Industrial Commission. An exception to the signing of an order presents for review the question of whether the facts found support the conclusions of law. *Schloss v. Jamison*, 258 N.C. 271, 128 S.E. 2d 590 (1962). The determination of negligence, proximate cause and contributory negligence requires an application of principles of law to the determination of facts. These are, therefore, mixed questions of law and fact and so are reviewable on appeal from the commission, the designations "Finding of Fact" or "Conclusion of Law" by the commission not being conclusive. *Brown v. Board of Education*, 269 N.C. 667, 153 S.E. 2d 335 (1967).

It has long been the rule in this State that the Industrial Commission must make findings of fact and conclusions of law to determine the issues raised by the evidence in a case before it. Specific findings covering the crucial questions of fact upon which a plaintiff's right to compensation depends are required. *Bailey v. Dept. of Mental Health*, 272 N.C. 680, 159 S.E. 2d 28 (1968); *Cannady v. Gold Kist*, 43 N.C. App. 482, 259 S.E. 2d 342 (1979); *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619 (1968).

In the case of *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952), Judge Ervin, speaking for the court, stated:

> If the findings of fact of the Industrial Commission are supported by competent evidence and are determinative of all the questions at issue in the proceeding, the court must accept such findings as final truth, and merely determine whether or not they justify the legal conclusions and decision of the commission. (Citations omitted.) But if the findings of fact of the Industrial Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the commission for proper findings. (Citations omitted.)

Id. at 605, 70 S.E. 2d at 708.

It is clear that the plaintiff in this proceeding raised the issue of whether Randy Turpin and Miss Gibbs failed to exercise due care and were actively negligent in failing to obtain timely and adequate examination, diagnosis and treatment of claimant's injuries. This is a determinative question of fact in the case *sub judice*, as there was evidence tending to show that the delay in diagnosing the ruptured Achilles tendon enhanced the seriousness of plaintiff's injury. The issue engenders three distinct findings which must be made: (1) was there an unreasonable delay in examining, diagnosing and treating plaintiff's injuries?, (2) if so, was the delay caused by Randy Turpin, Miss Gibbs or the infirmary nurse, Alva Porter? and (3) if so, was the delay a proximate cause of plaintiff's injury? The Full Commission failed to make any of these findings.

The rule espoused by this Court in *Smith v. Construction Co.*, 27 N.C. App. 286, 218 S.E. 2d 717 (1975), a case involving a claim under the Workmen's Compensation Act, is applicable to the case *sub judice*. In *Smith*, the claimant had received compensation for temporary total disability under an agreement with his employer. He did not notify the Industrial Commission in writing within the time required by statute that he claimed additional benefits under the Workmen's Compensation Act. Smith contended that his failure to comply with the statute should not bar his claim for additional compensation because his delay in requesting a hearing resulted from his reliance on

representations made by defendant employer's secretary, and defendant was therefore estopped from pleading the lapse of time as a defense to his claim. The findings of fact of the hearing commissioner included findings that the defendant's secretary made the statements, that Smith relied on her statements, and that because of his reliance Smith failed to notify the Industrial Commission of his claim for additional benefits within the time required by statute. The hearing commissioner found that defendants were estopped to plead the lapse of time and made an award in favor of plaintiff. Defendants appealed to the full commission who vacated the opinion and award of the hearing commissioner. In denying Smith's claim due to his failure to notify the Industrial Commission within the statutory time period, the full commission failed to make any findings of fact regarding the statements of defendant employer's secretary or Smith's reliance thereon. The full commission merely concluded that "plaintiff has shown no conduct on the part of the defendant which constitutes estoppel." *Id.* at 290, 218 S.E. 2d at 719. On appeal by Smith, this Court held "when evidence is presented in support of a material issue raised, it becomes necessary for the commission to make a finding one way or the other." *Id.* at 291, 218 S.E. 2d at 720. We stated:

> While the evidence in the instant case on the question of estoppel was minimal, we think it was sufficient to raise the issue and require a finding of fact on the issue. . . . [T]he hearing commissioner made a finding on the question. . . . [The full commission] merely eliminated the hearing commissioner's finding and made no finding in its place. *The conclusion that "plaintiff has shown no conduct on the part of the defendant which constitutes estoppel" is not sufficient to meet the requirement with respect to findings of fact.* (Emphasis added.)

Id.

In the case *sub judice*, Deputy Commissioner Roney's decision and award contained the following findings:

> 12. The delay in diagnosing the ruptured Achilles tendon increased the difficulty of surgical repair and subsequent treatment. The delay did not, however, contribute to any permanent disability.

13. The cumulative conduct of those individuals responsible for supervising claimant's activities while participating in the Gifted and Talented Program sponsored by Western Carolina University and the conduct of the personnel on duty in the infirmary at 6:15 p.m. on 6 July 1977 wanted for due care under the circumstances attendant herewith. This want of due care materially contributed to the seriousness of the injury requiring claimant's early departure from the program. The Achilles tendon was sprained during the fall on 2 July 1977. The sprain had developed, by reason of claimant's continued participation in the program, into a rupture by the evening of 6 July 1977. Claimant was nonetheless allowed to participate in a hike over mountainous terrain on 7 July 1977. He was much worse following this activity.

In its decision and order the full commission eliminated these two findings by the hearing commissioner and made the following finding in their place: "12. The defendant's employees named in plaintiff's pleading were guilty of no negligent conduct proximately causing damage to the minor, J. Michael Martinez."

The commission also found as a fact that Randy Turpin "was directly responsible for the welfare and conduct of the students assigned to him. Miss Gibbs supervised the activities of the various counselors." Plaintiff was on Randy Turpin's hall. Both Randy Turpin and Miss Gibbs undertook to care for and supervise the students assigned to them, including the plaintiff herein. We hold that the commission's finding that "the defendant's employees ... were guilty of no negligent conduct proximately causing damage to ... Martinez" is not sufficient to meet its duty to make specific findings as to each material fact upon which the rights of the parties depend.

Upon remand it is not for this Court to tell the commission what findings to make. *Cannady v. Gold Kist, supra.* However, for failure of the commission to make sufficient findings of fact to support its conclusions of law, the opinion appealed from is vacated and this cause is remanded to the Industrial Commission for proper findings of fact, conclusions of law and determination of the rights of the parties. *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 235 S.E. 2d 856 (1977).

Vacated and remanded.

Judges VAUGHN and WEBB concur.

IN THE MATTER OF DAVID L. COLLINS

No. 8021DC355

(Filed 21 October 1980)

1. **Insane Persons § 1.2– involuntary commitment – unconditional discharge – appeal not mooted**

Respondent's unconditional discharge did not moot his appeal from an involuntary commitment proceeding.

2. **Insane Persons § 1.2– involuntary commitment – review by appellate court**

The function of the appellate court in an appeal from an involuntary commitment order is to determine whether there was any competent evidence to support the facts recorded in the commitment order and whether the trial court's ultimate findings of mental illness and dangerousness to self or others were supported by the facts recorded in the order.

3. **Insane Persons § 1.2; Evidence § 50– expert psychiatric testimony**

A psychiatrist's "mental status" examination of respondent for approximately thirty minutes provided sufficient data to support the psychiatrist's expert opinion in an involuntary commitment proceeding and to remove his opinion from the realm of mere conjecture or speculation.

4. **Insane Persons § 1.2 – involuntary commitment – dangerousness to self or others – sufficiency of evidence**

In this involuntary commitment proceeding, the trial court's finding that respondent was dangerous to himself was supported by testimony that he deliberately cut himself with a knife and deliberately exposed himself to danger by sitting on the edge of a busy airport runway, and the trial court's finding that respondent was dangerous to others was supported by testimony that he kept an iron pipe and hatchet under his bed, that he required his mother through threats to sit in one chair and not move for two hours while he was screaming, shouting and cursing, and that he threatened to "bust" his mother's head if she called anyone.

APPEAL by respondent from *Keiger, Judge.* Order entered 21 December 1979 in District Court, FORSYTH County. Heard in the Court of Appeals 11 September 1980.

Respondent was taken into custody on 12 December 1979 following a determination by the Assistant Clerk of Superior Court that respondent was probably mentally ill and dangerous

to himself or others. This determination was based on a petition for the involuntary commitment of respondent initiated by James D. Collins, the respondent's father.

At the hearing held on 20 December 1979 the petitioner offered the testimony of two physicians and respondent's parents. Dr. Selwyn Rose, a psychiatrist at Reynolds Health Center, testified that based on his "mental status" examination of the respondent lasting approximately thirty minutes on 18 December 1979, Dr. Rose believed that respondent was suffering from paranoid schizophrenia and was dangerous to himself and others. Dr. Rose explained that he administered no psychological tests on the respondent and that he spoke with no one other than respondent to obtain respondent's medical history. Dr. Rose testified that his opinions were based on respondent's flattened affect[1], strange thinking, impaired judgment and lack of insight into his own problem. The respondent was dangerous according to Dr. Rose because unpredictability is one of the hallmarks of paranoid schizophrenia.

Dr. H. Ezell Branham, a psychiatrist, testified that in his opinion the respondent was dangerous to himself and others. Dr. Branham based his opinion on an examination of respondent at Reynolds Memorial Hospital on 13 December 1979 and respondent's history as related to Dr. Branham by a resident at the hospital. Dr. Branham recalled observing respondent's flatness of affect during the examination, but Dr. Branham could not supply specific instances of such behavior by respondent. Respondent's history included reports of respondent's belief that demons were chasing him and of respondent's difficulty sleeping.

Respondent's parents testified that respondent kept a long iron pipe and a hatchet under his bed and that respondent had intentionally cut himself on the hand with a knife a few weeks prior to 12 December. Respondent also had threatened his mother three days prior to 12 December and forced her to sit in

[1]"Affect" in the language of psychiatry is defined as follows: "1. Emotion regarded as an influence on the state of mind; the feeling of pleasantness or unpleasantness resulting from a particular stimulus. 2. Mood; feeling; the feeling associated with a particular type of emotion. A *flat* affect is a diminished outward emotional reaction to a stimulus or situation." 1 Schmidt's Attorneys' Dictionary of Medicine, p. A-98 (1980).

a chair for two hours. There was testimony that respondent had been observed in the woods with a rope around his neck and that respondent complained of demons and of feeling that his bones were being pulled out. His parents testified as to other recent episodes of erratic or irrational behavior.

Respondent's evidence tended to show that he had never actually struck anyone and that he had been generally cooperative with his parents. Respondent also offered testimony in explanation of the incidents and events testified to by his parents. On cross-examination respondent testified that the demons that occasionally attacked him were "brutally cruel" and that they gave him no peace.

After hearing the evidence the trial judge issued the following order for involuntary commitment.

> The Court finds as fact from clear, cogent and convincing evidence that the respondent is mentally ill and dangerous to himself and to others;
>
> The facts supporting such finding are as follows: Within the recent past the person has acted in such manner as to evidence that he would be unable without care, supervision and the continued assistance of others not otherwise available, to exercise self-control, judgment and discretion in the conduct of his daily responsibilities and social relations; satisfy his need for nourishment, personal or medical care, shelter or self-protection and safety; and that there is a reasonable probability of serious physical debilitation to him within the near future unless adequate treatment is afforded.
>
> Within the recent past the respondent has threatened suicide and threatened his mother with harm ....

In the order of commitment, the trial judge also recorded and found as supporting facts the testimony of petitioner's witnesses detailed above. The order provided that respondent be involuntarily committed as an in-patient at Umstead Hospital for a period not to exceed ninety days. Respondent appeals from this order challenging the sufficiency of the evidence to support the trial judge's findings that respondent was mentally ill and dangerous to himself and to others.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Nonnie F. Midgette, for the State.

Robert F. Johnson for the respondent appellant.

WELLS, Judge.

[1] We note at the outset that respondent's unconditional discharge on 8 January 1980 does not moot this appeal. *In re Hatley*, 291 N.C. 693, 694-95, 231 S.E. 2d 633, 634-35 (1977); *In re Mackie*, 36 N.C. App. 638, 244 S.E. 2d 450 (1978).

To enter the commitment order the trial court was required to ultimately find two distinct facts, *i.e.*, that the respondent was mentally ill and was dangerous to himself or to others. G.S. 122-58.1; *see In re Doty*, 38 N.C. App. 233, 234, 247 S.E. 2d 628, 629 (1978). The trial court must determine that each finding is supported by clear, cogent and convincing evidence. G.S. 122-58.7(i). In its order the trial court must record the facts upon which its ultimate findings are based. *Id.; In re Jacobs*, 38 N.C. App. 573, 575, 248 S.E. 2d 448, 449 (1978).

[2] On appeal of a commitment order our function is to determine whether there was *any* competent evidence to support the "facts" recorded in the commitment order and whether the trial court's ultimate findings of mental illness and dangerous to self or others were supported by the "facts" recorded in the order. *In re Underwood*, 38 N.C. App. 344, 347-48, 247 S.E. 2d 778, 781 (1978); *In re Hogan*, 32 N.C. App. 429, 433, 232 S.E. 2d 492, 494 (1977). We do not consider whether the evidence of respondent's mental illness and dangerousness was clear, cogent and convincing. It is for the trier of fact to determine whether the competent evidence offered in a particular case met the burden of proof. *In re Underwood, supra*, at 347, 247 S.E. 2d at 781.

In the case *sub judice*, respondent contends that some of the evidence offered by petitioner was incompetent and that the remaining competent evidence was insufficient to support the facts recorded in the commitment order. Respondent also contends that the recorded facts were insufficient to justify the ultimate findings of respondent's mental illness and dangerousness. We disagree with both contentions.

Respondent first challenges the competency of the opinion evidence offered by petitioner's two expert witnesses, objecting

to such expert witness testimony on two grounds. First respondent correctly states that competent expert testimony must be based on sufficient data and not mere conjecture or speculation. *Dean v. Coach Co.*, 287 N.C. 515, 522, 215 S.E. 2d 89, 94 (1975). Respondent also correctly argues that the premises underlying an expert's opinion must be made known to the trier of fact in order that the trier of fact may properly evaluate the opinion. *Schafer v. R.R.*, 266 N.C. 285, 288-89, 145 S.E. 2d 887, 890 (1966); *Service Co. v. Sales Co.*, 259 N.C. 400, 414, 131 S.E. 2d 9, 20 (1963). Thus respondent questions whether the short mental status examinations given to the respondent by each physician provided sufficient data to support the witnesses' expert opinions, and whether each physician's testimony adequately informed the trier of fact of that supporting data. In involuntary commitment proceedings our appellate courts have on occasion rejected psychiatric opinion evidence on both grounds mentioned above (lack of sufficient data on which to base an expert opinion, *In re Hatley, supra*, at 699; expert's stated premises fail to justify stated conclusion, *In re Hogan, supra*, at 434).

[3] We hold that Dr. Rose's interview with respondent, though brief, is adequate to remove his opinion from the realm of mere conjecture or speculation. The special value of expert testimony is the ability of the expert to draw inferences which the finder of fact is incompetent to draw, McCormick, Evidence § 13, p. 29 (2d ed. 1972), therefore the finder of fact cannot always be expected to fully understand the basis of the expert's inferences even if the expert testifies at great length. *See Rutherford v. Air Conditioning Co.*, 38 N.C. App. 630, 639, 248 S.E. 2d 887, 894 (1978). Psychiatric evidence should not be excluded merely because the basis for such inferences seems less than compelling to the trier of fact.

> The law must recognize that the usefulness of psychiatric evidence is not determined by the exactness or infallibility of the witness' science. Rather, it is measured by the probability that what he has to say offers more information and better comprehension of the human behavior which the law wishes to understand. The psychiatrist offers a hypothesis explaining a specific set of human thoughts, feelings, and actions. He then attaches values to the phenomena he describes: certain feelings are "normal," certain thoughts or actions are "pathological," cer-

tain behavior is "compulsive," other behavior is "free," etc. The legal usefulness of such hypotheses and values will depend less upon their scientific precision than upon their wisdom.

Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 Mich. L. Rev. 1335, 1341 (1965). It is for the trier of fact to determine the amount of wisdom in and the amount of weight to be given to the competent psychiatric evidence.

[4] We now address the question of whether the evidence supported the trial court's finding of fact that respondent was dangerous to himself and others. The statutory provisions as to this requisite finding have undergone recent changes. With the enactment of Chapter 1408 of the 1973 Session Laws, effective 12 June 1974, the General Assembly rewrote the pertinent provisions of Article 5A of Chapter 122 in pertinent part as follows:

> § 122-58.1. Declaration of policy. — It is the policy of the State that no person shall be committed to a mental health facility unless he is mentally ill or an inebriate and imminently dangerous to himself or others ....
>
> § 122-58.2. Definitions. — As used in this Article:
>
> . . .
>
> (c) The phrase 'dangerous to himself'[2] includes, but is not limited to, those mentally ill or inebriate persons who are unable to provide for their basic needs for food, clothing, or shelter ....
>
> . . . .
>
> § 122-58.7. District court hearing. —
>
> . . . .
>
> (i) To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others ....

[2]The 1973 Revision contains no definition of the term "dangerous to others."

The enactment of Chapter 915 of the 1979 Session Laws of the General Assembly completely rewrote G.S. 122-58.2, quoted below, to redefine the term "dangerous to himself," and to provide for the first time a statutory definition of the term "dangerous to others." The entire section as amended now provides as follows:

§ 122-58.2. Definitions. — As used in this Article:

(1) The phrase "dangerous to himself or others" when used in this Article is defined as follows:

a. "Dangerous to himself" shall mean that within the recent past:

1. The person has acted in such manner as to evidence:

I. That he would be unable without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and

II. That there is a reasonable probability of serious physical debilitation to him within the near future unless adequate treatment is afforded pursuant to this Article. A showing of behavior that is grossly irrational or of actions which the person is unable to control or of behavior that is grossly inappropriate to the situation or other evidence of severely impaired insight and judgment shall create a prima facie inference that the person is unable to care for himself; or

2. The person has attempted suicide or threatened suicide and that there is a reasonable probability of suicide unless

adequate treatment is afforded under this Article; or

3. The person has mutilated himself or attempted to mutilate himself and that there is a reasonable probability of serious self-mutilation unless adequate treatment is afforded under this Article.

b. "Dangerous to others" shall mean that within the recent past, the person has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another or has acted in such a manner as to create a substantial risk of serious bodily harm to another and that there is a reasonable probability that such conduct will be repeated.

By the same enactment, the General Assembly amended G.S. 122-58.1 and G.S. 122-58.7(i) to delete the word "imminently" in conjunction with the use of the word "dangerous". The present requirement, therefore, is for the District Court to find that the respondent is dangerous to himself and others; and the additional finding that the danger to himself or others is imminent, *see In re Hogan*, 32 N.C. App. 429, 232 S.E. 2d 492 (1977); *In re Salem*, 31 N.C. App. 57, 228 S.E. 2d 649 (1976); *In re Carter*, 25 N.C. App. 442, 213 S.E. 2d 409 (1975), is no longer required.

Having found that there was competent evidence to support the facts recorded in the order, we now consider and reject respondent's contention that the recorded facts do not support the ultimate findings of mental illness and dangerousness to self or others. The testimony of respondent's parents that he deliberately cut himself with a knife and deliberately exposed himself to danger by sitting on the edge of a busy airport runway supports the finding that respondent was dangerous to himself. His parents' testimony that he kept an iron pipe and a hatchet under his bed and that through threats required his mother to sit in one chair and not move for two hours while he was screaming, shouting, and cursing and that he threatened to "bust" his mother's head if she called anybody supports the finding that he was dangerous to others. We hold that the facts recorded in the order are clearly sufficient to support the trial judge's conclusions.

We hold that the order of the trial court must be and is Affirmed.

Judges ARNOLD and ERWIN concur.

FRANCES MADDOX v. COLONIAL LIFE AND ACCIDENT INSURANCE COMPANY

No. 8030DC411

(Filed 21 October 1980)

Insurance §52– selected risk accident policy – shooting self-inflicted – recovery reduced to one-fifth

In an action to recover the face amount of a selected risk accident policy, the trial court erred in entering summary judgment for plaintiff beneficiary where the policy in question included a suicide exclusion and a reduction clause to one-fifth of the amount otherwise payable for death resulting from "shooting self-inflicted"; deceased died from an unintentional gunshot wound; the term "shooting self-inflicted" included an accidental shooting of insured by himself; and the plaintiff beneficiary was therefore entitled to only one-fifth of the face amount of the policy.

Judge HILL dissenting.

APPEAL by defendant from *McDarris, Judge.* Judgment entered 5 February 1980 in District Court, SWAIN County. Heard in the Court of Appeals 28 August 1980, at Waynesville, North Carolina.

Defendant issued a "Master Select Risk Accident Policy," insuring Carter Maddox for loss of life. The policy was in effect at the time of Maddox's death on 26 October 1977.

The deceased and his son, Keith Maddox, were at a water tank or reservoir, where they were doing some work. Keith was carrying a .41-caliber magnum Ruger pistol in a holster. When he started to work at the tank, Keith handed the holstered pistol to Carter Maddox. Thereafter, Keith heard a sound, looked around and saw his father sitting or lying on a bank. He had been wounded by a bullet from the pistol. The pistol was found a short distance from Carter Maddox with the muzzle end of the holster torn out by the discharge of the pistol. Carter Maddox died as the result of the gunshot wound. No other

persons were in the vicinity at the time of the incident. The parties agree that the pistol could fire if it were dropped on the ground while holstered.

Plaintiff contended that upon this evidence she was entitled to receive the face amount of the policy, $3,750. Defendant contends that plaintiff's claim is governed by the reduction clause of the policy, and that plaintiff is only entitled to recover $750. Defendant tenders that amount.

Both plaintiff and defendant filed motions for summary judgment. After hearing, the court denied defendant's motion and entered summary judgment for plaintiff in the sum of $3,750. Defendant appeals.

Holt, Haire & Bridgers, by R. Phillip Haire, for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and James M. Stanley, Jr., for defendant appellant.

MARTIN (Harry C.), Judge.

This appeal requires us to construe the insurance contract in question. In so doing, any ambiguity arising from the policy must be resolved in favor of the insured and against the company that drafted the instrument. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970). An ambiguity arises in a policy when "in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend." *Id.* at 354, 172 S.E. 2d at 522. The meaning of language used in an insurance policy is a question of law. *Trust Co., supra.* The policy must be construed in its entirety and resort may be had to other portions of the policy in order to determine the meaning of a specific phrase or section. The policy should be so construed as to harmonize it as a whole, where possible. *Id.* An insurance contract is to be interpreted in the same manner as contracts generally, and unambiguous terms are to be given their usual, ordinary and commonly accepted meanings. *Motor Co. v. Insurance Co.*, 233 N.C. 251, 63 S.E. 2d 538 (1951); *Brown v. Insurance Co.*, 35 N.C. App. 256, 241 S.E. 2d 87 (1978). *See generally* 43 Am. Jur. 2d Insurance § 263 (1969).

The portions of the policy requiring resolution are:

EXCEPTIONS AND REDUCTIONS

The insurance under this policy shall not cover: (a) suicide while sane or insane; . . .

. . . .

For death covered by the provisions of this policy, where it results from . . . shooting self-inflicted, . . . the amount payable shall be one-fifth the amount otherwise payable for accidental death . . . .

We do not find any ambiguity in the provisions of the policy that are in dispute. Nor are they irreconcilable. To the contrary, we find the two provisions to be in harmony. Bear in mind that this is a selected risk policy. Deaths resulting from suicide create a higher risk to the insurer and therefore are excluded from coverage. Additionally, certain other risks that are covered, such as gunshot wounds, are deemed by the company to be greater than others; the amount payable for death from these causes is one-fifth of the amount otherwise payable for accidental death.

Clearly, there are only two ways that one can shoot oneself with a pistol, causing death: (1) intentionally, that is, suicide, and (2) accidentally. Under the provisions set out above, where the shooting is intentional the policy does not afford any coverage. Where the shooting is accidental, the award is reduced to one-fifth of the amount otherwise payable.

Counsel for plaintiff would have us adopt the view that the phrase "shooting self-inflicted," in the above reduction provision, applies only to intentional shootings by the insured. To do so would negate the suicide clause and create an ambiguity between the two provisions. We refuse to adopt this reasoning.

Plaintiff relies upon *Lynch v. Mutual Life Ins. Co.* of New York, 159 Pa. Super. Ct. 488, 48 A. 2d 877 (1946), and *National Security Insurance Co. v. Ingalls*, 56 Ala. App. 498, 323 So. 2d 384 (1975). In *Ingalls* the Alabama court in interpreting the phrase "shooting accidentally self-inflicted" held it meant "accidentally shooting oneself." If the injury was caused in that manner, plaintiff could only recover twenty-five percent of the amount otherwise payable. The court held that the injury to plaintiff was caused by a cotton bar falling on a shotgun in his auto-

mobile, causing it to discharge, and that this was not "accidentally shooting oneself" and therefore plaintiff's claim was not subject to the reduction clause. The Alabama court further stated that to "shoot oneself" connoted that the "injury results from direct, immediate, and conscious employment of a firearm by the victim," thus distinguishing Ingalls's injury in which he did not have the shotgun in his hand. 323 So. 2d at 386. Although *Ingalls* was not concerned with the reconciliation of a suicide provision with a reduction provision, our result is consistent with the Alabama court's finding that a "shooting accidentally self-inflicted" means "accidentally shooting oneself." We do not find *Ingalls* helpful to plaintiff's position.

In *Lynch* the court was concerned with an exclusion for "self-inflicted injury" and held it meant one that the insured willed or intended. The court was applying the exclusion to the question whether chronic alcoholism was a self-inflicted injury. In affirming the judgment for the defendant insurance company, the court held if the *result* (alcoholism) was intended, it was a self-inflicted injury, whereas in our case we are concerned with whether the *event* that caused the result was intentional or accidental. The exclusion in *Lynch* is more similar to the suicide exclusion in our case than the reduction provision. Again, *Lynch* was not concerned with the relation of a suicide provision and a reduction clause and we do not find it persuasive or helpful. Nor do we find *Parker v. Ins. Co.*, 188 N.C. 403, 125 S.E. 6, 39 A.L.R. 1085 (1924), analogous. There the Court was concerned with construing a suicide provision as to whether accidental death at the hand of the insured was included in the meaning of death by self-destruction.

Although we have not found any North Carolina cases directly in point, our holding is in accord with decisions in other jurisdictions. *Colonial Life & Acc. Ins. Co. v. Cook*, 374 So. 2d 1288 (Miss. 1979), involved a policy with a reduction clause identical to the one sub judice and issued by the same company. Deceased was getting into his truck with a pistol tucked into his belt. The gun discharged, fatally wounding him. There was no other evidence or contention as to cause of death. While the court did not analyze the policy with respect to the suicide and reduction clauses, it held plaintiff was only entitled to one-fifth of the amount otherwise payable under the circumstances of the case and the express terms of the policy.

In *Lemmon v. Massachusetts Protective Ass'n*, 53 F. 2d 255 (N.D. Okla. 1931), the court was concerned with a policy containing a suicide exclusion and a reduction clause to one-fifth of the amount otherwise payable for death resulting from "shooting self-inflicted." Deceased died as a result of an unintentional gunshot wound. The court held the term "shooting self-inflicted" included an accidental shooting of insured by himself and affirmed the award of damages of one-fifth the amount otherwise payable. The court analyzed the policy with respect to the suicide and reduction clauses, held they were plain and unambiguous, and as such, it was the duty of the court to carry out the contract as actually made by the parties.

We find both *Cook* and *Lemmon* to be indistinguishable from the case at bar and strong authority in accord with our holding. The trial court erred in denying defendant's motion for summary judgment and in granting plaintiff's motion. The actions of the trial court are reversed and the case is remanded to the District Court of Swain County for the entry of summary judgment in favor of defendant.

Reversed and remanded.

Judge CLARK concurs.

Judge HILL dissents.

Judge HILL dissenting.

I dissent from the position taken by the majority. The trial court's action denying defendant's motion for summary judgment and entering summary judgment for plaintiff should be affirmed. Like the majority, I believe it is clear that "there are only two ways that one can shoot oneself with a pistol, causing death ...." A person can shoot himself intentionally; that is, commit suicide. A person can also self-inflict a gunshot wound so that the result — death — is an accident, although not due to accidental means. However, in a situation where no third party is involved, there is still a third way a person can die from a gunshot wound. A person can die from an accidentally inflicted gunshot wound. *See Ingalls, supra*, at p. 385.

Unlike the majority, I find the reasoning in *Ingalls* to be helpful. It does not concern me that the case only deals with a reduction clause because, given the reasoning set forth in *Ing-*

alls, the clauses in the case sub judice would be consistent with each other.

The *Ingalls* court states at p. 386 that "[a]n injury is 'self-inflicted' only when the insured wills it or intends to cause it." "[T]hat which is unexpected and unintended, happening by chance" is "accidental." *Id.* p. 386. As the majority correctly points out, recovery was not reduced in *Ingalls* because the injury, "while accidental, was not self-inflicted." Injury did not result from the "direct and knowing employment of a firearm, but rather from the inadvertent application of an intervening force ...." *Id.* p. 386.

Like the majority, I believe the policy in the instant case makes it clear that where death results from suicide, coverage is excluded. Like the majority, I feel compelled to harmonize the exclusion and reduction clauses. Unlike the majority, I do not believe that, under the terms of the policy, "[w]here the shooting is accidental [coverage] is reduced ...."

The policy states that it "provides indemnity for loss of life ... caused by bodily injuries effected through accidental means" except as limited by the terms of the policy. *Only* when the accidental death is caused by a self-inflicted shooting would coverage in this case be reduced.

The evidence is clear. Carter Maddox died as the result of a gunshot wound. The defendant has not shown, however, that the wound was self-inflicted; and, in view of the fact that the pistol was still holstered when it discharged, I believe it is clear that the pistol discharged by accident.

I believe it is clear that Carter Maddox died accidentally and that his death did not result from a "direct and knowing employment of a firearm." *Id.* p. 386. The policy must be construed in its entirety and summary judgment for plaintiff affirmed.

State v. Wade

STATE OF NORTH CAROLINA v. CARLOS RICHARD WADE, JR.

No. 8012SC391

(Filed 21 October 1980)

1. **Criminal Law § 118.1– defendant's contentions not stated by court – instructions proper**

There was no merit to defendant's contention that the trial court erred in stating the contentions of the State without stating the contentions of defendant, since defendant did not object to the charge during the course of the trial; the trial judge did not give all the contentions of the State nor did he recapitulate all the evidence of the State; and there was no evidence favorable to the nontestifying defendant which would require an instruction thereon.

2. **Rape § 6.1– first degree rape charged – assault with intent to rape properly submitted to jury**

In a prosecution of defendant for the first degree rape of two people, the trial court did not err in submitting the offense of assault with intent to commit rape to the jury, since there was evidence of the lesser included offense, and there was no reasonable possibility that a verdict of not guilty would have been returned had the judge failed to instruct on the lesser included offense.

3. **Rape § 6– rape of two victims – instructions not ambiguous**

There was no merit to defendant's contention that the trial court's instructions in a rape prosecution were confusing, and there was no language which would suggest that the jury should find defendant guilty of rape of both victims if he was found guilty of raping one of the victims.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 29 November 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 17 September 1980.

Defendant was charged in two bills of indictment, to wit: in Case No. 79CRS36555, defendant was charged with the offense of first-degree rape of one Catherine Thaggard, and in Case No. 79CRS36556, defendant was also charged with the offense of first-degree rape of one Sue Carol Thaggard. Defendant was found guilty of assault with intent to commit rape of Catherine Thaggard and guilty of second-degree rape of Sue Carol Thaggard.

The State's evidence tended to show that the prosecuting witnesses, Sue Carol and Catherine Thaggard, are sisters, ages eighteen and sixteen years. On Saturday, 4 August 1979, Sue Carol and Catherine were visiting their older sister, Emma, at

her apartment in Fayetteville. Sometime after midnight, the defendant, who had previously dated Emma Thaggard, arrived at the apartment. After about an hour, defendant went into Emma's bedroom and lay on her bed. Emma could not get defendant to leave her apartment, so Sue Carol and Catherine slept in the living room. About 6:00 a.m., Emma left for work. Emma and a cousin, Charles Whitted, who drove her to her job at a nursing home, were able to persuade defendant to leave the apartment at the same time they were leaving. However, defendant returned to the apartment within a few minutes and asked Sue Carol and Catherine to let him in the apartment to look for his keys. Once inside the apartment, defendant drew a knife and forced the sisters to go into the bedroom and undress. He first forced Sue Carol to have sexual intercourse while he lay on the bed. He then told Catherine to assume the same position as her sister.

Defendant then left the apartment after threatening to harm the sisters if they told anyone about the incident. During the incident, Randy Herring, a friend of Sue Carol, was asleep on a couch in the living room. The sisters awakened him approximately one hour after the defendant left. The sisters returned to their home, at which time Sue Carol told her mother that they had been raped. However, the police were not called until the following Friday when Emma heard of the alleged rapes from Sue Carol and informed the police. Neither girl was examined by a doctor.

Defendant did not offer any evidence, and from a consolidated judgment of active imprisonment of not less than seven nor more than twenty-eight years, defendant appealed.

Attorney General Edmisten, by Associate Attorney Jane P. Gray and Deputy Attorney General William W. Melvin, for the State.

James D. Little, for defendant appellant.

ERWIN, Judge.

Defendant presents three assignments of error with reference to the charge of the trial court to the jury: (1) The court erred in stating the contentions of the State but failed to state the contentions of defendant. (2) The court erred in instructing the jury as to the lesser included offense of assault with intent

to commit rape. (3) The court erred by giving confusing instructions. We do not agree with defendant and find no prejudicial error in his trial.

Statement of Contentions

[1] The record does not reveal any objections to the charge given during the course of the trial. Our general rule is that objections to the charge in reviewing and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise, they are deemed to have been waived and will not be considered on appeal. *State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1978); *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968). The question comes as to whether or not the additional rule applies in the case *sub judice;* that is, where the trial judge in his charge states fully the contentions of the State but fails to give any contentions of the defendant. In that event, the party whose contentions have been omitted is not required to object or otherwise bring the omissions to the attention of the trial court. *State v. Hewett, supra; State v. Crawford*, 261 N.C. 658, 135 S.E. 2d 652 (1964).

The court instructed the jury, *inter alia:*

> "In this case the State has offered evidence that in substance tends to show that early on the morning of August the 5th of this year, the defendant, Carlos Richard Wade, Jr., threatened the life of Catherine Thaggard and Sue Carol Thaggard with a knife which has been described as I recall the testimony about so long (indicating) with a brown handle and with a case. That by the use or threatened use of that weapon, he induced Sue Carol Thaggard to engage in the act of sexual intercourse with him and he attempted to require Catherine Thaggard to have intercourse with him but according to her testimony only a small amount of penetration was accomplished and that the act of intercourse was not in fact completed.
>
> DEFENDANT'S EXCEPTION #1
>
> There is a great deal of other evidence offered by the State relating to the various events of this evening but I think the evidence which I have recited is sufficient for the purposes of these instructions to you."

The record is clear that Judge Bailey did not give all the contentions of the State nor did he recapitulate all the evidence of the State. We hold that defendant has waived his right to challenge the instructions by his failure to object at trial. In *State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979), our Supreme Court held that where the defendant did not testify as in the case *sub judice*, but where certain evidence was brought out on cross-examination which tended to exculpate defendant, and where the State's evidence itself tended to raise inferences favorable to defendant, the trial court committed error in its instructions where it failed to state any of the evidence favorable to defendant to the extent necessary to explain the application of the law thereto.

Defendant contends that the following evidence is favorable to him: (1) Witness Randy Herring had spent the entire night from about 12:00 midnight or 1:00 a.m. on the couch beside the door leading to the bedroom where the alleged rapes occurred. (2) There was no medical evidence offered. (3) Neither victim mentioned the alleged rape to Randy Herring, Charlie Whitted, Jr., her grandmother, or her aunt on 5 August 1979, the date of the events in question. Randy Herring testified:

"When I woke up, Sue and Catherine were both calling me.

They did not shake me to wake me up, they were just standing in the door calling me, but they said they had threw some water on me at first. When I woke up they were standing in the door and neither one of them said anything to me at that point about anything that had happened. I'd say that the first time either one of them told me anything about what had happened was about four weeks or five."

Charlie Whitted, Jr. testified:

"They came over later on around about 9:30 or 10, something like that and woke me up and I took them back, dropped them off at my aunt's house and went home. They did not tell me anything about what had happened to them.

... I could not tell that there was any difference in them than they looked the night before. They just didn't say nothing when we was riding; they did not say anything about Carlos or Randy."

The reasonable inference from the above evidence does not rise to the status of a defense to the offenses charged. This evidence as other evidence was for the jury to consider in deciding on defendant's guilt or innocence. The court instructed the jury:

> "You should not consider that I have mentioned the evidence to you for the purpose of refreshing your recollection. I have not. Should you find that your recollection of what the evidence indicates was differs [sic] from what either I or the lawyers have stated to you, you should disregard what we have said about the evidence and be guided in your deliberations solely by your own recollection of what the evidence in the case was. I have not made any attempt as I stated to recite all the evidence. You should not consider by that fact that all the evidence is not important. You should consider all of the evidence that you have heard at least to the extent of deciding what evidence you believe and what the importance of that evidence is in the light of the other believable evidence."

We find no merit in this contention of defendant.

The Lesser Included Offense

[2] Defendant contends that "[t]here was no evidence whatsoever presented that [defendant] committed the offense of assault with intent to commit rape. The evidence of the State indicated that he was guilty of either first or second degree rape or not guilty."

The determinative factor for charging the jury on a lesser included offense is the presence of evidence offered at trial from which a jury could find that such a crime of a lesser degree was committed.

In *State v. Roy* and *State v. Slate*, 233 N.C. 558, 559, 64 S.E. 2d 840, 841 (1951), our Supreme Court held:

> "The defendant Roy contends that since all the evidence pointed toward the crime of rape, and the State not having asked for a conviction of that crime, that his motion for nonsuit on the charge of assault with intent to commit rape should have been allowed. The contention is without merit. For, it is well settled that an indictment for an

offense includes all the lesser degrees of the same crime. *S. v. Moore*, 227 N.C. 326, 42 S.E. 2d 84; *S. v. Gay*, 224 N.C. 141, 29 S.E. 2d 458; *S. v. Jones*, 222 N.C. 37, 21 S.E. 2d 812; *S. v. High*, 215 N.C. 244, 1 S.E. 2d 563; *S. v. Williams*, 185 N.C. 685, 116 S.E. 736; *S. v. Hill*, 181 N.C. 558, 107 S.E. 140. And although all the evidence may point to the commission of the graver crime charged in a bill of indictment, the jury's verdict for an offense of a lesser degree will not be disturbed, since it is favorable to the defendant. G.S. 15-169; *S. v. Bentley*, 223 N.C. 563, 27 S.E. 2d 738; *S. v. Harvey*, 228 N.C. 62, 44 S.E. 2d 472; *S. v. Matthews*, 231 N.C. 617, 58 S.E. 2d 625."

Relying on *State v. Ray*, 299 N.C. 151, 261 S.E. 2d 789 (1979), defendant contends that in his case, there existed a reasonable possibility that he would have been acquitted had not the lesser offense been erroneously submitted, the error is prejudicial, and he is entitled to appellate relief.

Catherine Thaggard testified:

"Nothing happened after I got up in position on top of the defendant, Carlos Wade. He was forcing hisself [sic] into me. When I say he was forcing himself into me I mean he was up there forcing his penis into my private. He actually forced his penis a little into my vagina or private part and that is when I started crying."

We hold the evidence supported the verdict returned, and there was no reasonable possibility that a verdict of not guilty would have been returned had the judge failed to instruct on the lesser included offense. If there were error from the instruction complained of, such was favorable to defendant and harmless.

Confusing Instructions

[3] In this contention, defendant states that the court's instructions considered as a whole are confusing, thereby denying him his right to due process of law and equal protection of the law.

In reviewing the charge of a trial court, this Court must read and consider the charge as a whole. When a charge presents the law fairly and clearly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous.

State v. Hall, 267 N.C. 90, 147 S.E. 2d 548 (1966); *State v. Exum*, 138 N.C. 599, 50 S.E. 283 (1905). Defendant calls our attention to *State v. Patterson*, 39 N.C. App. 243, 249 S.E. 2d 833 (1978), which he contends is authority which would require us to reverse the judgment entered by the trial court and award defendant a new trial. We do not agree. In *Patterson*, the charge in question was susceptible to the construction that the jury should convict all defendants if it found one of them guilty. In the case *sub judice*, only one defendant was tried; there were two victims who alleged that they had been raped. We do not find ambiguity in the charge when considered as a whole, nor do we find any language that would suggest that the jury should find defendant guilty of rape of both victims if he was found guilty of raping one of the victims. We hold this assignment of error to be without merit.

In the trial of defendant, we find

No error.

Judges ARNOLD and WELLS concur.

MARTHA A. VESTAL v. TOM R. VESTAL

No 8028SC430

(Filed 21 October 1980)

Evidence § 32.2; Husband and Wife § 11.2 – separation agreement – provision not ambiguous – parol evidence inadmissible

A provision of a separation agreement in which defendant husband agreed "at the time of divorce decree to execute a document assigning his interest to said household" to plaintiff wife was unambiguous and required defendant to transfer a fee simple estate to the wife; therefore, parol evidence was not admissible to show that the parties intended the assignment of plaintiff's interest in the home to be in trust for the benefit of their child where it appears from the terms of the separation agreement that it was the intent of both parties for the instrument to represent fully their mutual intentions regarding the home.

APPEAL by defendant from *Thornburg, Judge*. Judgment entered 25 March 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 28 August 1980, at Waynesville, North Carolina.

Plaintiff, Martha A. Vestal, brings this action seeking to compel defendant, Tom R. Vestal, to convey to plaintiff, in fee simple, all his interest in a home acquired by the parties as husband and wife.

Plaintiff and defendant were married 14 April 1962. They entered into and signed a separation agreement dated 1 September 1974. The document was prepared by defendant, who is an attorney.

The separation agreement provides the following:

> (1) Martha shall have custody and care of their one child John Wallace and dog Max.
>
> (2) Martha shall have the right of residence in the household at 37 Brookcliff Drive during the period of separation and Tom further agrees at the time of divorce decree to execute a document assigning his interest to said household to Martha . . . Martha agrees to maintain the household and belongings therein in good condition excepting for normal wear and tear at her own expense and/or with the funds to be provided by Tom hereinafter set forth.
>
> . . .
>
> (3) Tom shall make so long as able and until the decree of divorce a monthly payment to Martha in the amount of $400.00 on or about the third day of each month, said monies to be applied by Martha to the care and welfare of John Wallace and Max, including day care when necessary, and further toward all payments of outstanding accounts due on the residence and household at 37 Brookcliff Drive, including mortgage notes and escrow payments, home insurance, utilities and normal upkeep.
>
> (4) Each party shall be responsible hereafter only for debts incurred by that party . . ..
>
> (5) Tom shall have reasonable visitation rights, including at least once each two weeks.

The agreement also allocated certain items of personal property to defendant upon decree of divorce.

Plaintiff was granted an absolute divorce from defendant on 12 October 1979. She then demanded that defendant execute

and deliver a deed to her, pursuant to the separation agreement. Defendant refused to convey his interest in the property in fee simple, alleging that the parties' intention was to transfer the home in trust for the benefit of their child. Plaintiff began this action on 5 December 1979 and later moved for summary judgment. Upon hearing, the trial court granted plaintiff's motion and ordered all defendant's interest in the property to be transferred to plaintiff.

Defendant appeals from the entry of summary judgment.

Russell & Greene, by William E. Greene, for plaintiff appellee.

John A. Powell for defendant appellant.

MARTIN (Harry C.), Judge.

In this appeal we are asked to interpret part of paragraph 2 of the separation agreement, set out above. In that paragraph defendant agreed to "execute a document assigning his interest to said household" to plaintiff. Defendant contends that this language is ambiguous and that the parties intended the assignment of his interest to be in trust for the benefit of the child, John Wallace. Defendant assigns as error the trial court's conclusion of law that there is no genuine issue as to any material fact and the entry of summary judgment. He argues that his introduction of parol evidence, without objection by plaintiff, as to the meaning of the disputed term was sufficient to preclude summary judgment. We cannot agree.

In his pleadings defendant alleged that "[i]t was at no time the intention of either the Plaintiff or the Defendant that the document ... be considered a total integration of all agreements by and between the parties ...." The evidence indicates that the separation agreement was a product of many discussions and negotiations between plaintiff and defendant. With respect to the division of property and the responsibility for maintenance of the home and care of the child the instrument clearly demonstrates that the parties intended the wife to retain full control over the household pending divorce. Defendant's only duty was to contribute $400 per month toward John Wallace's care and maintenance of the home. His obligation was to last only until a divorce decree was obtained. Upon divorce defendant was given the right to remove certain items of per-

sonal property. This implies that he was to have no more involvement in the management of the household and that plaintiff was to be completely and solely responsible thereafter. We must conclude from the terms of the agreement that both parties meant for the instrument to fully represent their mutual intentions regarding the home.

Because the document appears to be complete, defendant may not introduce parol evidence that adds to or contradicts the express terms.

> It appears to be well settled in this jurisdiction that parol testimony of prior or contemporaneous negotiations or conversations inconsistent with a written contract entered into between the parties, or which tends to substitute a new or different contract for the one evidenced by the writing, is incompetent. 2 Stansbury's N.C. Evidence § 253 (Brandis Rev. 1973). This rule applies where the writing totally integrates all the terms of a contract or supersedes all other agreements relating to the transaction. The rule is otherwise where it is shown that the writing is not a full integration of the terms of the contract. The terms not included in the writing may then be shown by parol. *Id.*, § 252.

Craig v. Kessing, 297 N.C. 32, 34-35, 253 S.E. 2d 264, 265-66 (1979). Defendant relies on *Beal v. Supply Co.*, 36 N.C. App. 505, 244 S.E. 2d 463 (1978), as authority for allowing his parol evidence to be accepted as competent to prove an agreement to create a trust, thus precluding summary judgment against him. In *Beal*, this Court was construing an employment contract, which the parties agreed was only partially contained in the writing. Here we have no such concurrence between plaintiff and defendant. In *Beal*, we stated: "When a contract is reduced to writing, parol evidence cannot vary its terms. When a contract is partially parol and partially written, parol evidence may prove parol terms." *Id.* at 508, 244 S.E. 2d at 465. We are not persuaded by defendant's contention that the parties' total agreement concerning the transfer of the home was not reduced to writing. Defendant may not add to the written document.

Although parol evidence may not be allowed to vary, add to, or contradict an integrated written instrument, *Emerson v. Carras*, 33 N.C. App. 91, 234 S.E. 2d 642 (1977), an ambiguous

term may be explained or construed with the aid of parol evidence. *Medders v. Medders*, 40 N.C. App. 681, 254 S.E. 2d 44 (1979). *See* 40 A.L.R. 3d 1384 (1971). The document in question makes no mention of transfer to plaintiff in any form other than a legal estate in fee simple. The law favors creation of a fee simple estate unless it is clearly shown a lesser estate was intended. *See* N.C. Gen. Stat. 39-1. It is true, as defendant points out in his brief, that a trust may be created by oral agreement. *Thompson v. Davis*, 223 N.C. 792, 28 S.E. 2d 556 (1944). To prove the existence of a parol trust, however, the evidence must be "clear, strong and convincing — that a 'mere preponderance' of the evidence is not sufficient to establish a parol trust." *Paul v. Neece*, 244 N.C. 565, 568, 94 S.E. 2d 596, 599 (1956). *See also Wells v. Dickens*, 274 N.C. 203, 162 S.E. 2d 552 (1968). No such evidence is apparent in this case; we hold that the phrase "to execute a document assigning his interest" is unambiguous on its face.

An apparently precise term still may be latently ambiguous when "by reason of extraneous facts the definite and certain application of those words is found impracticable." *Miller v. Green*, 183 N.C. 652, 654, 112 S.E. 417, 418 (1922). In such cases "preliminary negotiations and surrounding circumstances may be considered for the purpose of determining what the parties intended — *i.e.*, for the purpose of ascertaining in what sense they used the ambiguous language, but not for the purpose of contradicting the written contract or varying its terms." *Id.* at 654, 112 S.E. at 417-18. *See also Emerson, supra.*

In *Rhoades v. Rhoades*, 44 N.C. App. 43, 260 S.E. 2d 151 (1979), we addressed a similar issue in the interpretation of a separation agreement. In *Rhoades* the document contained the following paragraph:

> 9. The parties hereto agree that Husband shall pay to the Wife the sum of $350.00 per month as child support for the two minor children of the marriage; said payments to continue until the two minor children reach the age of eighteen (18) years.

Id. at 43, 260 S.E. 2d at 152. Upon the older child's attaining the age of eighteen the husband attempted to reduce the monthly payment by one-half. Because the agreement did not allocate any definite part of the payment to each child, this Court held: "[T]he language of paragraph 9 of the separation agreement

executed by the parties is plain and unambiguous and its effect is a question of law for this Court. We further hold it constitutes an absolute obligation . . .." *Id.* at 45, 260 S.E. 2d at 153. In view of the total separation agreement in the case at bar, we hold that *Rhoades* controls and defendant may not rely on parol evidence to show that a conveyance in trust was intended.

Further supporting our decision is the fact that the document in dispute was prepared by defendant. "It is a rule of contracts that in case of disputed items, the interpretation of the contract will be inclined against the person who drafted it." *Contracting Co. v. Ports Authority*, 284 N.C. 732, 738, 202 S.E. 2d 473, 476 (1974). Defendant is an attorney. He should be familiar with the language of the law. If he and plaintiff had intended a trust to be created at the time he prepared the separation agreement, he undoubtedly would have drafted it to so read.

There is no evidence of an agreement between plaintiff and defendant to create a trust. Defendant's affidavit specifically negates such an agreement, in that he states "there is a lack of understanding between Plaintiff and Defendant" concerning this issue. Defendant has offered only his own allegations of the parties' subjective intent. It is not the understanding or intent of one of the parties that controls the interpretation of a contract, but the agreement of both parties. *Lumber Co. v. Lumber Co.*, 137 N.C. 431, 49 S.E. 946 (1905); *Rhoades v. Rhoades, supra.* Under Rule 56(e) of the North Carolina Rules of Civil Procedure, we find that the entry of summary judgment was proper.

We affirm.

Judges CLARK and HILL concur.

Clark v. Burlington Industries

JESSE T. CLARK, EMPLOYEE, PLAINTIFF, v. BURLINGTON INDUSTRIES, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8010IC237

(Filed 21 October 1980)

1. **Master and Servant § 68– workers' compensation – pulmonary disease not compensable**

Evidence was sufficient to support the Industrial Commission's finding that plaintiff's pulmonary disease was not compensable under the Workers' Compensation Act where one doctor stated that plaintiff's bronchitis "may be job related although the heavy smoking in the past must be considered a major etiologic factor," and another doctor stated that there was no Monday exacerbation of plaintiff's symptoms.

2. **Master and Servant § 68– workers' compensation – employee not entitled to additional physical exam**

Plaintiff, who filed a claim under the Workers' Compensation Act for an alleged occupational disease resulting from exposure to cotton dust, was not entitled to an additional panel physical examination under G.S. 97-27(b), since that statute provides for an additional examination if there is a question as to the percentage of permanent disability, but that was not the question in this case.

APPEAL by plaintiff from order of North Carolina Industrial Commission entered 1 October 1979. Heard in the Court of Appeals 11 September 1980.

Plaintiff filed a claim under the Workers' Compensation Act for an alleged occupational disease resulting from exposure to cotton dust. Hearings were held before the Chairman of the Industrial Commission in Raleigh and before a Deputy Commissioner in Durham. The evidence showed that plaintiff was employed by Burlington Industries for approximately 37 years. He worked from 1934 until 1971 principally as a loom fixer in the weave room but "pretty infrequently" he also worked in the card room.

Plaintiff testified that he was almost 62 years of age at the time of the hearing and that he had smoked a "pack or a half a pack" of cigarettes a day since he was "a teenager." He quit for three years approximately 25 years ago "because [he] had a spot on [his] lungs," and he "had surgery as a result of that." He

also testified that he first noticed he had breathing problems three or four years before he retired.

Dr. Herbert O. Sieker, a member of the Industrial Commission's Textile Occupational Disease Panel testified, and by stipulation the Hearing Commissioner considered written reports from three other doctors. Dr. Sieker said in answer to a hypothetical question that plaintiff was disabled for work because of a chronic lung disease, and in his opinion, cotton dust was a factor contributing to his chronic obstructive lung disease. On cross-examination, he stated: "it is not uncommon to find persons with the same degree of lung impairment as Mr. Clark who have not been exposed to cotton dust, who have not worked in textile mills."

A letter from plaintiff's family physician, Dr. W.E. Adair, was introduced into evidence in which Dr. Adair stated that plaintiff was totally disabled "due to severe chronic obstructive pulmonary disease . . . . [Plaintiff's] history of cotton dust exposure" would "have to be considered as a causative factor."

A letter dated 13 January 1972 from Dr. Tryggvi Asmundsson of Duke University Medical Center was received in evidence. Dr. Asmundsson said plaintiff had chronic bronchitis, status post right upper lobectomy and right phrenic nerve crush for TB, peptic ulcer disease, mild hypertension, and nephrolithiasis; that plaintiff had no evidence of emphysema or classical byssinosis; and that his "bronchitis may be job related although the heavy smoking in the past must be considered a major etiologic factor."

Dr. Charles D. Williams, a member of the Industrial Commission's Textile Occupational Disease Panel, examined plaintiff on 28 January 1977. His report was introduced into evidence. In it he said: "[Plaintiff] gives the history of gradual onset of dyspnea on exertion which began about 3 yrs. prior to his retirement . . . . [T]here was no history of any Monday exacerbation of symptoms such as chest tightness, dyspnea, cough or wheezing." Dr. Williams listed chronic bronchitis and no evidence of byssinosis among his impressions and expressed no opinion as to whether the bronchitis was job related.

Chairman William H. Stephenson entered an opinion and award in which he found among others the following facts:

"9. Plaintiff does not have the disease byssinosis and does not suffer from any condition which has been proven to be due to causes and conditions which are characteristic of and peculiar to his particular trade, occupation, or employment.

10. Plaintiff is not suffering from an occupational disease."

Chairman Stephenson denied compensation. The Full Commission adopted the opinion and award of Chairman Stephenson with one dissent. Plaintiff appealed.

Hassell and Hudson, by Charles R. Hassell, Jr. for plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, by C. Ernest Simons, Jr., for defendant appellees.

WEBB, Judge.

[1] Plaintiff bases his claim for disability benefits on G.S. 97-53(13) and G.S. 97-52. G.S. 97-52 provides that a disablement from an occupational disease under G.S. 97-53 shall be treated as an accident under the Workers' Compensation Act. G.S. 97-53(13) defines an occupational disease as:

> Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

Finding of fact number nine is sufficient to support the conclusion that plaintiff's pulmonary disease is not compensable.

If from a reading of the whole record the evidence supports this finding of fact, we are bound by it. *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979) and *Moore v. Stevens & Co.*, 47 N.C. App. 744, 269 S.E. 2d 159 (1980). We hold the whole record does support this finding of fact. Dr. Asmundsson's statement that there is no evidence of byssinosis, that "[h]is bronchitis may be job related although the heavy smoking in the past must be considered a major etiologic factor" and the

report of Dr. Williams that there was no history of any Monday exacerbation of symptoms support this finding. The plaintiff has the burden of proving his claim is compensable. *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950). Although there is competent evidence to the contrary, we cannot hold that the Hearing Commissioner's finding of fact is not supported by the whole record.

[2] Plaintiff also assigns as error the denial of his motion for an additional panel physician examination. He contends he was entitled to such an examination under G.S. 97-27(b) which provides in part:

> (b) In those cases arising under this Article in which there is a question as to the percentage of permanent disability suffered by an employee, if any employee, required to submit to a physical examination under the provisions of subsection (a) is dissatisfied with such examination or the report thereof, he shall be entitled to have another examination by a duly qualified physician . . . designated by him and paid by the employer or the Industrial Commission . . . .

The order denying the plaintiff's motion held the plaintiff was examined pursuant to G.S. 97-89 which does not provide for examination by an additional physician. We do not believe it is helpful to the defendant whether he was examined pursuant to G.S. 97-27(b) or G.S. 97-89. G.S. 97-27(b) provides for an additional examination if there is a question as to the percentage of permanent disability. That is not the question in this case. G.S. 97-89 does not provide for an additional examination. This assignment of error is overruled.

Affirmed.

Judges VAUGHN and MARTIN (Robert M.) concur.

In re Frick

IN THE MATTER OF RUBY FRICK

No. 8010DC445

(Filed 21 October 1980)

Insane Persons § 1.2– involuntary commitment – dangerousness to self – sufficiency of findings

The trial court's determination in an involuntary commitment proceeding that respondent was dangerous to herself was supported by the court's findings, which in turn were supported by competent evidence, that respondent had no home or place to stay; in the past respondent had lived in her automobile except for nights spent in motel rooms with men she met in motel lounges; respondent was not able to say what she was going to do to make money in order to get a place to stay or to be able to eat; she exhibited a thought disorder and impaired judgment relating to plans for self-care; she exhibited a psychotic mood disorder with pressured speech, loose associations, tangential thinking, and labile emotions, often laughing or singing inappropriately and switching to crying; and, if released, respondent would become psychotically manic, would decompensate rapidly, and her psychiatric decompensation would likely lead to fights associated with prostitution and money.

APPEAL by respondent from *Bason, Judge.* Order entered 24 January 1980 in District Court, WAKE County. Heard in the Court of Appeals on 7 October 1980.

This is an appeal from an involuntary commitment proceeding held pursuant to G.S. § 122-58.7. After a hearing, Judge Bason made the following pertinent findings and conclusions:

> 1. Respondent is separated from her husband and her husband has custody of their children, living in their home in Albemarle.
>
> . . .
>
> 4. On arriving in Raleigh in July 1979, respondent began living in her automobile.
>
> 5. Respondent continued to live in her automobile except when occupying someone else's motel room in Raleigh, from July 1979, until she unlawfully returned to the premises of her husband and children, which caused her to be convicted on trespass charges and imprisoned at Women's Correctional Center for a little over one month shortly preceding her admission to the hospital. Respondent's

automobile was placed in storage in Albemarle where it remains to this date.

6. While living in her automobile in Raleigh respondent would, from time to time, frequent lounges at motels where she would meet men and go with them to their motel rooms to spend the night.

7. Respondent acknowledged that on one occasion after leaving prison while her automobile was still in storage in Albemarle, she went with a man from a lounge to his room for prostitution. Respondent stated in court, "I was forced to do this."

8. On that occasion respondent was to sell herself for $20.00. Respondent managed to get possession of the $20.00 and left the room. She denied performing the sexual act, but does not consider her conduct as stealing.

. . .

10. Immediately preceding respondent's admission to Dorothea Dix Hospital she was brought to the W.H. Trentman Mental Health Center in Raleigh where she was seen by Dr. Zarzar.

11. Respondent was not eligible for day hospital treatment because she had no place to stay, no home; and Dr. Zarzar initiated this proceeding for involuntary commitment with a petition.

12. At the time of admission to Dorothea Dix Hospital respondent was not able to say what she was going to do to make money in order to get a place to stay or to be able to eat. She had nowhere to go. She had no plans for where to go, other than back to her car (in storage) or to go back to her husband's house (where she was arrested for trespass).

13. At the time of admission to the hospital respondent exhibited a thought disorder and impaired judgment relating to plans for self care. She exhibited a psychotic mood disorder with pressured speech, loose associations, tangential thinking and labile emotions, often laughing or singing inappropriately and switching to crying.

14. Respondent suffers from manic depressive illness.

15. Respondent has been a patient at Dorothea Dix Hospital on three previous occasions.

. . .

18. Respondent would become psychotically manic if released. She would decompensate rapidly. Her psychiatric decompensation is likely to lead to fights associated with prostitution and money.

. . .

The Court concludes as a matter of law that respondent is dangerous to herself in that: (a) she would be unable without care, supervision and the continued assistance of others, not otherwise available, to exercise self-control, judgment and discretion in the conduct of her daily responsibilities and social relations, and unable to satisfy her need for nourishment, personal or medical care, shelter, self protection and safety; and (b) by reason of respondent's severely impaired insight and judgment there is a reasonable probability of serious physical debilitation to herself within the near future unless adequate treatment is afforded.

From an order committing respondent to Dorothea Dix Hospital for a period not exceeding ninety days, respondent appealed pursuant to G.S. § 122-58.9.

Attorney General Edmisten, by Associate Attorney Steven F. Bryant, for the State.

Dorothy E. Thompson, for the respondent appellant.

HEDRICK, Judge.

Respondent contends in her first assignment of error, based on Exceptions nos. 1, 2, and 3, that Findings of Fact nos. 7, 8, and 18 are not supported by the evidence. We disagree. At the hearing, respondent testified:

I'm talking about staying with people that I've met. Some of these are men. But in my book you have to accept charity where charity is offered. And if you can handle the situation, I feel like. I meet these men at the lounge. No, no I don't go for stuff like that but it's better than, if my car is in Albemarle, I was forced to do this.

Respondent further testified that on one occasion she was at Jonnie's Lounge, where

> there was this guy who kept wanting me to you know, but I said well if I'm not going to sleep anyway I might as well get up and walk somewhere else. Because this kind of thing I can't, well he had offered me twenty dollars so I just picked it up and carried it with me. If you want to call it stealing, I don't, because one way or the other it would have been dirty money.

In addition, Dr. Fahs, who had respondent under his care while she was at Dorothea Dix Hospital, testified that "[w]ere Ms. Frick not receiving treatment at this hospital, I would be afraid that she would become psychotically manic again" and that "I would be afraid that she would decompensate rapidly again and maybe endanger herself." Dr. Fahs also testified that "[i]n her condition" respondent had been arrested for trespassing, but "[i]t may not be so benign next time," and that "with her psychiatric decompensation I feel [it] would likely lead to fights, . . ." We think it patently obvious from this testimony that the challenged findings of fact are amply supported by the evidence and thus this assignment of error is meritless.

By his second assignment of error, respondent contends that there is "insufficient competent evidence to support a conclusion that the respondent is dangerous to herself." We do not agree. G.S. § 122-58.7(i) provides in pertinent part as follows:

> To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and dangerous to himself or others, . . . The court shall record the facts which support its findings.

The phrase "dangerous to himself" is defined in G.S. § 122-58.2(1)(a) as follows:

> "Dangerous to himself" shall mean that within the recent past:
>
> 1. The person has acted in such manner as to evidence:
>
> I. That he would be unable without care, supervision, and the continued assistance of others not

otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and

II. That there is a reasonable probability of serious physical debilitation to him within the near future unless adequate treatment is afforded pursuant to this Article. A showing of behavior that is grossly irrational or of actions which the person is unable to control or of behavior that is grossly inappropriate to the situation or other evidence of severely impaired insight and judgment shall create a prima facie inference that the person is unable to care for himself; . . .

Our function on this appeal is to determine whether the court's ultimate finding that respondent was dangerous to herself is indeed supported by the facts which the court recorded in its order as supporting that finding, and whether, in any event, there was competent evidence to support such a finding. *Matter of Hernandez*, 46 N.C. App. 265, 264 S.E. 2d 780 (1980); *Matter of Hogan*, 32 N.C. App. 429, 232 S.E. 2d 492 (1977). *See also Matter of Monroe*, 49 N.C. App. 23, 270 S.E. 2d 537 (1980).

In the instant case, the court found and recorded as facts that at the time of her admission to Dorothea Dix Hospital, respondent "was not able to say what she was going to do to make money in order to get a place to stay or to be able to eat;" that she "exhibited a thought disorder and impaired judgment relating to plans for self-care;" that she "exhibited a psychotic mood disorder with pressured speech, loose associations, tangential thinking, and labile emotions, often laughing or singing inappropriately and switching to crying;" and that respondent "would become psychotically manic if released" and "would decompensate rapidly," "likely" leading to "fights associated with prostitution and money." In our view, the facts found and recorded by the court show by clear, cogent and convincing evidence that respondent is "dangerous to herself." Furthermore, after a careful review of the evidence adduced at the hearing, we believe that the court's determination is sup-

ported by competent evidence.

This assignment of error is without merit.

The order appealed from is

Affirmed.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. ANNIE RAY ODOM

No. 8012SC289

(Filed 21 October 1980)

Constitutional Law § 28; Criminal Law § 57– refusal to take paraffin test – reliance on right to consult attorney – use of refusal to impeach defendant improper

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious bodily injury where defendant was advised that she had a right to consult with her attorney and defendant relied on that assertion in refusing to take a paraffin test to determine if there was gunpowder residue on her hands, the State violated defendant's due process rights by introducing evidence from which the jury could reasonably infer that defendant's refusal to submit to the test until she had consulted with her attorney constituted a "statement" by defendant which was inconsistent with her plea of not guilty, and such violation was prejudicial to defendant where it improperly impeached her denial that she had shot the victim.

Judge HEDRICK dissenting.

APPEAL by defendant from *Preston, Judge.* Judgment entered 18 October 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 9 September 1980.

Defendant was arrested without a warrant on the evening of 16 March 1979 for the shooting of Robert Lee Moore. The shooting occurred between 6:30 and 7:00 p.m. At 9:30 p.m., the police arrived at defendant's home and began to question her about the shooting. Defendant stated she knew about the fight that had preceded the shooting, but knew nothing about the shooting. Defendant told the police she was not going to say anything else until she got in touch with her lawyer, although

at some point during the questioning she did sign a waiver of her *Miranda* rights.

After the preliminary questioning, defendant was taken to the Law Enforcement Center in Fayetteville. At her initial appearance, while standing before the magistrate, defendant was asked if she would submit to a gunshot residue test, otherwise known as a paraffin test. It was explained to defendant that the test would show whether there was any gunpowder residue on her hands. Defendant refused to take the test until she had spoken with her lawyer.

Subsequently, defendant was charged in a proper bill of indictment with assaulting Robert Moore "with a deadly weapon, to wit: a gun, with intent to kill the said Robert Moore, inflicting serious bodily injury" and was tried in superior court. The prosecution asked defendant on cross-examination whether she had refused to take the paraffin test. Defendant's counsel objected; but after an extensive voir dire, the State was allowed to question defendant concerning her refusal to submit to the gunshot residue test.

Defendant was found guilty of assault with a deadly weapon inflicting serious bodily injury and was sentenced to not less than five nor more than seven years in the Department of Correction for Women. Defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General John R.B. Matthis and Assistant Attorney General Acie L. Ward, for the State.

Seavy A. Carroll for defendant appellant.

HILL, Judge.

Defendant first argues that it was a violation of her Fifth and Fourteenth Amendment rights to allow the State to question her and one other witness concerning her refusal to submit to the paraffin test. Defendant further argues that the trial court erred when it permitted the State to cross-examine her about a fight she had with State's witness Nancy Ezell the day prior to Robert Moore's shooting. After due consideration, we find both arguments to be without merit.

Although defendant has not raised the issue, we do find, however, that the State's solicitation at trial of evidence concerning defendant's refusal to submit to the paraffin test before consulting with her attorney violated her rights under the Fourteenth Amendment to the United States Constitution and under Article I, Section 19 of the North Carolina Constitution.

In the case *sub judice*, the State neither compelled defendant to submit to a non-testimonial identification proceeding nor introduced physical evidence of defendant's guilt. Rather, the State introduced evidence from which the jury could reasonably infer that defendant's refusal to submit to a paraffin test until she had consulted with her attorney constituted a "statement" by defendant, inconsistent with her plea of not guilty.

Defendant's refusal to submit to the test until she could speak with her attorney came only after the arresting officers told her that she had a right to consult an attorney. It would appear, therefore, that the defendant relied on the statements of the officers when she requested the opportunity to consult with retained counsel prior to submitting to the test. We find that it would be fundamentally unfair and a violation of defendant's federal and state constitutional rights to allow the State to use her request to consult with an attorney, made in reliance on the State's declaration of her right, as an implication of defendant's guilt.

We are persuaded, in reaching our decision, by the reasoning in *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240 (1976), and in *State v. Lane*, 46 N.C. App. 501, 265 S.E. 2d 493 (1980). In each of those cases, defendant exercised his right to remain silent during custodial interrogation and did not give his explanation of exculpatory circumstances until his trial. The prosecution in each case argued that if defendant were not guilty he would have asserted his alibi defense prior to trial. The courts granted the defendants new trials and found that it would be "fundamentally unfair and a deprivation of due process" to allow the prosecution to use defendant's reliance on his right to remain silent to impeach defendant's assertion of innocence. *Doyle*, 426 U.S. at 618, 49 L.Ed. 2d at 98.

Ms. Odom, like the defendants in *Doyle* and *Lane*, merely exercised what she had been told, and believed to be, her right

to consult with an attorney when she refused to submit to the paraffin test. We are concerned by such a situation where the State tells the defendant upon arrest that she has a right to see her lawyer, the defendant justifiably relies on that assertion, and the State then uses defendant's reliance on her perceived right as an affirmative inference of guilt. We find that such practice violates defendant's due process rights under the United States and North Carolina Constitutions.

We further find the State's violation of defendant's due process rights to have been prejudicial.

> A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

G.S. 15A-1443(b). *Also see Chapman v. California*, 386 U.S. 18, 24, 17 L.Ed. 2d 705, 710-11, 87 S.Ct. 824; *reh. denied* 386 U.S. 987 (1967).

The State's evidence tends to show that defendant shot Robert Moore. The defendant took the stand and denied her guilt, but the credibility of the denial was lessened when the State pointed out that defendant refused to take a test that could have conclusively proven her innocence. This Court cannot find that the State has demonstrated beyond a reasonable doubt that the improper impeachment of defendant's denial was not prejudicial.

The case must be remanded for a new trial.

New Trial.

Judge WHICHARD concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting:

I am unwilling to extend the principle enunciated in *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240 (1976), to say that the trial judge committed error in allowing the State to introduce evidence concerning defendant's refusal to take a paraffin test because she did not have her lawyer present.

Assuming, arguendo, that any error was committed with reference to such evidence, I am satisfied that under the circumstances of this case, such error was harmless beyond a reasonable doubt. I would vote to hold that defendant had a fair trial free from prejudicial error.

STATE OF NORTH CAROLINA v. CRAIG RICHARD DUERS

No. 8010SC405

(Filed 21 October 1980)

1. **Searches and Seizures § 34– vehicle fleeing from robbery scene – plastic bag in plain view – no expectation of privacy**

Where an officer stopped defendant's vehicle while defendant was fleeing from the scene of an armed robbery, defendant had no reasonable expectation of privacy in a white plastic bag in plain view in the vehicle which contained money obtained in the robbery, and the officer was justified in searching the white plastic bag.

2. **Arrest and Bail § 3.6; Searches and Seizures § 37– probable cause for arrest – search of vehicle incident to arrest**

An officer had probable cause to believe defendant had committed a felony, G.S. 15A-401(b)(2), and the officer lawfully searched defendant's vehicle where the officer was in a shopping center parking lot when he saw a man chasing another man and yelling that he had just robbed a theater; the officer saw the person being chased enter the passenger side of an automobile which was then driven away; and the officer stopped the automobile and found that a female was on the driver's side and defendant was on the passenger side.

3. **Criminal Law § 76.2– admission of incriminating statement – failure to hold voir dire – harmless error**

The trial court in an armed robbery case erred in admitting over objection a statement made by defendant when he was arrested that his female companion who was driving the getaway car "knew nothing of this" without conducting a voir dire hearing to determine the voluntariness of the statement; however, such error was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt of the robbery in question.

4. **Criminal Law § 75.9– spontaneous in-custody statements – absence of Miranda warnings**

Defendant's in-custody statements to an officer that he didn't "know why [he] did it" and that he hated that he "ever came to Raleigh" were properly admitted into evidence where the court found upon supporting evidence on voir dire that the statements were spontaneously and voluntari-

ly made by defendant during the course of a general conversation with the officer and were not made in response to questioning.

5. **Robbery § 4.3– armed robbery – identity of perpetrator – sufficiency of evidence**

The State's evidence was sufficient to identify defendant as the perpetrator of an armed robbery of a theater box office where it tended to show that a theater employee followed the robber when he left the theater; the employee called to a policeman in a car to stop the robber; the fleeing robber entered the passenger side of a white car; the policeman followed the white car, stopped it, and found a female on the driver's side and defendant on the passenger side; and the stolen money and a handgun were found in the car.

APPEAL by defendant from *Martin (John C.), Judge.* Judgment entered 18 December 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 18 September 1980.

The defendant was tried for armed robbery. The State offered evidence that on 20 October 1979 at approximately 9:30 p.m. the Valley Twin Theater in Crabtree Valley was robbed of $651.60 at gunpoint by a man wearing a ski mask. Michael R. Rodden testified that he was working as a doorman at the theater at the time. He saw a lone gunman robbing the box office of the theater, and as the gunman left the box office, he followed him. Mr. Rodden testified he lost sight of the robber for approximately six seconds as he turned a corner and then he saw him running towards a Fast Fare. As Mr. Rodden was chasing the robber, he observed a police car in the parking lot and called to the officer in the car: "Stop that man. He robbed the theater." Mr. Rodden testified he saw the man he was chasing get into the passenger side of a white automobile which drove away with the police car following it.

Joe Gunter, an officer with the City of Raleigh Police Department, testified he was in a police vehicle in the Crabtree Valley parking lot when he saw Michael R. Rodden chasing a person and yelling that the person had just robbed the theater. He saw the person get into the passenger side of a white automobile which was driven away as soon as the person entered it. Mr. Gunter testified he did not lose sight of the vehicle until he stopped it in the Crabtree Valley Mall parking lot area. He approached the vehicle and removed two persons from it. A woman was on the driver's side, and the defendant was on the passenger side. He saw a handgun lying on the passenger side

floorboard and a white plastic bag which was in plain view on the passenger side. He opened the bag and it contained $651.60 in currency. He also found a yellow ski mask between the passenger seat and the console.

Defendant was convicted of common law robbery. From a prison sentence imposed, he appealed.

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

William Eugene Anderson for defendant appellant.

WEBB, Judge.

[1] The defendant's first assignment of error is to the admission into evidence of the money which was found in the white bag in plain view in the automobile. The defendant relies on *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed. 2d 235 (1979); *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed. 2d 538 (1977); *State v. Gauldin*, 44 N.C. App. 19, 259 S.E. 2d 779 (1979), *cert. denied*, 299 N.C. 333, 265 S.E. 2d 399 (1980). Defendant argues that there is no greater exigency in the case sub judice than in those cases, and it violated his fourth amendment rights for the officer to search the bag within the automobile without obtaining a search warrant. In each of the cases relied on by the defendant, the officers, acting on a tip from an informant that a suitcase or footlocker carried by the defendant contained marijuana, arrested the defendant, took the suitcase or footlocker in custody, and searched it without a warrant. The rationale of these cases is that there is an expectation of privacy in a suitcase or footlocker so that once it has been seized, no exigency exists such that it may be searched without a warrant. The factual situation in the case sub judice is distinguishable from *Chadwick*, *Sanders*, and *Gauldin*. The officer was not acting on a tip from an informant but had intervened during a flight from a robbery. We hold there was not a reasonable expectation of privacy in a white plastic bag used to carry the fruits of the crime. Under these circumstances, we hold the officer was justified in searching the plastic bag found in the automobile.

[2] The defendant's second assignment of error is to the admission in evidence of the other items seized after a search of the

automobile. The defendant contends the arrest was not lawful which made a search of the vehicle unlawful. G.S. 15A-401 provides in part:

> (b) Arrest by Officer Without a Warrant.
>
> * * *
>
> (2) Offense Out of Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe:
>
> a. Has committed a felony . . . .

Without reviewing the evidence in detail, we hold it is sufficient to show the officer had probable cause to believe defendant had committed a felony. The search of the vehicle was lawful. *See State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973).

[3] In his third assignment of error, defendant argues a statement he made at the time of his arrest should have been excluded. Mr. Gunter testified that as he was putting the handcuffs on defendant, he "said she knew nothing about this, something to that effect." The court overruled the defendant's objection to this inculpatory statement without conducting any hearing. It was error for the court not to determine the voluntariness of the admission by a preliminary inquiry in the absence of the jury. *State v. Vickers*, 274 N.C. 311, 163 S.E. 2d 481 (1968). We do not believe, however, this error requires a new trial. According to the evidence, the statement was not coerced. The evidence of the defendant's guilt is overwhelming. After reviewing the record, we hold that the impact of all the evidence on the minds of the average jury would be such that the exclusion of the challenged testimony would not affect the outcome. We hold this error was harmless beyond a reasonable doubt. *See State v. Cox*, 281 N.C. 275, 188 S.E. 2d 356 (1972) and *State v. Hudson*, 281 N.C. 100, 187 S.E. 2d 756 (1972).

[4] Defendant also assigns as error the admission into evidence of a statement he made to Mr. Gunter as he was being carried to police headquarters. Mr. Gunter testified that as defendant was being carried from the Crabtree Valley Mall to police headquarters, he said, "I don't know why I did it. I hate I ever came to Raleigh." Prior to the trial, a *voir dire* hearing was held as to the admissibility of this statement. Mr. Gunter testi-

fied that, as he was carrying the defendant to police headquarters, they were engaged in a general conversation. The statement about which he testified was made by the defendant in the course of the conversation and was not in response to a question. Defendant offered no evidence. The court found the statement was spontaneously and voluntarily made by the defendant and overruled the motion to suppress. These findings were supported by the evidence and we are bound by them. The admission of this statement was not error. *State v. Williams*, 13 N.C. App. 423, 185 S.E. 2d 604 (1972) and *State v. Basden*, 8 N.C. App. 401, 174 S.E. 2d 613 (1970).

[5] The defendant's last assignment of error is to the court's failure to grant his motion to dismiss. He says this should have been done because the evidence is not sufficient to identify the defendant as the perpetrator of the robbery. This assignment of error is overruled.

No error.

Judges VAUGHN and MARTIN (Robert M.) concur.

BURDEN PALLET COMPANY, INC. v. RYDER TRUCK RENTAL, INC.

No. 8028SC75

(Filed 21 October 1980)

1. **Contracts § 5– lease of personal property – writing signed by parties unnecessary**

A contract for the lease of personal property is not required by statute to be in writing and signed by the parties.

2. **Contracts § 16; Estoppel § 4.3– lease of equipment – condition imposed by lessor – waiver – equitable estoppel**

In an action to recover for breach of a contract to lease a tractor and trailer from defendant where the agreement provided that it was not binding upon defendant until executed at its general offices in Miami, defendant waived this requirement or should equitably be estopped from asserting it, since the lease agreement was prepared by defendant, executed by plaintiff, and returned to and retained by defendant or its agent; plaintiff was not advised of any time period within which the contract would be submitted to and executed or rejected at defendant's Miami offices; defendant provided a tractor and accepted payments from plaintiff under the contract terms for a substantial period of time; over a period of about a year defendant failed to

notify plaintiff that the agreement was rejected and not signed at its Miami offices; and plaintiff relied on defendant's promises to alter an electronic van for use with the tractor.

APPEAL by plaintiff from *Gaines, Judge.* Judgment entered 9 October 1979 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals in Waynesville on 26 August 1980.

The plaintiff appeals from the judgment allowing defendant's motion for a directed verdict made at the close of plaintiff's evidence and awarding defendant $5,154.33 on its counterclaim as stipulated.

The plaintiff alleged and offered evidence tending to show the following:

In May 1975, Burt J. Burden, then engaged in the manufacture of wooden pallets under the name of Burden Pallet Company, decided to bid on a proposal by Walker Manufacturing Company for the delivery of pallets to various distribution points outside North Carolina. Before submitting his bid, Burden conferred with Charles King, defendant's manager of the Asheville Branch, about his need for a large trailer to deliver the pallets. King suggested to Burden an Electrovan trailer, 45' × 13'6", and Burden, after determining that he could load at least 1400 pallets in the trailer, agreed to lease from defendant the Electrovan trailer and a suitable tractor to pull the same if he were the successful bidder on the Walker proposal. In August 1975, Burden informed defendant (King) that he had been awarded the Walker contract.

King brought to Burden a "Truck Lease and Service Agreement," dated 14 August 1975, which was signed by Burden six days thereafter. King signed the agreement as a witness. The agreement provided that it was not "binding upon Ryder until executed at its general offices in Miami . . . ." The agreement was not so executed in Miami.

The agreement provided for the lease by defendant Ryder to plaintiff for one year of an IHC single-axle Diesel truck, and a GD Electronics Van, for a fixed rental charge, fuel cost, and mileage rate.

Plaintiff learned from one of its two drivers that a single-axle tractor could not be used because it would be over the

statutory axle weight. King then agreed to substitute a tandem tractor, and so changed the Agreement, including a change in the weekly rental, the fuel cost and mileage rate, with pen and ink, which plaintiff initialed.

Plaintiff's driver went to defendant's place of business to get the tractor and van and discovered that the tractor would not turn because its rear wheels would run into the landing gear, or dollies, of the van.

King promised plaintiff that he would have the van modified so it would work with the tandem tractor, and that he would send it to Savannah for that purpose. He offered plaintiff a standard 13'6" trailer until the modification was made, but the standard trailer had an inside roll-up door which reduced its capacity so it was returned to defendant. Plaintiff then leased a standard 13'6" trailer from another company, and attempted to perform the pallet deliveries under his contract with Walker.

On numerous occasions thereafter plaintiff inquired of King as to when the modified Electrovan would be available, but the modified van was never obtained for plaintiff. Finally, in mid-1976, defendant proposed to get the modified trailer for him if he would sign a contract providing for a substantially higher cost. Plaintiff refused.

Plaintiff lost money because he could not deliver economically the pallets under his contract with Walker Manufacturing, and plaintiff was forced to abandon the contract.

Bennett, Kelly & Cagle by Harold K. Bennett for plaintiff appellant.

Van Winkle, Buck, Wall, Starnes & Davis by Larry McDevitt for defendant appellee.

CLARK, Judge.

The defendant's motion for directed verdict was made orally but the record on appeal does not disclose the specific grounds therefor. G.S. 1A-1, Rule 50(a). The better practice is to set forth the specific grounds in a written motion. "If the movant relies upon an oral statement for such specific grounds, a transcript thereof must be incorporated in the case on appeal." *Hensley v. Ramsey*, 283 N.C. 714, 726, 199 S.E. 2d 1, 8

(1973). Such transcript does not appear in the record on appeal. However, the parties concede in their briefs that the only ground stated by defendant, and the basis for the judgment directing the verdict, was that the contract was unenforceable because it was not signed by the defendant as required by the contract. Under the circumstances we elect to waive the Rule 50(a) violation and to consider the appeal on its merits.

[1] A contract for the lease of personal property is not required by statute to be in writing and signed by the parties. The object of a signature to a contract is to show assent, but the signing of a written contract is not necessarily essential to its validity. Assent may be shown in other ways, such as acts or conduct or silence. *Fidelity and Casualty Co. v. Charles W. Angle, Inc.*, 243 N.C. 570, 91 S.E. 2d 575 (1956); *Coppersmith v. Aetna Ins. Co.*, 222 N.C. 14, 21 S.E. 2d 838 (1942); *Executive Leasing Associates v. Rowland*, 30 N.C. App. 590, 227 S.E. 2d 642 (1976).

[2] The issue on appeal involves more than failure of a party to sign a written contract in that the contract (lease agreement) contained a specific provision that it was "not binding upon Ryder until executed at its general offices in Miami . . . ." But basically the same principle of law is applicable. Though the contract made signing at its offices in Miami a condition precedent to being bound, the circumstances may, however, either amount to a waiver of this requirement or work an equitable estoppel against Ryder. *Oliver v. U.S. Fidelity and Guaranty Co.*, 176 N.C. 598, 97 S.E. 490 (1918); 17 Am Jur. 2d, *Contracts*, § 71. And we find that the circumstances in this case are sufficient to withstand a directed verdict for defendant and to justify the submission to the jury of an appropriate issue on the validity of the contract.

We find particularly significant the following circumstances: The lease agreement was prepared by defendant, executed by plaintiff, and returned to and retained by defendant or its agent. Plaintiff was not advised of any time period within which the contract would be submitted to and executed or rejected at defendant's Miami offices. Defendant provided a tractor and accepted payments from plaintiff under the contract terms for a substantial period of time. Over a period of about a year defendant failed to notify plaintiff that the agreement was rejected and not signed at its Miami offices. Plaintiff relied on

defendant's promises to alter an electronic van for use with the tractor.

These acts and conduct by the defendant are substantial evidence that defendant waived its contract right to first have it signed at its Miami offices or should be equitably estopped from asserting that right. It would be unconscionable to allow the defendant to accept the benefits of the contract and to avoid its obligations thereunder by retaining the contract unsigned.

The judgment for directed verdict is vacated and the cause is remanded.

Vacated and Remanded.

Chief Judge MORRIS and Judge HILL concur.

STATE OF NORTH CAROLINA v. JAMES ALLEN JUDGE

No. 804SC554

(Filed 21 October 1980)

1. **Criminal Law § 34.7– defendant's threats against witness – competency to show motive**

   In this homicide prosecution, a witness's testimony that defendant had made threats against the witness in the victim's presence approximately an hour before the killing and that the victim intervened was relevant to show the relationship between defendant and the victim and a possible motive of defendant in pursuing the quarrel at the time the victim was killed.

2. **Criminal Law § 99.4– comments by trial court – no expression of opinion on witness's credibility**

   The trial court did not express an opinion on the credibility of a witness when defense counsel asked the witness whether he knew that liquor was served in the house where the killing in question occurred, the witness asserted his Fifth Amendment rights, and the court told the witness that defense counsel was "not accusing you of serving it" and then stated, "I won't require him to answer because I don't think — I just won't," since the court's remarks amounted to no more than a ruling on the question asked the witness.

APPEAL by defendant from *Fountain, Judge*. Judgment entered 9 January 1980 in Superior Court, DUPLIN County. Heard in the Court of Appeals 8 October 1980.

Defendant was properly indicted for murder of one Lawrence Steve Rogers.

In summary, the evidence for the State tended to show that Marvin Lee, Lawrence Steve Rogers, and defendant were together at about 9:15 a.m. on 29 September 1979. Lee and defendant had an argument, and Rogers intervened. Lee testified that he observed defendant produce a ten inch long, silver-blade, switch-blade knife with a light brown handle, and he heard defendant tell Rogers that he was not afraid of him. Lee left the area. Later that morning, defendant and Rogers were at a pool hall, and a fight started between them when defendant beat on the bar and told Rogers he was not afraid of him. It culminated in defendant's stabbing Rogers in the chest. An autopsy revealed that Rogers bled to death as the result of the stab wound. Defendant presented no evidence.

Defendant was found guilty of manslaughter, and he was sentenced to serve a minimum of 18 and a maximum of 20 years in prison. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

Louis Jordan, for defendant appellant.

ERWIN, Judge.

[1] Defendant first contends that testimony elicited by the State from Marvin Lee concerning threats made by defendant against Lee and in the presence of Rogers was irrelevant and prejudicial.

The test of the relevancy of evidence "is whether it tends to shed any light on the subject of the inquiry or has as its only effect the exciting of prejudice or sympathy." *State v. Braxton*, 294 N.C. 446, 462, 242 S.E. 2d 769, 779 (1978). Evidence offered by the State, which tends to prove a relevant fact, "will not be excluded merely because it also shows defendant to have been guilty of an independent crime. [authorities omitted] Where evidence tends to prove a motive on the defendant's part to commit the crime charged, it is admissible even though it discloses the commission of another offense by the defendant." *State v. Cherry*, 298 N.C. 86, 109, 257 S.E. 2d 551, 565 (1979).

Lee testified, over objection, that defendant stated to Lee, and in the presence of Rogers, that " 'I ain't never liked you and you got Indian blood in you and I'm going to open you up and see some of it.' " Lee testified that at that point, Rogers intervened and told defendant that he was "ridiculous of starting a fuss." We hold that the evidence complained of was relevant to indicate the relationship between defendant and Rogers that morning and a possible motive of the defendant in pursuing the quarrel approximately one hour to one and one-half hours later. This assignment of error is overruled.

[2] Defendant assigned error to comments made by the trial court during the following exchange in the course of cross-examination of a State's witness who was at the pool hall:

"Q. [By defense counsel] You know they serve liquor in that house?

A. I'll take the Fifth Amendment on that.

COURT: He's not accusing you of serving it.

MR. JORDAN: If Your Honor please, I ask the Court —

COURT: I won't require him to answer because I don't think — I just won't. Go ahead to something else.

EXCEPTION NO. 18."

Defendant argues that the trial court expressed an opinion on the strength of the evidence or the credibility of the witness to the prejudice of defendant.

"[A] remark by the court in admitting or excluding evidence is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial." *State v. Cox*, 6 N.C. App. 18, 24, 169 S.E. 2d 134, 138 (1969). The probable effect of the comment upon the jury must be examined, considering the comment in the light of the circumstances under which it was made. *Id.*

We are of the opinion that the remark made by the trial judge amounted to no more than a ruling on the question, and it was not prejudicial to defendant. This assignment of error is overruled.

Defendant received a trial free from prejudicial error.

No error.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. WILLIE SMITH

No. 8016SC485

(Filed 21 October 1980)

Arrest and Bail § 3.1; Criminal Law § 75.3– defendant's confession resulting from codefendant's statement – legality of codefendant's arrest – probable cause

There was no merit to defendant's contention that his codefendant was arrested without probable cause, that the codefendant's incriminating statement was illegally obtained, and any evidence obtained by use of that statement, including his own confession, was inadmissible as fruit of an illegal arrest, since an officer had probable cause to arrest the codefendant on the basis of the fact that the burglar alarm system at a grocery store had been activated; at least one person had been seen running from the rear of the grocery store; and when the officer arrived on the scene, it was completely deserted except for the codefendant who was in a telephone booth only 40 feet away from the grocery store.

APPEAL by defendant from *Farmer, Judge.* Judgment entered 30 November 1979 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 9 October 1980.

Defendant was indicted for felonious breaking and entering of the North Main Grocery in Laurinburg with intent to commit larceny. He was tried along with two co-defendants. After the jury had been impanelled but before any evidence was given, defendants moved to suppress statements confessing to the crime given to officers. After *voir dire,* the trial judge ruled the statements admissible. References in each statement to co-defendants were not admitted into evidence. Defendant-appellant's motions for dismissal at the close of the State's evidence and at the close of all the evidence were denied.

The jury returned a verdict of guilty of felonious breaking and entering. From a judgment sentencing him to a maximum prison term of three years, the defendant appealed.

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

Gordon and Horne, by John H. Horne, Jr., for defendant-appellant.

MARTIN (Robert M.), Judge.

Defendant argues that the trial court erred in denying his motion to suppress the confession he made to the police. He argues that he made the statement after being confronted with an incriminating statement made by his co-defendant, Leo Pegues, who had been arrested without probable cause. He further argues that because Pegues' statement was illegally obtained and therefore inadmissible, any evidence obtained by use of that statement, including his own confession, is inadmissible as fruit of an illegal arrest.

As defendant states in his brief "the crux of defendant's argument rests upon the illegality of the arrest of the co-defendant [Leo Pegues] and the exploitation of illegally obtained evidence as a result of that arrest." In our opinion there was ample probable cause to support the arrest of Leo Pegues. We therefore do not address the issue of whether defendant has standing to assert the Fourth Amendment claims of his co-defendant.

An examination of the facts and circumstances presented to the arresting officer, Sergeant Perkins, immediately prior to Leo Pegues' arrest shows the following:

(1) The burglar alarm system at North Main Grocery had been activated;

(2) At least one person had been seen running from the rear of the North Main Grocery;

(3) Upon his arrival at North Main Grocery, Sergeant Perkins observed Leo Pegues in a telephone booth only 40 feet away from North Main Grocery;

(4) At that time the area, a business district, was completely deserted.

Looking at these facts it is clear that Sergeant Perkins had probable cause to arrest Leo Pegues because at that moment in time he had reasonable grounds to believe that a crime had been committed and that the individual in the phone booth had

participated in that crime. *See, Beck v. Ohio,* 379 U.S. 89, 13 L. Ed. 2d 142, 85 S. Ct. 223 (1964).

In *State v. Streeter,* 283 N.C. 203, 195 S.E. 2d 502 (1973), the North Carolina Supreme Court stated:

> "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.*** To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith." (Citation omitted.) "The existence of 'probable cause,' justifying an arrest without a warrant, is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved." (Citations omitted.)

Id. at 207, 195 S.E. 2d at 505.

The determination of probable cause is not to be made in the light of events or facts coming to light subsequent to the arrest, but rather the determination of probable cause "depends upon 'whether at that moment [the moment of arrest] the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' (Citation omitted.)" *State v. Streeter, supra,* at 207, 195 S.E. 2d at 505.

In the case *sub judice,* a reasonable and prudent man, confronted with the above-mentioned facts and circumstances, could, and probably would, come to the conclusion that the individual in the telephone booth was a lookout for others also involved in the crime. The reasonableness of this conclusion is borne out by the statements made by the appellant to investigating officers that Leo Pegues was in fact the lookout. As Sergeant Perkins had probable cause to arrest Leo Pegues, the arrest was constitutionally valid. *State v. Streeter, supra.* "The validity of the arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is

later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest." *Michigan v. DeFillippo*, 443 U.S. 31, 36, 61 L. Ed. 2d 343, 349, 99 S. Ct. 2627, 2631, 2632 (1979).

The arrest of Leo Pegues was constitutionally valid and, as the appellant readily concedes, *Miranda* was complied with in all respects. Therefore we affirm the trial court's denial of appellant's motion to suppress his statements.

In our opinion defendant received a fair trial free from prejudicial error.

No error.

Judges HEDRICK and MARTIN (Harry C.) concur.

THOMAS MICHAEL TAYLOR AND FRED EUGENE TAYLOR v. CHARLES THOMAS HUDSON ALSO KNOWN AS CHARLES BATTLE

No. 807SC313

(Filed 21 October 1980)

Automobiles §§ 58.1, 80– turning vehicle – negligence – contributory negligence

In an action to recover for damages sustained by plaintiff in a collision between plaintiff's motorcycle and defendant's car, plaintiff's evidence was sufficient for the jury on the issue of defendant's negligence and did not disclose that plaintiff was contributorily negligent as a matter of law where it tended to show that plaintiff observed defendant's approaching car when it was 200 feet away; plaintiff observed defendant change lanes and, without giving a signal, make a left turn in front of plaintiff when he was only eight feet away; plaintiff was traveling 25 mph in a 35 mph zone; and plaintiff attempted to avoid the collision by going to his left toward the rear of defendant's car instead of applying his brakes because he did not feel he had time to stop.

APPEAL by plaintiff from *Peel, Judge*. Judgment entered 20 September 1979 in Superior Court, NASH County. Heard in the Court of Appeals 7 October 1980.

Plaintiff's evidence tended to show that he was driving a motorcycle south on Dominick Drive in Rocky Mount at about 25 miles per hour and met a car driven by defendant. Defendant made a left turn in front of plaintiff without any indication he

was going to make a turn. Plaintiff attempted to avoid colliding with defendant by going to his left towards the rear of the defendant's car. Plaintiff's motorcycle struck the right rear bumper of defendant's car and plaintiff was thrown over the car. He landed on the pavement, sustaining injury.

The court granted defendant's motion for a directed verdict and entered a judgment dismissing plaintiff's action with prejudice. Plaintiff appealed.

Michael J. Anderson, for the plaintiff-appellant.

Valentine, Adams & Lamar, by L. Wardlaw Lamar, for the defendant-appellee.

MARTIN (Robert M.), Judge.

Plaintiff argues the trial court erred granting defendant's motion for a directed verdict. Defendant contends plaintiff's own evidence established plaintiff was contributorily negligent as a matter of law as plaintiff did not keep a proper lookout, did not reduce his speed, did not make reasonable efforts to avoid the collision, and did not keep his vehicle under control. We agree with plaintiff.

In North Carolina the standards governing a judge's consideration of a directed verdict are clear. *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976) holds:

> When a defendant moves for a directed verdict pursuant to Rule 50(a), the trial judge must take plaintiff's evidence to be true, consider all the evidence in the light most favorable to plaintiff and give him the benefit of every reasonable inference which may be legitimately drawn therefrom.

Id. at 250, 221 S.E. 2d at 509.

> With respect to contributory negligence as a matter of law, "[t]he general rule is that a directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must

be resolved by the jury rather than the trial judge." (Citations omitted.)

Rappaport v. Days Inn, 296 N.C. 382, 384, 250 S.E. 2d 245, 247 (1979).

The rule with respect to what the operator of the oncoming vehicle may assume when travelling in his correct lane of travel is stated in *Jenkins v. Coach Co.*, 231 N.C. 208, 56 S.E. 2d 571 (1949), as follows:

> A motorist, who is proceeding on his right side of the highway, is not required to anticipate that an automobile, which is coming from the opposite direction on its own side of the road, will suddenly leave its side of the road and turn into his path. He has the right to assume under such circumstances that the approaching automobile will remain on its own side of the road until the vehicles meet and pass in safety. (Citations omitted.)

Id. at 211, 56 S.E. 2d at 573.

The rule with respect to what the operator of the turning vehicle may assume in making a left turn is stated in *Cooley v. Baker*, 231 N.C. 533, 58 S.E. 2d 115 (1950), as follows:

> In considering whether he can turn with safety and whether he should give a statutory signal of his purpose, the driver of a motor vehicle, who undertakes to make a left turn in front of an approaching motorist, has the right to take it for granted in the absence of notice to the contrary that the oncoming motorist will maintain a proper lookout, drive at a lawful speed, and otherwise exercise due care to avoid collision with the turning vehicle. (Citations omitted.)

Id. at 536, 58 S.E. 2d at 117.

The rule with respect to the duty of the operator of the turning vehicle is set forth in *Clarke v. Holman*, 274 N.C. 425, 163 S.E. 2d 783 (1968), as follows:

> This safety statute [G.S. 20-154] requires a motorist intending to turn from a direct line (1) to see that the movement can be made in safety, and (2) to give the required signal *when the operation of any other vehicle may be*

> *affected.* (Emphasis in original.) (Citations omitted.) The first requirement does not mean that a motorist may not make a left turn unless the circumstances are absolutely free from danger. It means that a motorist must exercise reasonable care under existing conditions to ascertain that such movement can be made with safety. (Citations omitted.)

Id. at 429, 430, 163 S.E. 2d at 786.

Plaintiff's evidence shows that he first observed defendant's car when he came into Dominick Drive 200 feet to the north. He saw defendant change lanes and, without giving a signal, turn in front of him when he was eight feet away. These facts show plaintiff was observing defendant's car and had a right to assume the approaching car would remain on its own side of the road and would not suddenly leave its side and turn into his path. *Jenkins v. Coach Co., supra.*

Plaintiff was travelling 25 miles per hour. The speed limit according to Officer Larry Mitchell was 35 miles per hour. Even if plaintiff had been travelling at a speed greater than was reasonable under the circumstances, his speed would not have been a proximate cause of the accident. *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331 (1954).

The evidence tends to show that instead of applying his brakes, plaintiff attempted to turn his motorcycle by leaning it to his left to avoid the collision. He testified that he attempted this evasive action rather than applying the brakes because he did not feel he had time to stop. Assuming that applying the brakes was an option, the doctrine of sudden emergency would require that the issue of contributory negligence be submitted to the jury. *Black v. Wilkinson*, 269 N.C. 689, 153 S.E. 2d 333 (1967); *see Day v. Davis*, 268 N.C. 643, 151 S.E. 2d 556 (1966).

The evidence does not support a directed verdict against the plaintiff.

Reversed.

Judges HEDRICK and MARTIN (Harry C.) concur.

GLENN A. LAZENBY, JR. AND JEAN G. LAZENBY v. DERWOOD H. GODWIN

No. 8014SC352

(Filed 21 October 1980)

Appeal and Error § 6.9– pretrial order not appealable

In an action to recover damages for fraud, a pretrial order denying plaintiffs' motion to amend and resolving issues to be submitted to the jury was interlocutory and not appealable.

APPEAL by plaintiffs from *Bailey, Judge.* Order entered 7 February 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 9 October 1980.

Plaintiffs seek to recover damages from defendant for fraud in a transaction in which defendant acquired plaintiffs' stock in a family corporation. The action was instituted 11 April 1974 and tried in 1977. A verdict was returned for plaintiffs but was set aside on their motion. A new trial was ordered on all issues. Upon appeal by defendant, the trial court's action was affirmed.

Thereafter, the case was peremptorily set for trial as the first case for the session beginning 11 February 1980. Plaintiffs filed a motion to amend to allege punitive damages on 28 January 1980. The record shows that at the request of the parties, the presiding judge scheduled a pretrial hearing for 7 February 1980 to hear plaintiffs' motion to amend and to resolve the issues to be submitted to the jury. Upon the pretrial hearing, the court entered an order denying plaintiffs' motion to amend and refusing to submit an issue on punitive damages. Judge Bailey stated that "the Court will not consider evidence relating to punitive damages." Plaintiffs appeal.

Nye, Mitchell, Jarvis & Bugg, by Jerry L. Jarvis and R. Roy Mitchell, Jr., for plaintiff appellants.

Poyner, Geraghty, Hartsfield & Townsend, by David W. Long and Elaine R. Pope, for defendant appellee.

MARTIN (Harry C.), Judge.

Plaintiffs attempt to appeal from a pretrial order entered pursuant to Rule 16 of the North Carolina Rules of Civil Proce-

dure. The pretrial order is interlocutory and is not appealable. *Green v. Insurance Co.*, 250 N.C. 730, 110 S.E. 2d 321 (1959); *DeBruhl v. Highway Com.*, 241 N.C. 616, 86 S.E. 2d 202 (1955). While *Green* involved interpreting former N.C.G.S. 1-169.1, repealed 1 January 1970, the language pertinent to that appeal is almost identical to the applicable portion of the present Rule 16. The former statute reads: "Such order shall control the subsequent course of the case unless in the discretion of the trial judge the ends of justice require its modification." Rule 16 states: "[S]uch order when entered controls the subsequent course of the action, unless modified *at the trial* to prevent manifest injustice." (Emphasis added.) The rule permits modification of the pretrial order by the trial court judge when necessary to prevent manifest injustice.

This Court continues to adhere to the principle set forth in *Green, supra. Board of Transportation v. Gragg*, 38 N.C. App. 740, 248 S.E. 2d 763 (1978); *Realty, Inc. v. City of High Point*, 36 N.C. App. 154, 242 S.E. 2d 895 (1978); *Knight v. Power Co.*, 34 N.C. App. 218, 237 S.E. 2d 574 (1977).

The appeal is dismissed.

Judges HEDRICK and MARTIN (Robert M.) concur.

CULLEN WALSTON, EMPLOYEE, PLAINTIFF v. BURLINGTON INDUSTRIES, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8010IC240

(Filed 30 October 1980)

1. Master and Servant § 96.5– workers' compensation – finding supported by evidence

In an action to recover disability benefits for an occupational disease allegedly contracted by plaintiff as a result of his exposure to cotton dust during the course of his employment with defendant, evidence was sufficient to support the Industrial Commission's finding that plaintiff suffered from pulmonary emphysema and chronic bronchitis where the evidence tended to show that plaintiff's breathing problems began after he had been both working in defendant's cloth room from eight to ten years and smoking at least one-half pack of cigarettes a day for some twenty-six years.

2. **Master and Servant § 68– workers' compensation – onset of disabling condition hastened by work place irritants – causation of disability**

Where an employee is exposed in his work place to environmental irritants which in fact hasten the onset of a disabling condition which did not previously exist, such aggravation is tantamount to causation for purposes of G.S. 97-53(13), and the resulting disability is an "occupational disease" thereunder. The Industrial Commission erred in making no findings with respect to the extent to which plaintiff's exposure to cotton dust contributed to the onset of his disabling disease.

APPEAL by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 21 September 1979. Heard in the Court of Appeals 11 September 1980.

Plaintiff in this case contends that he contracted an occupational disease as a result of his exposure to cotton dust during the course of his employment with defendant, that he became totally disabled as a result of such disease, and that he is due compensation for his disability pursuant to G.S. 97-53(13).

Commissioner Robert S. Brown conducted hearings on 25 and 26 July 1977. Plaintiff testified that he began working for defendant on 2 February 1942 and remained continuously in defendant's employ until his retirement on 17 March 1972 due to breathing problems. For the first fifteen or sixteen years of his employment, plaintiff operated a stitching machine in the cloth-finishing department in defendant's plant. Plaintiff testified that he was continually exposed to thick cotton dust in the air as a result of the brushing and stitching operations of the machine and his duties of blowing off and sweeping the accumulated dust from the walls and floors in his work area. In or about 1952, plaintiff began experiencing difficulty breathing upon exertion at work. Because of his breathing problems, plaintiff transferred to a less strenuous job in 1958. Plaintiff was examined at North Carolina Memorial Hospital in Chapel Hill where he was told that he had emphysema and bronchitis. Plaintiff was also examined and treated at Duke University Medical Center. Plaintiff, age 66 on the date of the hearing, has smoked cigarettes since he was fourteen or fifteen and with the exception of two years, has averaged at least a half pack per day during this entire period. For the four years immediately preceding the hearing, plaintiff had averaged a pack a day of cigarettes. During the ten years immediately preceding his retirement, plaintiff's respiratory problems became progres-

sively worse, requiring him to take occasional medical leaves of absence from work, and to remain under the regular care of a physician.

Dr. Henderson Mabe, plaintiff's family physician, testified that he had treated plaintiff for approximately ten years prior to the date of the hearing. He stated that he diagnosed plaintiff as suffering from pulmonary emphysema and chronic obstructive lung disease and noted that he was of the opinion that these conditions had rendered him totally disabled. Dr. Mabe also indicated that he recommended that plaintiff apply for disability benefits on the basis of his pulmonary disease.

Subsequent to filing his claim with the Industrial Commission, plaintiff was examined by Dr. Charles D. Williams, Jr., a specialist in pulmonary medicine and member of the Industrial Commission's Textile Occupational Disease Panel. Dr. Williams' testimony was taken in a hearing before Chief Deputy Commissioner Shuford on 6 February 1978. Dr. Williams testified in pertinent part that his predominant diagnosis was that plaintiff had chronic bronchitis, pulmonary emphysema, and possible byssinosis. Dr. Williams went on to note the following: that plaintiff's diseases are due to "causes and conditions more characteristic of the textile industry than other industrial environment"; that plaintiff is disabled for all but sedentary work, provided he has the requisite training and experience; that plaintiff's pulmonary disease is the cause of his disability; that plaintiff's smoking habits likely played a part in the onset of his disability; and that plaintiff's years of exposure to cotton dust could have played a contributory role in causing his disability.

On 15 May 1979, Commissioner Brown filed an Opinion and Award denying plaintiff's claim. On 21 September 1979, the full Commission, with one member dissenting, affirmed and adopted as its own the Opinion and Award of Commissioner Brown, denying plaintiff benefits. Plaintiff appealed.

Hassell & Hudson, by Charles R. Hassell, Jr. and Robin E. Hudson, for plaintiff appellant.

Teague, Campbell, Conely & Dennis, by C. Woodrow Teague, Richard B. Conely, and George W. Dennis III, for defendant appellees.

ERWIN, Judge.

By appropriate assignments of error, plaintiff challenges, *inter alia*, the Commission's findings of fact and conclusions of law holding that plaintiff does not have an "occupational disease."

For purposes of our review, the pertinent findings of fact of Commissioner Brown and affirmed by the full Commission are as follow:

> "6. . . . Dr. Williams, in his written report, a part of the evidence in this case, gave the following comment:
>
> > Mr. Walston's symptoms of shortness of breath appear to be clearly related to pulmonary emphysema and chronic bronchitis and may be, at least in part, related to cigarette smoking. It is also possible that he has had intrinsic asthma which could be confirmed from old Duke Outpatient Clinic records. With this syndrome, he could have noticed an aggravation of his symptoms by dust in the mill as described without necessarily invoking the diagnosis of byssinosis. The history for byssinosis is somewhat equivocal in that he did have exacerbation of symptoms on Monday morning but this occurred immediately on exposure to dust and did not seem to improve during the remainder of the week.
>
> 7. Plaintiff's shortness of breath is due to pulmonary emphysema and chronic bronchitis.
>
> *EXCEPTION NO. 1*
>
> 8. Plaintiff does not have an occupational disease.
>
> *EXCEPTION NO. 2*"

On the basis of these findings of fact, the Commission concluded as a matter of law that:

> "1. Plaintiff has failed to carry the burden of proof that he has a disease due to causes and conditions characteristic of and peculiar to his employment by defendant. G.S. 97-53(13).
>
> *EXCEPTION NO. 3.*

2. Plaintiff is not entitled to benefits under G.S. 97.

EXCEPTION NO. 4."

In its Opinion and Award of 21 September 1979, the full Commission made the following additional notation: "While the doctor expressed the opinion that plaintiff's exposure to cotton dust 'could possibly' have played a role in causing the pulmonary problems, the doctor further was of the opinion that smoking by plaintiff 'most likely' played a part in causing the pulmonary disability."

[1] In reviewing an award of the Industrial Commission, the inquiry of this Court is limited to two questions of law: (1) whether the Commission's findings are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its legal conclusions. *Inscoe v. Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977). Plaintiff in his initial assignment of error alleges that the Commission's findings of fact regarding the cause of plaintiff's lung disease are not supported by the evidence. We do not agree. We note that the Commission's finding that plaintiff's shortness of breath is due to pulmonary emphysema and chronic bronchitis is merely a restatement of the diagnosis made by Dr. Williams. Dr. Williams testified that there exists a significant link between cigarette smoking and the onset of respiratory diseases such as emphysema and bronchitis. Evidence in the record reveals that although non-disabling at the outset, plaintiff's breathing problems began after he had been both working in defendant's cloth room from eight to ten years, and smoking at least one-half pack of cigarettes a day for some twenty-six years. As it is the exclusive province of the Commission to resolve conflicts in the evidence, *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950), we hold that the Commission's finding that plaintiff suffered from pulmonary emphysema and chronic bronchitis was supported by competent evidence. We, therefore, overrule this assignment of error.

Plaintiff by his second assignment of error contends that "[t]he Industrial Commission erred in failing to make findings required by G.S. 97-53(13) on the issue of whether plaintiff's lung disease is compensable as an occupational disease." Plaintiff maintains that under certain circumstances, the occupa-

tional aggravation of a non-disabling, non-occupational lung condition may result in an "occupational disease" within the meaning of G.S. 97-53(13) and that where competent evidence to that effect is adduced, the Commission must determine the extent to which the aggravating aspects of plaintiff's employment contribute to the onset of his disability. We are of the view that the position urged by plaintiff correctly states the law in this area and, therefore, reverse the Opinion and Award of the full Commission and remand the case for further findings by the Commission not inconsistent with the guidelines set forth.

G.S. 97-53 of the Worker's Compensation Act sets forth a schedule of diseases which are prima facie "occupational diseases" and compensable as a matter of law. Plaintiff in this case has based his claim for benefits upon a disability allegedly due to chronic obstructive lung disease caused by prolonged exposure to cotton dust. The condition complained of by plaintiff is not listed in the schedule of compensable diseases of G.S. 97-53; therefore, the standard for determining whether it is compensable as an "occupational disease" must be governed by G.S. 97-53(13). That subsection includes within the definition of "occupational disease" the following:

> "Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment."

In *Wood v. Stevens*, 297 N.C. 636, 256 S.E. 2d 692 (1979), our Supreme Court set forth the duties of the Commission in deciding a claim under G.S. 97-53(13).

> "The Commission must determine first the nature of the disease from which the plaintiff is suffering — that is, its characteristics, symptoms and manifestations. Ordinarily, such findings will be based on expert medical testimony. Having made appropriate findings of fact, the next question the Commission must answer is whether or not the illness plaintiff has contracted falls within the definition set out in the statute. This latter judgment requires a conclusion of law."

Id. at 640, 256 S.E. 2d at 695-96.

It is well settled that the findings of fact of the Commission are conclusive on appeal if supported by competent evidence. G.S. 97-86. As we have noted, the Commission's Finding of Fact No. 7, that plaintiff suffered from pulmonary emphysema and chronic bronchitis, is supported by competent evidence and is binding upon this Court on our review. It is equally clear, however, that conclusions of law entered by the Commission are not binding on this Court, and are reviewable here for purposes of determining their evidentiary basis and the reasonableness of the legal inferences made therefrom. *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 229 S.E. 2d 325 (1976), *cert. denied*, 292 N.C. 467, 234 S.E. 2d 2 (1977). A conclusion of law is made no less reviewable by virtue of the fact that it is denominated a finding of fact. *Moore v. Adams Electric Co.*, 259 N.C. 735, 131 S.E. 2d 356 (1963). It is apparent from the record that the Commission's Finding of Fact No. 8, that plaintiff does not have an occupational disease, is in reality a determination of the ultimate question presented for decision, and as such, represents a conclusion of law appropriate for our review.

In a case involving a claim for compensation, the Commission must make specific findings of fact as to each material fact upon which the rights of the parties depend, *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619 (1968), and where such findings are insufficient to enable the court to determine the rights of the parties, the cause must be remanded for proper findings. *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952). As we have indicated, there was sufficient evidence to show that plaintiff had smoked cigarettes for several years and that prolonged cigarette smoking significantly increases the risk of contracting a respiratory illness. The Commission's finding that plaintiff had contracted bronchitis and emphysema was, therefore, without error. Where, however, such finding is immediately followed by the conclusion that "[p]laintiff does not have an occupational disease," the only reasonable inference to be gleaned therefrom is that, in the view of the Commission, if a condition is non-occupational in its incipience, it is non-compensable as a matter of law notwithstanding the intervention of several years of occupational exposure to hazardous conditions between the time the disease was

contracted and the time it became disabling. We view this failure to inquire into the casual relation between plaintiff's intervening occupational exposure and his resulting disability as error.

In *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979), the Supreme Court identified the elements necessary to prove the existence of an "occupational disease" within the meaning of G.S. 97-53(13). In addition to the statutorily prescribed elements that a disease be "due to causes and conditions which are characteristic" of a particular occupation and that it not be an ordinary disease of life "to which the general public is equally exposed outside of the employment," the Court went on to note that the plaintiff's disability must be fairly traceable to some duty of the employment as a proximate cause. *Id.* at 475, 256 S.E. 2d at 200.

At the hearing before Deputy Commissioner Shuford, the following colloquy between plaintiff's attorney and Dr. Williams occurred:

> "Q. (Mr. Hassell) ... Again, Doctor, based on the facts I gave you and your examination and history and tests, do you have an opinion satisfactory to yourself to a reasonable degree of medical certainty as to whether the diseases you found and diagnosed in this man are diseases which are due to causes and conditions more characteristic of the textile industry than other industrial environment?
>
> * * *
>
> A. I think that it is.
>
> * * *
>
> Q. (Mr. Hassell) Well, again, Doctor, based upon the same set of factors, do you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty as to whether the plaintiff's exposure to cotton dust 30 years in his employment could have caused the respiratory diseases you found in him?
>
> . . . .
>
> A. Yes.

Q. (Mr. Hassell) What is that opinion?

. . . .

A. My opinion is that it could possibly have played a role in the causation of his pulmonary problems. I feel that it would be, if it did, it would be more likely a contributory role rather than a single cause and effect relationship."

This testimony tends to show that the diseases responsible for plaintiff's disability satisfy the statutory requirements of compensability. Its clear import is that: (1) the environmental conditions which characterize plaintiff's place of employment are also substantial factors in causing the diseases of which plaintiff suffers; and (2) plaintiff by virtue of his employment is exposed to such irritants in greater quantities than persons otherwise employed. Defendant, however, contends that in view of plaintiff's history of cigarette smoking, the above-quoted testimony fails to establish the necessary causal link between plaintiff's occupation and his disabling disease. Defendant maintains that, at best, such testimony tends to show only "aggravation" of a preexisting condition which does not satisfy the requirement of proof of causation. We do not agree.

Where a claimant's right to recovery is based on an injury by "accident," the rule of causation under our act is that the employment need not be the sole causative force to render the injury compensable. In *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173 (1951), the Supreme Court noted that where an employee "by reason of constitutional infirmities is predisposed to sustain injuries while engaged in labor, nevertheless the leniency and humanity of the law permit him to recover compensation if the physical aspects of the employment contribute in some reasonable degree to bring about or intensify the condition" which results in disability. *Id.* at 92, 63 S.E. 2d at 176 (1951). In *Kennedy v. Martin Marietta Chemicals*, 34 N.C. App. 177, 237 S.E. 2d 542 (1977), recovery was allowed where the cause of an employee's fatal heart attack was found to be a preexisting heart condition which was aggravated when he was suddenly overcome by gaseous fumes while working in one of his employer's storage tanks. In *Pruitt v. Publishing Co.*, 27 N.C. App. 254, 218 S.E. 2d 876 (1975), *rev'd on other grounds*, 289 N.C. 254, 221 S.E. 2d 355 (1976), an employee who aggravated a

preexisting back injury while working was awarded full compensation where evidence tended to show that twenty-five percent of his thirty-five percent permanent disability of the spine was attributable to the former injury with only the remaining ten percent being attributed to the injury suffered while working for the defendant. In *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 117 S.E. 2d 476 (1960), an employee whose job required him to drive an automobile on service calls for his employer and who for several years had been subject to "blackout spells" was allowed to recover for injuries sustained in an accident caused when he "blacked out" and drove into a pole upon returning to the employer's place of business from one such service call. These cases are illustrative of the well settled principle in the area of worker's compensation law that an employee's unique susceptibility to injury because of a disease or disability which predates his employment "affords no sound basis for a reduction in the employer's liability." *Pruitt v. Publishing Co.*, 27 N.C. App. at 257, 218 S.E. 2d at 879.

Neither the briefs of counsel nor our own independent research has disclosed any authority in this jurisdiction directly addressing the question of whether occupational aggravation of a preexisting condition results in an "occupational disease" within the meaning of G.S. 97-53(13); *Cf. Morrison v. Burlington Industries*, 47 N.C. App. 50, 266 S.E. 2d 741 (1980). We find it instructive, however, to note the consideration given the question by the courts of other jurisdictions with worker's compensation statutes substantially similar to our own. While there continues to be divergence of opinion on the question, the majority, and we think better, view appears to be that succinctly stated by Professor Larson: "[W]hen distinctive employment hazards act upon these preexisting conditions to produce a disabling disease, the result is an occupational disease." 1 B. Larson, Workmen's Compensation Law, § 41.63, 7-418 (1980). *See, e.g., National Zinc Co. v. Hainline*, 360 P. 2d 236 (Okla. 1961); *Smith v. I.R. Equipment Corp.*, 60 A.D. 2d 746, 400 N.Y.S. 2d 900 (1977); *Hutcheson v. Weyerhaeuser Co.*, 288 Or. 51, 602 P. 2d 268 (1979); *Zallea Bros. v. Cooper*, 53 Del. 168, 166 A. 2d 723 (1960); *Bond v. Rose Ribbon & Carbon Mfg. Co.*, 78 N.J. Super. 505, 189 A. 2d 459 (1963), *aff'd.*, 42 N.J. 308, 200 A. 2d 322 (1964).

[2] The occupational disease provisions of the North Carolina Worker's Compensation Act are clearly an integrated part of

the entire Act and must be construed in light of the same liberal principles as are applied in cases of injury by accident. Since a disability resulting from an accidental injury which aggravates a preexisting infirmity is fully compensable, we can perceive of no valid reason why a different rule should pertain where, as here, the evidence tends to show that the plaintiff's exposure to environmental irritants on his job precipitated the onset of a disability which did not previously exist. We hold, therefore, that where an employee is in his work place exposed to environmental irritants which in fact hasten the onset of a disabling condition which did not previously exist, such aggravation is tantamount to causation for purposes of G.S. 97-53(13), and the resulting disability is an "occupational disease" thereunder. Defendant's reliance upon this Court's recent decision in *Moore v. Stevens & Co.*, 47 N.C. App. 744, 269 S.E. 2d 159 (1980), is misplaced. In that case, the Industrial Commission made specific findings that the employee's disability was not caused by her exposure to cotton dust. Because in the case *sub judice* the Industrial Commission made no findings with respect to the extent to which plaintiff's exposure to cotton dust contributed to the onset of his disabling disease, the Opinion and Award of the full Commission is

Reversed and remanded.

Judges ARNOLD and WELLS concur.

JAMES L. OLIVER, JR., AND CRAVEN VENTURE MANAGEMENT, INC. v. JOHN B. ROBERTS AND JOHN ROBERTS, LTD.

No. 8021SC275

(Filed 30 October 1980)

1. **Rules of Civil Procedure § 56– motion to dismiss – consideration of matters outside pleadings**

Where the trial court considered matters outside the pleadings in ruling on a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), the motion should be treated as a motion for summary judgment and be disposed of in the manner provided in G.S. 1A-1, Rule 56.

2. **Joint Ventures § 1– failure of joint venture – no breach of fiduciary duty**

In an action to recover damages for defendant's alleged breach of his

fiduciary duty to plaintiffs in a joint venture formed for the purpose of acquiring the assets of a corporation, summary judgment was properly entered for defendant where plaintiffs' materials tended to show that the parties obtained an option to purchase the corporate assets; in their efforts to obtain sufficient financial resources to make the purchase, the parties at the suggestion of defendant sought the involvement of a third party; the third party agreed to invest $250,000 to $300,000 in the venture if the three parties would invest $500,000 of their own money; plaintiffs were unable to raise the necessary capital and negotiations with the third party ended; and the third party subsequently purchased the corporate assets in his own right, made defendant an officer in a new corporation formed to acquire the assets, and gave defendant the option to purchase fifty percent of the assets for fifty percent of his investment therein, since plaintiffs failed to present evidence of specific instances of conduct by defendant which was contrary to the interests of plaintiffs in the corporate assets, and all the evidence showed that the joint venture was unsuccessful because plaintiffs failed to obtain the money necessary to enter into an agreement with the third party to purchase the corporate assets.

APPEAL by plaintiffs from *Rousseau, Judge.* Order entered 17 December 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 17 September 1980.

The facts of this case are summarized as follows. In December 1975, plaintiffs and defendants began a series of meetings wherein they considered the possibility of acquiring the Helio Courier, Stallion, and Twin aircraft assets of the General Aircraft Corporation (hereinafter GAC). During the early months of 1976, the parties began negotiating with GAC for the purchase of these assets with a view toward either reselling them at a profit or using them in the operation of a business. Neither the terms nor the duration of the parties' venture was incorporated in a writing. In April 1976, Ben F. Craven, the sole shareholder, officer, and director of plaintiff Craven Venture Management, Inc., submitted on behalf of the parties a revised, written offer to GAC to purchase their Helio Courier, Stallion, and Twin aircraft properties. This revised offer was subsequently accepted by GAC. Through the contributions of the parties, an option to purchase the assets was obtained. In their efforts to obtain the sufficient financial resources to consummate the purchase, the parties at the suggestion of defendant Roberts sought the involvement of one Alvin Goldhush of Winchester, Virginia. Roberts had attempted to purchase these same GAC assets in 1975 prior to his affiliation with the plaintiffs and had then unsuccessfully sought to enlist Goldhush as an investor.

Goldhush agreed to invest from $250,000 to $300,000 in the venture if the three parties would invest $500,000 of their own money. Plaintiffs were unable to raise the necessary capital, and negotiations between the parties and Goldhush ended. Goldhush subsequently purchased the GAC assets in his own right and offered to sell defendant a fifty percent interest therein in exchange for $550,000, one-half of Goldhush's investment.

Plaintiffs contend that they and defendant John B. Roberts, acting individually and as officer for defendant John Roberts, Ltd., had formed a joint venture for the purpose of acquiring the GAC assets; that before the venture was either successfully completed or terminated, defendant abandoned the venture and sought to obtain the same property in his individual capacity; that defendant did in fact obtain an interest in such property; and that such conduct was in breach of a fiduciary duty owed by defendant to plaintiffs as co-venturers.

Plaintiffs prayed the court for relief in the form of an accounting pursuant to G.S. 59-52, a constructive trust imposed upon any profits derived by defendants from the use of the contested assets, and treble damages and attorneys' fees pursuant to G.S. 75-16 and G.S. 75-16.1.

The trial court granted summary judgment for defendants. Plaintiffs appealed.

White & Crumpler, by Fred G. Crumpler, Jr., and Robert B. Womble, for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by Norwood Robinson and F. Joseph Treachy, Jr., for defendant appellee.

ERWIN, Judge.

The question presented for our review is whether the trial court erred in granting defendants' motions to dismiss and for summary judgment pursuant to G.S. 1A-1, Rules 12(b)(6) and 56, of the Rules of Civil Procedure. We find that the motions were properly allowed.

[1] We note at the outset that in granting defendants' motions, the trial court considered, *inter alia*, the depositions of the parties, the plaintiffs' amended complaint, the affidavits of

plaintiffs, the affidavit of Alvin A. Goldhush, and the defendants' interrogatories to plaintiff Craven Management, Inc., and the answers thereto by Ben F. Craven, Jr. Because the trial court considered matters outside the pleadings in reaching its decision, the motion should be treated as a motion for summary judgment and disposed of in the manner provided in Rule 56. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

Where a motion of summary judgment is granted, the critical questions for determination upon appeal are whether on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. *Barbour v. Little*, 37 N.C. App. 686, 247 S.E. 2d 252, *cert. denied*, 295 N.C. 733, 248 S.E. 2d 862 (1978). In this regard, we find it instructive to note that "[w]hether there is a *genuine issue of fact* is not the question. The question is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is a *genuine issue as to any material fact.*" (emphasis in original) *Tuberculosis Assoc. v. Tuberculosis Assoc.*, 15 N.C. App. 492, 494, 190 S.E. 2d 264, 265 (1972). Therefore, although the presence of immaterial, factual questions does not preclude the grant of summary judgment, the moving party retains the continuing burden of establishing the nonexistence of any triable issue of fact. The movant may discharge this burden either by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of its claim. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974).

[2] Plaintiffs contend that the case *sub judice* is one where Roberts as co-venturer withdrew from the venture and in concert with a third party, pursued the very object of the venture. Plaintiffs maintain that it was this conduct by Roberts that prevented them from purchasing the GAC assets. In support of these contentions, plaintiffs allege that: Roberts negotiated directly with Goldhush "without keeping Craven and Oliver advised of what was going on"; Goldhush has made Roberts a vice president in the new corporation formed to acquire the GAC assets; Goldhush has reimbursed Roberts for all the expenses Roberts had incurred while attempting to negotiate for

the purchase of the assets; and Roberts has received from Goldhush an option to purchase fifty percent of the GAC assets for fifty percent of Goldhush's investment therein. While there exist factual disputes with respect to most of the above allegations, it is significant to note that even if all of plaintiffs' contentions are admitted, they would not assist plaintiffs in discharging their burden of establishing a causal relation between some specific act or omission by defendants and plaintiffs' failure to effect the purchase of the aircraft assets. It is well settled that proof of such a causal relation is an essential element of plaintiffs' cause of action. *See Meyer v. McCarley and Co., Inc.*, 288 N.C. 62, 215 S.E. 2d 583 (1975). We note further that the largely baseless nature of plaintiffs' allegations is illustrated by the deposition testimony of Ben F. Craven, Jr. Craven testified in pertinent part:

> "To the very best of my knowledge, Roberts cooperated in every possible way to try to put this deal together. He contacted all the people he could, including Goldhush.
>
> * * *
>
> I cannot specifically state anything that Roberts did that was against my best interest as I alleged in the complaint."

Plaintiffs' pleadings, affidavits, deposition testimony, and answers to interrogatories are otherwise void of any allegations of specific instances of active or omissive conduct by defendants which was contrary to the interests of plaintiffs in the GAC assets.

In viewing the record, as we must, in the light most favorable to plaintiffs, we are compelled to conclude that plaintiffs' evidence fails to raise a genuine issue of material fact with respect to their allegations that defendants detrimentally affected plaintiffs' ability to acquire the GAC assets. Indeed, all the evidence indicates that the efforts of the parties to acquire the aircraft assets failed because of plaintiffs' inability or unwillingness to borrow the money necessary to enter into an agreement with Goldhush.

Ordinarily where an agreement of joint venture fails to fix a definite date of termination, the agreement remains in force until its purpose is accomplished or until such accomplishment

has become impracticable. 46 Am. Jur. 2d, Joint Ventures, § 30, p. 51. Where, as here, it is the failure of the complaining parties to make agreed contributions to the common undertaking which makes continuation of the effort impracticable, such parties have no claim to share any of the benefits or profits which may be subsequently derived therefrom. 46 Am. Jur. 2d, Joint Ventures, § 45, p. 65.

The judgment below is

Affirmed.

Judges ARNOLD and WELLS concur.

ALFRED L. COLLINS, JR. AND WIFE, KATHLEEN B. COLLINS; GEORGE C. MUSSOTTER AND WIFE, JARIS MUSSOTTER v. OGBURN REALTY COMPANY, INC.; J.R. OGBURN

No. 8010DC304

(Filed 30 October 1980)

1. **Brokers and Factors § 6.1– exclusive listing contract for realty – right to commission**

Defendant realtors were entitled to recover a six percent real estate commission pursuant to an exclusive listing contract giving defendants the power to sell plaintiffs' house for a period of 120 days at a price of $58,900 where the listing contract was executed on 20 September 1976; purchasers of the house executed an offer to purchase on 5 October 1976, well within the 120 day period; the purchasers entered into possession of the house on 8 November 1976 pursuant to a rental agreement in which they agreed to complete the purchase of the house within five days after notification that their loan was ready to be closed; and on 3 September 1977 plaintiffs conveyed title to the property to the purchasers by warranty deed at a purchase price of $56,000, since defendant realtors were the procuring cause of the sale of the house, and defendants were not precluded from recovering a commission because the house was not actually conveyed within the 120 day period.

2. **Trial § 13– permitting jury to take exhibits to jury room – absence of consent by plaintiffs**

The trial court erred in permitting the jury, over plaintiffs' objections, to take into the jury room and retain during its deliberations exhibits which had been admitted into evidence and an exhibit which had not been admitted into evidence.

APPEAL by plaintiffs from *Barnette, Judge.* Judgment entered 24 October 1979 in District Court, WAKE County. Heard in the Court of Appeals 18 September 1980.

On 20 September 1976, George C. Mussotter and wife, Jaris Mussotter, plaintiffs, and defendant Ogburn Realty Company, through its agent J.R. Ogburn, executed an exclusive listing contract which gave defendants the power to sell plaintiffs' house at 704 Fieldstone Court in Raleigh for a period of 120 days at a sale price of $58,900. The contract provided that plaintiffs were to pay defendants a six percent real estate commission on the amount of the gross sale. The contract also required plaintiffs to pay defendants the full six percent commission if a prospect to whom the defendant has actually shown the property purchases or contracts to purchase the property within 90 days after the expiration of the listing agreement.

On 5 October 1976, Alfred L. Collins, Jr. and wife, Kathleen B. Collins, executed an offer to purchase contract respecting the property at 704 Fieldstone Court at a sale price of $58,900. The contract specified that it was to be contingent on the sale of the Collinses' house in Virginia Beach, Virginia. Other pertinent conditions of the agreement were that: the Collinses were to close 704 Fieldstone no later than fifteen days after the sale of their house in Virginia Beach; the Collinses were to take possession of the property on 8 November 1976 at the rental fee of $7.50 per day; and in the event that the Collinses' Virginia Beach property is not sold within 270 days, they will pay the Mussotters $450 per month rent or vacate the premises within 30 days. Pursuant to the contract, the Collinses paid defendants an earnest money deposit of $1,000 to be held by defendants for the purpose of guaranteeing their performance of the contract.

On 8 November 1976, the Collinses entered into possession of the property pursuant to a rental agreement wherein the Collinses agreed to pay a rental fee of $7.50 per day and to complete the purchase of the property within five days after notification that their loan was ready to be closed.

By letter dated 27 July 1977, the Mussotters instructed defendants to return to the Collinses their $1,000 deposit. Defendants did not follow these instructions, but rather informed the Mussotters that they had done everything necessary to

earn their commission and that they would expect the Mussotters to remit payment in the agreed upon amount of $3,534, six percent of $58,900.

On 3 September 1977, the Mussotters conveyed title to the property to the Collinses by warranty deed at a purchase price of $56,000.

On 3 November 1977, the Collinses filed a complaint against defendants alleging that defendants were obligated to return to the Collinses their $1,000 earnest money deposit. As their basis for recovery, the Collinses asserted a breach of contract claim in their first cause of action and a claim arising from breach of fiduciary duty in their second cause of action. Defendants answered, denied these allegations, and counter-claimed against the Collinses for a realtor's commission of six percent. Thereafter, defendants successfully moved to join George and Jaris Mussotter as parties plaintiff and were permitted to file an amended answer alleging a claim for a realtor's commission against the Mussotters as sellers of the property.

A summons was issued on 24 March 1978 directing the Mussotters to file an answer to the allegations contained in defendants' amended answer. The Mussotters filed a responsive pleading and counterclaim wherein they admitted executing the exclusive listing contract, the offer to purchase agreement, and the rental contract. They also admitted that they conveyed their house to the Collinses on 3 September 1977 and that they have not paid defendants a realtor's commission.

On 28 June 1979, orders of summary judgment were entered which, *inter alia*, denied recovery to the Collinses on their second cause of action, denied recovery to the Mussotters upon their counterclaim, and adjudicated liability in favor of defendants against the Mussotters for a realtor's commission. The court reserved as the sole issue for trial the amount of the commission due the defendants.

On 18 October 1979, plaintiffs Collins filed notice of voluntary dismissal pursuant to G.S. 1A-1, Rule 41(a)(1), of the Rules of Civil Procedure with respect to their first cause of action and have no further interest in the prosecution or appeal of this action.

The issue of the amount of damages owing from the Mussotters to defendants was tried before a jury on 23 October 1979. That judgment established damages in the amount of six percent of $56,000 with credit against the judgment amount being given for the $1,000 held by defendants as an earnest money deposit. Plaintiffs appealed.

Brenton D. Adams, for plaintiff appellants.

Seay, Rouse, Johnson, Harvey & Bolton, by Ronald H. Garber, for defendant appellees.

ERWIN, Judge.

[1] Plaintiffs assign as error, *inter alia*, the summary adjudication of their liability to defendants for a six percent realtor's commission. They contend that there was neither evidence that the Collinses were "ready, willing and able" to purchase plaintiffs' house at the listing price, nor evidence that defendants were the procuring cause of the eventual sale of the property. Plaintiffs further contend that defendants are precluded from recovering a realtor's commission because of their failure to effect a sale of the property within the 120-day period prescribed in the listing agreement. We do not agree.

The elements which a broker must prove to establish his or her entitlement to commissions were set forth in *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 162 S.E. 2d 486 (1968). There Justice (later Chief Justice) Sharp noted that:

> "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. [Citations omitted.] 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 commission provided the case is not taken out of the rule by the contract of employment. [Citations omitted.] The broker is the procuring cause if the sale is the direct and proximate result of his efforts or services."

Id. at 250-51, 162 S.E. 2d at 491.

In this case, the responsive pleading and counterclaim of the Mussotters, owners of the property, contain the following pertinent admissions: the Mussotters listed their property at 704 Fieldstone Court with defendants at a sale price of $58,900; the Mussotters executed an offer to purchase agreement concerning the property with the Collinses at a purchase price of $58,900; the Mussotters conveyed the property to the Collinses by warranty deed on or about 3 September 1977; and the Mussotters have refused to pay defendants a realtor's commission. In view of the guidelines set forth in *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, *id.*, the defendants' entitlement to their commission is clearly demonstrated upon the face of plaintiffs' pleadings. There exists no dispute that the defendants performed the duty of presenting to the Mussotters a party who actually contracted to purchase their property upon terms acceptable to them and that this was done well within the 120-day period set forth in the listing agreement. Plaintiffs' contention that defendants are precluded from recovering a commission because of their failure to effect a sale of the property within the 120-day period is unavailing in view of the fact that, as noted above, it is defendants' procurement of "a party who actually contracts for the purchase of the property," *id.*, which determines entitlement to a realtor's commission.

In opposing defendants' motion for summary judgment on the issue of liability for realtor's commissions, plaintiffs have failed to raise a genuine issue as to a material fact concerning any element upon which defendants' claim for relief depends. *Best v. Perry*, 41 N.C. App. 107, 254 S.E. 2d 281 (1979). Since summary judgment was properly entered on this issue, we overrule this assignment of error.

[2] Plaintiff also assigns as error the trial court's action in permitting the jurors to take exhibits offered at trial into the jury room during their deliberations. During the trial on the issue of damages, defendants offered the testimony of J.R. Ogburn. During direct examination, Ogburn was permitted to read the amount of real estate commissions charged by members of the Multiple Listing Service of the Raleigh Board of Realtors, as found on randomly selected pages of different volumes of the weekly listing booklets published by that organization. These booklets were marked as Defendants' Exhibits 1 through 33. The witness was also permitted to identify and

describe the listing agreement wherein plaintiffs granted defendants the exclusive right to sell their property for a 120-day period. This contract was marked as Defendants' Exhibit 34. During the witnesses' testimony, the court received into evidence Defendants' Exhibits 1 through 34. Finally, the witness identified and described a deed from plaintiffs to the Collinses conveying the property at 704 Fieldstone Court. The witness testified that the presence of revenue stamps in the amount of $56.00 upon the deed indicated a gross sale price of $56,000. The deed was marked as Defendants' Exhibit 35, but was not received into evidence.

At the conclusion of its charge to the jury, the court, over plaintiffs' objections, allowed the jurors to take Defendants' Exhibits 1 through 35 into the jury room during deliberations. It is well settled in this jurisdiction that without the consent of the parties, it is error to permit the jury to take exhibits into the jury room and to retain them during its deliberations. *Doby v. Fowler*, 49 N.C. App. 162, 270 S.E. 2d 532 (1980); *Brown v. Buchanan*, 194 N.C. 675, 140 S.E. 749 (1927). In *Watson v. Davis*, 52 N.C. 178, 181 (1859), our Supreme Court explained the reason for the rule as follows:

> "The jury ought to make up their verdict upon evidence offered to their senses, *i.e.*, what they see and hear in the presence of the court, and should not be allowed to take papers, which have been received as competent evidence, into the jury room, so as to make a comparison of handwriting, or draw any other inference which their imaginations may suggest, because the opposite party ought to have an opportunity to reply to any suggestion of an inference contrary to what was made in open court."

In view of this well settled principle as respects exhibits which have been received into evidence, it follows *a fortiori* that the trial court commits error when it permits the jury to retain in the jury room exhibits which have not been received into evidence. Because we believe that such action by the trial court prejudically affected plaintiffs' right to have the question submitted to the jury considered impartially, we sustain plaintiffs' assignment of error and grant plaintiffs a new trial on the issue of damages. The judgment appealed from is

Reversed in part and affirmed in part.

Judges ARNOLD and WELLS concur.

IN THE MATTER OF EDITH BOLCH MASTERS, INCOMPETENT, JOHN BOLICK, PETITIONER, v. ELEANOR B. COLE AND LILLIAN M. MANEY, RESPONDENTS

No. 8028SC220

(Filed 4 November 1980)

1. **Insane Persons § 4.1– guardian's sale of incompetent's assets – letter to clerk of court – report of sale – legal test**

In determining whether a guardian's letter to the clerk of court constituted a report of sale of an incompetent's property within the meaning of G.S. 1-339.35 although it did not comply with all the technical requirements of the statute, the proper legal test is whether its partial compliance has fully attained the objective of the statute.

2. **Insane Persons § 4.1– sale of incompetent's property – purpose of report of sale**

The "report of sale" of an incompetent's property required by G.S. 1-339.35 was intended not just to give record notice of the fact of sale but also to operate with G.S. 1-339.36 and G.S. 1-339.25 to ensure "that the price received shall be greater" by facilitating the practice of upset bidding by providing a clear-cut starting point for the time period during which upset bids may be filed.

3. **Insane Persons § 4.1– sale of incompetent's property – letter to clerk of court – insufficiency as report of sale**

A guardian's letter to the clerk of court did not constitute a valid "report of sale" of an incompetent's property where it failed to set out the title of the action and failed to specify the terms of sale as required by G.S. 1-339.35(b)(1) and (b)(6), since a potential upset bidder could not look at the letter and know with certainty whether it was a report of sale.

APPEAL by petitioner from *Burroughs, Judge.* Order entered 30 October 1979 in Superior Court of BUNCOMBE County. Heard in the Court of Appeals in Waynesville on 28 August 1980.

This case involves the sale of an incompetent's real and personal property to produce assets for the benefit of the incompetent.

The events which lead up to this appeal began in 1977 with the filing of a Petition by John Bolick to have Edith Bolch

Masters declared incompetent. Mr. Bolick is a nephew of Ms. Masters. On 9 May 1977, Ms. Masters was adjudged incompetent, and Eleanor B. Cole was appointed guardian with the consent of Mr. Bolick after Ms. Cole had agreed to sell the land in question to Mr. Bolick.

On 17 September 1979, a Petition was filed by W.K. McLean, Attorney for Petitioner, Eleanor B. Cole, seeking an Order for the sale of the property of the incompetent. On 27 September 1979, the Honorable J. Ray Elingburg, Clerk of Superior Court of Buncombe County issued an Order based on the Petition heretofore filed ordering "that the properties described in the petition be sold at a private sale to be conducted by the guardian, petitioner in this cause."

Thereafter, a letter was filed with the Clerk by Ms. Cole acting as guardian, stating that she had entered into agreements to sell the real property to Ms. Maney "for the sum of twelve thousand, five hundred and no/100 dollars ($12,500.00) ...." In response to this letter, appellant wrote and filed letters with the Clerk, the attorney for the guardian, and the guardian stating in essence that Mr. Bolick had offered more money for the property and "is willing to pay in cash ...." Enclosed was a proposed contract giving the terms of the sale, a description of the property, the names of the parties, the authority of Ms. Cole to act, and it was dated and signed by Mr. Bolick.

On 11 October 1979, a Report of Sale was filed with the Clerk and signed by the Guardian for the sale of the incompetent's personal property, and another Report was filed the same day for the sale of the incompetent's real property. Both Reports had the proper captions, and each stated the price was "to be paid in cash ...." On the same day the Reports were filed, a Confirmation of Sale for each sale was executed and filed by the Clerk. The confirmations recite that the "sale was reported on the 11th day of October, 1979, as appears of record .... That the report of such sale has remained on file for ten (10) days .... THIS, the 11th day of October, 1979." Thence, a Confirmation of Sale for the real property was executed by Judge Robert D. Lewis, Superior Court Judge Presiding, and was filed with the Clerk on 19 October 1979.

As a result of the filing of the Reports of Sale on 11 October 1979, Mr. Bolick gave notice and submitted cash representing

an upset bid on 22 October 1979. At the same time, a Petition to Set Aside the Confirmation of Sale was filed because "ten days had not passed from the time the report of sale was filed and the confirmation of sale was filed." A second Petition to Set Aside was filed 23 October 1979, in order to encompass the Confirmation executed by Judge Lewis. Consequently, an Order was entered *ex parte* by Judge Robert M. Burroughs, Superior Court Judge Presiding, Buncombe County, setting aside the sale and ordering the properties be resold.

A hearing was held in this matter on 25 October 1979, for the purpose of reaching a final determination of the facts and rights of the parties. The Court, after hearing the arguments of the attorneys for Ms. Cole and Ms. Maney, and after reviewing the letter of 28 September 1979, felt that "that in essence is the Report of Sale." The court ordered that the dates on Judge Lewis's Order be changed to "speak the truth, that the Report of Sale was actually made on September 28, 1979, instead of October 11, 1979 ..." even though "it's not in technical compliance with the Statute ...." Mr. Bolick perfected this appeal from the 30 October 1979 Order.

Lentz and Ball by Roger T. Smith for John Bolick, petitioner appellant.

DuMont, McLean, Leake, Harrell, Talman & Stevenson by Wesley F. Talman, Jr. for Eleanor B. Cole, guardian respondent.

Hyldburg & Grimes by Carl A. Hyldburg for Lillian M. Maney, purchaser respondent.

CLARK, Judge.

The sole issue in this case is whether the guardian's letter of 28 September 1979 constituted a Report of Sale within the meaning of G.S. 1-339.35. That letter is set out below:

"Clerk of Superior Court
Buncombe County
Asheville, N.C.

Dear Sir:

This is to notify you that I have this day entered into agreements to sell the property of Edith Bolch Masters, located at 540 Old Haw Creek Road, as recorded in the

Register of Deeds Office in Deed Book 752, Page 9, to Lillian M. Maney for the sum of twelve thousand, five hundred and no/100 dollars ($12,500.00), and to sell the Vagabond trailer to Mark Evans for teh [*sic*] sum of two thousand, seven hundred and fifty and no/100 dollars ($2750.00).

Very truly yours,

Eleanor B. Cole, Guardian
s/ ELEANOR B. COLE

Eleanor B. Cole, Guardian
95 Pinecroft Road
Asheville, N.C. 28804"

The pertinent statute provides:

"§ 1-339.35. *Private sale; report of sale.* — (a) The person holding a private sale shall, within five days after the date of the sale, file a report with the clerk of the superior court of the county where the proceeding for the sale is pending.

(b) The report shall be signed and shall show

(1) The title of the action or proceeding;

(2) The authority under which the person making the sale acted;

(3) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold;

(4) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;

(5) The name or names of the person or persons to whom the property was sold;

(6) The price at which the property, or each part thereof, was sold, and the terms of the sale; and

(7) The date of the report."

Petitioner claims that the letter failed to satisfy requirements (b)(1) and (b)(6) of the above quoted statute by failing to

set out the title of the action and failing to specify the terms of the sale. The letter apparently does lack these two requirements.

Repondents claim that failure to include the title of the case is not important since the nature of the proceeding could be ascertained from the body of the letter. Respondents contend as well that sufficient terms were included. An examination of the letter, however, reveals no terms of sale other than price; yet a listing of the price is separately required by the statute. The legislature must have meant by "terms of sale" something more than price alone. Any other reading would render superfluous the language requiring "terms of sale."

Respondents assert that the sale was a cash sale and that the only reasonable conclusion that third parties could draw from the evidence of terms in the letter was that the sale was for cash. Respondents cite no North Carolina authority for this proposition. We do not accept the proposition. Were we examining a written contract between Cole and Maney, we might infer from silence as to terms that the parties intended the sale to be for cash; but here we are not looking at a written agreement between them. We are looking at a statutorily required Report of Sale designed to give notice to third parties of, among other things, the terms of the sale. It is of primary importance that a potential upset bidder recognize the paper writing filed with the court as the Report of Sale and not a mere statement of intent to bid. Such bidder should not have to infer cash terms or other provisions specifically required by G.S. 1-339.35. That guardian respondent's attorney recognized the necessity of including the terms in the Report of Sale is made manifest by their inclusion in the properly captioned Report of Sale filed 11 October 1979.

Judge Burroughs also recognized these deficiencies and noted at the hearing on 30 October 1979 that the letter was "not in technical compliance with the statute." He nonetheless held the letter to be in substantial compliance with the statute and treated it as a Report of Sale.

[1] Respondent in arguing that substantial compliance is the appropriate standard in this case states in her brief:

> "'Substantial compliance' with statutory requirement is normally sufficient and occurs when as a practical matter, it is reasonable to conclude that partial compliance has fully attained objective of statute ...' 'In other words, there has been such compliance with essential requirements of statutory provisions as may be sufficient for accomplishment of purpose' *Houman v. Mayer,* 382 A. 2d 413, 474; 155 N.J. Super. 129; 40 Words and Phrases, 112 and 113 (1978-1979 Pocket Part) (Substantial Compliance with Statute)."

Regardless of the label used, we agree the proper legal test to apply to the letter before us is whether its partial compliance has *fully attained* the objective of the statute. We begin this determination by examining the purpose or objective of G.S. 1-339.35.

[2] We believe the legislature intended the Report of Sale under G.S. 1-339.35 to accomplish one major objective:

> "Proceedings outlined by statute for the holding of judicial sales ... and giving notice thereof are 'merely methods of administration and disposition of property by fiduciary officers, *their purpose being that the price received shall be greater,* and not that the title given shall be better.'" [Citations omitted, emphasis added].

Wadsworth v. Wadsworth, 260 N.C. 702, 708, 133 S.E. 2d 681, 686 (1963). The Report of Sale was thus intended not just to give record notice of the fact of the sale but, more importantly, to operate along with G.S. 1-339.36 and 1-339.25 to ensure "that the price received shall be greater" by facilitating the practice of upset bidding by providing a clear-cut starting point for the time period during which upset bids could be filed.

[3] In determining whether the 28 September letter accomplishes these purposes, we note that G.S. 1-339.25 requires that upset bids be deposited "with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report." This provision applies to private sales. G.S. 1-339.36(b). Thus the time for filing an upset bid is determined from the date of the Report of Sale and to accomplish the purpose of the legislature a writing filed with the clerk must not only put third parties on notice that the Commissioner has an

offer which he wishes the court to accept, but also that this writing is the statutorily required Report of Sale which begins the running of the ten days in which upset bids may be filed. The letter of 28 September in this case, by failing to set out the title of the case or to style itself a Report of Sale, left reasonable doubt as to its status. We believe the upset bidding procedure can work properly only when there is certainty as to what constitutes a Report of Sale so that the potential upset bidder can know with certainty by what date he must deposit his upset bid with the Clerk of Court. We note that the potential upset bidder in this case did not have the benefit of the judicial determination that the letter was a Report of Sale until it was *already too late* to file an upset bid.

We believe, moreover, that partial compliance with the statutory language is no compliance at all, where, as here, it fails to achieve the legislature's objective of facilitating the practice of upset bidding by ensuring certainty on the part of potential upset bidders as to when their upset bids must be deposited with the clerk. To effectuate the legislative purpose of the statute we must ensure that a potential upset bidder can look at a writing filed with the clerk and *know* whether it is a Report of Sale.

This result seems to us particularly just in the case *sub judice* in light of the party who will benefit from our holding, the incompetent. "There is no principle more universally recognized in the law than this: Those who by reason of legal disability are unable to preserve for themselves their legal rights are deserving of having those rights assiduously protected by the courts including courts of last resort." *In re Lancaster*, 290 N.C. 410, 423, 226 S.E. 2d 371, 379 (1976). The device of the upset bid was to have protected the incompetent, Ms. Masters, by assuring that her property bring the best price possible. We will not allow this protective device to be circumvented, however inadvertently.

The portion of the order of 30 October 1979 which amended the prior confirmations of the clerk and judge to reflect the date of the Report of Sale as 28 September 1979, is vacated. The confirmations thus read as originally filed, *i.e.*, in the case of the clerk's confirmation: "sale was reported on the 11th day of October, 1979, as appears of record. . . . [R]eport of such sale has

remained on file for ten (10) days .... THIS, the 11th day of October, 1979"; and in the case of the judge's confirmation: "sale was reported on the 11th day of October, 1979, as appears of record .... [R]eport of such sale has remained on file for ten (10) days .... THIS, the 19th day of October, 1979." The irregularities on the faces of these confirmations establish their invalidity in that the clerk and judge acted without statutory authority when they confirmed the sale prior to the expiration of the statutorily required ten-day period for the deposit of upset bids. G.S. 1-339.37. Mr. Bolick's upset bid of 22 October 1979 was thus timely filed. *See* G.S. 1-339.36 and 1-339.25.

The order of 30 October 1979 is vacated and the cause is remanded for proceedings consistent with this opinion.

Vacated and Remanded.

Judges MARTIN (Harry C.) and HILL concur.

JUDITH ANN TRIPP (MERCER) v. EUGENE PATE, M.D., KINSTON BONE AND JOINT CLINIC, P.A., AND LENOIR MEMORIAL HOSPITAL, INC.

No. 808SC314

(Filed 4 November 1980)

1. **Trial § 3– motion for continuance – denial no abuse of discretion**

The trial judge did not abuse his discretion in denying plaintiff's motion for continuance made on the ground that her attorney had been unable to prepare adequately for trial due to a schedule conflict, since the trial judge, in denying plaintiff's motion, noted that plaintiff's attorney no longer had any schedule conflict and that he had over a year to prepare her case for trial.

2. **Appeal and Error § 30.1– objections to evidence — timeliness**

Plaintiff's objection to certain portions of defendant's testimony was not timely where she did not object at the time the testimony was offered but instead moved to strike the testimony at the conclusion of all her evidence.

3. **Hospitals § 3.3– malpractice alleged – failure to show negligence of hospital**

In a malpractice action to recover damages for injury resulting from an alleged post-operative infection, the trial court properly directed verdict in favor of defendant hospital where plaintiff alleged that the hospital was negligent in not reporting promptly the results of certain tests ordered by her doctors after her surgery, but plaintiff failed to present any evidence of

the standard of care for a hospital in Kinston or similar communities regarding time necessary to report test results, and where plaintiff argued that she presented evidence that the hospital was negligent by failing to provide a sterile atmosphere in its operating room, but she failed to present any evidence of lack of sterile conditions in defendant hospital's operating room.

4. **Physicians, Surgeons and Allied Professions § 16.1– malpractice of physician alleged – insufficiency of evidence of negligence**

In a malpractice action to recover damages for injury resulting from an alleged post-operative infection, the trial court properly directed verdict for defendant doctor where plaintiff argued (1) that defendant negligently failed to inform her of the possible consequences of the proposed surgery, but plaintiff testified that she would have had the surgery even if she had been so informed; (2) that she presented evidence that defendant negligently abandoned her after surgery, but the evidence disclosed that defendant left plaintiff in the care of his two associates who did in fact treat and care for plaintiff; and (3) that defendant and his associates, acting as his agents in his absence, failed to diagnose properly and treat her condition subsequent to surgery, but there was a total absence of expert or other testimony in the case that the medical care plaintiff received was not in conformity with approved medical practices and treatment in Kinston or similar communities.

APPEAL by plaintiff from *Rouse, Judge.* Judgment entered 26 October 1979 in Superior Court, GREENE County. Heard in the Court of Appeals 7 October 1980.

Plaintiff brought this action for malpractice against defendants seeking to recover damages for injury resulting from an alleged post-operative infection in her right knee.

Plaintiff's evidence at trial tended to show that plaintiff injured her knee in a basketball game and sought treatment from defendant Dr. Pate who arranged to have her admitted at defendant hospital located in Kinston, North Carolina, for exploratory surgery. After performing the surgery, Dr. Pate left town on vacation for several days and arranged for his associates, Drs. Spigner and McGirt, to attend plaintiff. During Dr. Pate's absence, plaintiff began running an elevated body temperature and complained of pain in her leg. Plaintiff's white blood count increased and eventually she broke out in a red rash. Dr. Pate resumed treatment of plaintiff upon his return to Kinston. After other physicians were consulted, plaintiff's condition was diagnosed as a drug allergy and certain medications were discontinued. Plaintiff's condition appeared to improve, but plaintiff continued to suffer from pain, stiffness and swell-

ing. Several months later plaintiff's condition was diagnosed as a post-operative infection of the knee joint, resulting in a permanently stiff knee. Other pertinent facts are stated in the body of the opinion.

Plaintiff presented her case through the testimony of defendant Dr. Pate, plaintiff, and plaintiff's parents and through the depositions of Dr. Frank H. Bassett, III and Dr. Thomas Dameron.

At the conclusion of plaintiff's evidence, defendants moved for and were granted directed verdicts. Plaintiff appealed.

Farris, Thomas & Farris, by Robert A. Farris, Jr. and Thomas J. Farris, for the plaintiff-appellant.

Ward and Smith, by Thomas E. Harris, for the defendants-appellees.

MARTIN (Robert M.), Judge.

[1] By her first assignment of error plaintiff contends the trial court erred in denying certain motions. First, plaintiff argues the trial court erred in denying her pre-trial motion to continue. The granting of a continuance is within the discretion of the trial court judge and absent a manifest abuse of discretion his ruling is not reviewable on appeal. *Johnson v. Johnson*, 14 N.C. App. 40, 187 S.E. 2d 420 (1972); 12 Strong's N.C. Index 3d *Trial* § 3.1 (1978). In the case *sub judice* the basis for plaintiff's motion was that her attorney had been unable to adequately prepare for trial due to a schedule conflict. In denying plaintiff's motion, Judge Rouse noted that plaintiff's attorney no longer had any schedule conflict and that he had over a year to prepare her case for trial. Clearly Judge Rouse did not abuse his discretion in denying plaintiff's motion for a continuance.

[2] Second, plaintiff argues the trial court erred in denying her motion to strike and suppress portions of Dr. Pate's testimony which plaintiff contends were contrary to prior statements in his answers to written interrogatories and in his deposition. Plaintiff contends defendant Pate was under a duty to amend his responses pursuant to Rule 26(e), N.C. Rules Civ. Proc. Without deciding whether defendant was under such a duty, we must overrule this assignment of error. Plaintiff's counsel did not object to Dr. Pate's testimony at the time it was offered, but

rather elected to proceed with the presentation of her evidence by offering additional proof through five other witnesses. At the conclusion of all her evidence, plaintiff moved the trial court to strike the testimony of Dr. Pate as to his diagnosis of plaintiff's condition. Such motion was not timely. If it was to have been made properly, it should have been made at the time the testimony was offered. "An objection is timely only when made as soon as the potential objector has the opportunity to learn that the evidence is objectionable, unless there is some specific reason for a postponement. Unless prompt objection is made, the opponent will be held to have waived it." 1 Stansbury's N.C. Evidence § 27, at 69 (Brandis rev. 1973).

Plaintiff by her second assignment of error contends the trial court erred in granting defendants' motions for directed verdicts at the conclusion of plaintiff's evidence. N.C. Gen. Stat. § 90-21.12 sets forth the statutory standard of care a plaintiff must establish in medical malpractice actions as follows:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

In malpractice cases, plaintiff must demonstrate by the testimony of a qualified expert that the treatment administered by defendant was in negligent violation of the accepted standard of medical care in the same or similar communities *and* that defendant's treatment proximately caused plaintiff's injury. *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978). Plaintiff argues she presented evidence showing violations of the standards of care owed her by both defendants, the hospital and Dr. Pate, and that the alleged violations were proximate causes of her injury. The question presented by a defendant's motion for a directed verdict is whether all the evidence, which supports the plaintiff's claim, when taken as true, considered in

the light most favorable to the plaintiff and given the benefit of every reasonable inference in the plaintiff's favor which may legitimately be drawn therefrom is sufficient for submission to the jury. Contradictions, conflicts and inconsistencies in the evidence must be resolved in plaintiff's favor in determining the sufficiency of the evidence to withstand a motion for directed verdict. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979). With these general principles in mind, we will discuss this assignment separately as to each defendant.

I. The Hospital

[3] Plaintiff offers two arguments to support her contention that the trial court erred in granting a directed verdict in the defendant hospital's favor. We believe neither argument has merit.

First, plaintiff argues she presented evidence the hospital was negligent in not reporting promptly the results of certain tests ordered by plaintiff's doctors after her surgery, thereby causing a delay in the diagnosis of plaintiff's condition. In order to withstand a motion for directed verdict on this issue, however, plaintiff was required by N.C. Gen. Stat. § 90-21.12, *supra*, to offer some evidence that the care of the defendant hospital was not in accordance with the standards of practice among *other hospitals* in the same or similar communities. Plaintiff failed to present any evidence of the standard of care for a *hospital* in Kinston or similar communities regarding time necessary to report test results.

Second, plaintiff argues she presented evidence the hospital was negligent by failing to provide a sterile atmosphere in its operating room. We disagree. Plaintiff presented ample expert medical testimony at trial that the most opportune time for infection to have become established in her knee was during the time the incision was open in the operating room. Plaintiff, however, failed to present any evidence of lack of sterile conditions in defendant hospital's operating room. Liability in malpractice cases must be based on proof of actionable negligence. *Watson v. Clutts*, 262 N.C. 153, 136 S.E. 2d 617 (1964).

For the above-stated reasons, we affirm the trial court's granting of a directed verdict in favor of defendant hospital.

II. Dr. Pate

[4] Plaintiff offers three arguments to support her contention that the trial court erred in granting a directed verdict in defendant Pate's favor. In our opinion, none of these arguments have merit.

First, plaintiff argues Dr. Pate negligently failed to inform her of the possible consequences of the proposed surgery and therefore, although plaintiff signed consent forms agreeing to the surgery, she did not give an informed consent to the operation. Plaintiff testified at trial that she did not know an infection could have resulted from the surgery and that Dr. Pate had failed to inform her an infection might have resulted. Plaintiff also testified, however, that

> I was very anxious to have this surgery done so I could get better and play basketball. The people that I knew that had surgery were back playing ball after a week. No one, nurses, doctors advised me of the dangers or risks that surgery entailed, *if they had it would not have changed my mind.* (Emphasis added.)

Thus plaintiff herself established that Dr. Pate's alleged failure to inform her of the risks inherent in the surgery was not a proximate cause of her injury. In malpractice cases, "[t]he plaintiff must not only show that the defendant physician or surgeon was negligent, but also that the alleged negligence was the proximate cause or one of the proximate causes of the damage . . . ." 10 Strong's N.C. Index 3d *Physicians, Surgeons, and Allied Professions* § 20 at 187 (1977).

Second, plaintiff argues she presented evidence that Dr. Pate negligently abandoned her after surgery. We disagree. After he performed the surgery, Dr. Pate left plaintiff in the care of his two associates for a period of five days while he travelled out of town. The record discloses that prior to leaving the hospital, Dr. Pate ordered post-operative care, medication, special diet and chest x-rays for plaintiff. In addition, Dr. Pate arranged for his associates to care for plaintiff in his absence. Dr. Pate testified:

> I told them [his associates] I was going to operate on her and they understood that they were to take care of her

> while I was gone with full authority. Before I left town I told them she was in the recovery room and appeared to be doing well and they were to see her that night, the 12th, in making rounds. I left my medical records available to them and a handwritten note telling what had been done and what the procedure was.

Dr. Pate further testified that in his opinion his associates were competent to render whatever medical care plaintiff may have needed, that it was not unusual for them to "cover" for each other when one was out of town and that there was no medical reason why the surgery should not have been performed if he was leaving town subsequently. All of the other expert medical testimony at trial was to the effect that this was a regular practice among surgeons in communities similar to Kinston. Plaintiff testified at trial

> If Dr. Pate left town, I would have been equally happy to have Dr. McGirt or Spigner treat me. When Dr. Pate left town, it didn't make me unhappy because I knew I would be treated by Dr. McGirt or Spigner. It wouldn't have made any difference if Dr. Pate had told me he was going out of town. I would have gone ahead and had the surgery done.

The record discloses that Dr. Pate's associates did in fact treat and care for plaintiff in Dr. Pate's absence.

> The surgeon's duty to his patient does not, of course, end with the termination of the operation itself, nothing else appearing ... [T]he surgeon "must not only use reasonable and ordinary care, skill and diligence in its performance, but, in the subsequent treatment of the case, he must also give, *or see that the patient is given*, such attention as the necessity of the case demands." (Emphasis added.)

Starnes v. Taylor, 272 N.C. 386, 394, 158 S.E. 2d 339, 345 (1968).

Defendant cites *Groce v. Myers*, 224 N.C. 165, 29 S.E. 2d 553 (1944) in support of her argument that Dr. Pate abandoned her subsequent to the surgery. *Groce* involved a factual situation distinguishable from the case *sub judice*. In *Groce* the plaintiff sustained a broken arm while she was a patient in a hospital under the defendant doctor's care. The defendant refused to

treat the plaintiff's broken arm and called her father to remove the plaintiff from the hospital. The court in *Groce* held that the plaintiff's evidence on the issue of abandonment was sufficient to go to the jury.

In the case *sub judice* plaintiff was not left unattended after her surgery. Dr. Pate made every effort to provide medical care for plaintiff in his absence. The cases of *Nash v. Royster*, 189 N.C. 408, 127 S.E. 356 (1925) and *Wilson v. Hospital*, 232 N.C. 362, 61 S.E. 2d 102 (1950) stand for the proposition that where a surgeon has performed surgery upon his patient and left her under the care of another surgeon for further treatment, the substituted surgeon is the agent of the former in the performance of necessary services to the patient which the former had contracted to render. Thus it is clear from an examination of North Carolina case law that as a matter of law, Dr. Pate did not negligently abandon plaintiff. He fulfilled his duty to plaintiff as set out in *Starnes, supra,* to see that his patient was given such attention as the necessity of the case demanded, by making his associates his agents in the performance of necessary services to plaintiff subsequent to her surgery.

Third, plaintiff argues that she presented evidence that Dr. Pate and his associates, acting as his agents in his absence, failed to properly diagnose and treat her condition subsequent to the surgery.

> In an action for medical malpractice the burden of proof on the plaintiff is heavy. In order to recover for personal injury arising out of the furnishing of health care, the plaintiff must demonstrate by the testimony of a qualified expert that the care provided by defendant was not in accordance with the accepted standard of care in the community. *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978); N.C. Gen. Stat. § 90-21.12.

Vassey v. Burch, 45 N.C. App. 222, 225, 262 S.E. 2d 865, 867, *rev'd on other grounds*, 301 N.C. 68, 269 S.E. 2d 137 (1980).

> In cases of diseases or injuries "with respect to which a layman can have no knowledge at all, the court and the jury must be dependent on expert evidence. There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no

evidence of it proper to be submitted to the jury." *Smith v. Wharton*, 199 N.C. 246, 154 S.E. 12.

Ballance v. Wentz, 286 N.C. 294, 302, 210 S.E. 2d 390, 395 (1974).

There is a total absence of expert or other testimony in the case *sub judice* that the medical care plaintiff received was not in conformity with approved medical practices and treatment in Kinston or similar communities. Herein lies the fatal flaw in plaintiff's case against Dr. Pate. Dr. Bassett stated he had no opinion as to whether plaintiff received the usual and customary treatment for a patient in a community similar to Kinston. Dr. Dameron gave no opinion on the issue, merely stating that he would have suspected an infection.

When tested by the foregoing rules, the evidence of actionable negligence on the part of either Dr. Pate or the hospital was insufficient to be submitted to the jury. Hence Judge Rouse was required to grant defendants' motions for directed verdicts.

Discussion of defendants-appellees' assignment of error is unnecessary since we affirm the trial court's entry of the directed verdict.

Affirmed.

Judges HEDRICK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. CAROLYN ELAINE ROGERS

No. 8010SC368

(Filed 4 November 1980)

1. Criminal Law § 91– Speedy Trial Act – exclusion of time while waiting for defendant to hire counsel

In computing the time within which the trial of a criminal case was required to commence pursuant to the Speedy Trial Act, the time between defendant's indictment and a stipulation of readiness for trial by defendant's attorney was properly excluded as a "period of delay resulting from other proceedings concerning the defendant" within the meaning of G.S. 15A-701(b)(1) where defendant had informed the court at her first appearance in the district court that she would obtain private counsel and the State was waiting during that time for defendant to obtain such counsel.

2. **Criminal Law § 91– Speedy Trial Act – exclusionary periods – necessity for findings and conclusions**

In determining exclusionary periods under the Speedy Trial Act, the trial court should detail for the record findings of fact and conclusions of law in support of its rulings.

3. **Criminal Law § 80.1– stolen credit card – computer report – foundation for admissibility**

A computerized "lost report" containing information about a certain "stolen" Master Charge card was properly admitted into evidence where a witness testified that the records composing the "lost report" were maintained in the regular course of business by his employer, demonstrated his familiarity with the record keeping practice of his employer concerning the information in question, and described the process of obtaining and recording this information.

4. **Criminal Law § 75.10– in-custody statement – admissibility**

In a prosecution for attempting to obtain merchandise by false pretense by use of a stolen credit card, the trial court properly admitted defendant's statement to a police officer that she "had taken the credit cards from [the owner thereof] and that she was going to return them to him in a little while" where the court found upon supporting *voir dire* evidence that defendant voluntarily went to the police station for the purpose of clearing up the matter of her authority to use the credit card in question; the police learned while she was there that the credit card had been stolen; defendant was then informed that the investigation had become accusatory and was advised of her constitutional rights; defendant signed a waiver of rights form after an officer went over its contents with her and indicated that she would talk to the officers without an attorney present; and defendant thereafter made the statement to the officer.

5. **False Pretense § 3.1– attempt to obtain merchandise with stolen credit card**

The State's evidence was sufficient for the jury in a prosecution for attempting to obtain merchandise by false pretense by use of a stolen credit card in violation of G.S. 14-100.

APPEAL by defendant from *Lane, Judge.* Judgment entered 8 November 1979. Heard in the Court of Appeals 16 September 1980.

Defendant was charged in a proper bill of indictment with attempting to obtain merchandise by false pretenses in violation of G.S. 14-100. Evidence for the State tended to show that in early April, 1979, defendant was shopping at the Casual Corner store in Cary Village Mall, Cary, North Carolina. She went to the clothing racks where she picked up "one suit, a jacket and shirt, two dresses and two shirts." She then proceeded to the cash register and presented a temporary charge card bearing

the name Earl Hart. She did not present anything other than the charge card as payment for the goods. The name on the charge card "looked real familiar" to the store manager who had a list on her cash register bearing Earl Hart's name and instructions not to accept a charge on the store's charge card bearing that name because it had been acquired with a stolen Master Charge card. The manager then called the police and delayed the defendant's departure by talking to her until the police arrived.

Defendant was arrested, indicted, tried by a jury and found guilty as charged. From a judgment of imprisonment, defendant appeals.

Other facts necessary to consideration of the errors assigned will be set forth in the opinion.

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

Rafford E. Jones, for defendant appellant.

WHICHARD, Judge.

[1] Defendant's first assignment of error presents for decision a significant issue of first impression in the interpretation of North Carolina's Speedy Trial Act, G.S. 15A-701 *et seq.* The record reveals several undisputed facts pertinent to resolution of this issue. A warrant for defendant's arrest for the crime in question was issued 6 April 1979. The Grand Jury returned a true bill of indictment against defendant on 29 May 1979. Defendant's trial commenced 7 November 1979, and judgment was entered 8 November 1979.

G.S. 15A-701(al) provides:

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

Defendant's indictment fell within the time period to which section 15A-701(al)(1) applies. A period in excess of 120 days elapsed between indictment and trial. Nothing else appearing, therefore, defendant's motion to dismiss pursuant to the provisions of G.S. 15A-703 should have been granted. To deny the motion the court must have excluded some portion or portions of the time between indictment and trial pursuant to G.S. 15A-701(b).

The record does not reveal, nor does the State contend, that any of the specified exclusionary provisions of G.S. 15A-701(b) are applicable. The State does contend, however, and the trial court ruled, that the time between defendant's indictment on 29 May 1979 and a stipulation of readiness for trial by defendant's attorney dated 16 July 1979 should be excluded as a "period of delay resulting from other proceedings concerning the defendant" pursuant to G.S. 15A-701(b)(1) because the State was waiting during that time for defendant to secure counsel for her defense.

Our research discloses no cases resolving the issue presented by this ruling in this or other jurisdictions among the fifty states. G.S. 15A-701(b) was taken almost verbatim from the federal Speedy Trial Act, 18 U.S.C. § 3161(h) (Supp. 1980); yet, we find no federal cases interpreting the phrase "delay resulting from other proceedings concerning the defendant" as it relates to the issue of time which elapses while defendant is securing counsel. Thus, it becomes our task to attempt to ascertain legislative intent and to interpret and apply the provision accordingly.

While legislative history in North Carolina is generally quite limited, in this instance we have the benefit of a report to the 1977 General Assembly which recommended the enactment of the legislation now codified as G.S. 15A-701 *et seq.* That Report states the following with reference to the provision here in question:

> Subdivision (1) excludes delays resulting from other proceedings concerning the defendant. Several types of proceedings are listed. *The opening clause clearly states, however, that the specified exclusions are not exhaustive of the types of other proceedings.*

(Emphasis supplied.) Legislative Research Commission Report to the 1977 General Assembly, Speedy Trials, Appendix J, at J-3 (1977). It is evident that the drafters of this legislation contemplated that the courts would augment the specified types of proceedings which should result in exclusions in computing the time within which the trial of a criminal case must commence. It would also appear that a liberal construction of the phrase in question was intended.

So construing the phrase, we agree with the trial court that under the facts of this case the time period in question should be held to be among the excluded periods within the intended meaning of "delay resulting from other proceedings concerning the defendant" as contemplated by the General Assembly in enacting G.S. 15A-701(b). The defendant here testified at a hearing on the motion to dismiss for failure to comply with the Speedy Trial Act that at her first appearance in district court inquiry was made as to whether the court should appoint an attorney for her. At that time she executed a waiver of her right to counsel and indicated to the court that she would obtain her own counsel. She further testified: "I stated to the Court that my parents could obtain counsel with our own funds at that time." The trial judge asked the defendant at the hearing: "Now, did you at any time intend to proceed without the benefit of a lawyer?" Defendant answered: "No."

[2] We note that the record reveals no findings of fact and no conclusions of law entered by the trial court on the basis of this and other evidence adduced at the hearing on the motion; and we suggest that trial courts hereafter in determining exclusionary periods under the Speedy Trial Act detail for the record findings of fact and conclusions of law in support of their rulings. It is apparent here, nevertheless, that the trial court determined that the State met the burden of proof imposed on it by G.S. 15A-703 of "going forward with evidence in connection with excluding periods from computation of time in determining whether or not the time limitations . . . have been complied with."

The defendant here was entitled not only to a speedy trial, but also to representation by counsel in the presentation of her defense. She represented to the court at the outset of the proceedings her intention to secure privately retained counsel. She

subsequently represented to the court that she did not at any time intend to proceed without the benefit of a lawyer. The State had no notice that defendant was represented by counsel, retained or appointed, until stipulation of readiness for trial dated 16 July 1979 was submitted by counsel appointed to represent defendant in other cases. Under these facts, it was not unreasonable nor was it beyond the purview of the exclusionary provisions for "delay resulting from other proceedings concerning the defendant" for the trial court to exclude from its Speedy Trial Act computation the period between defendant's indictment on 29 May 1979 and the stipulation of readiness for trial dated 16 July 1979. A trial of defendant without benefit of counsel would be subject to nullification by virtue of deprivation of defendant's well-established constitutional right to counsel. For the courts to interpret the computation of delays under the Speedy Trial Act so as to create the possibility of constitutional error would be an absurdity, and "[i]t is fully established that 'the language of a statute will be interpreted so as to avoid an absurd consequence.' " *Taylor v. Crisp*, 286 N.C. 488, 496, 212 S.E. 2d 381, 386 (1975).

We hold, therefore, that under the particular facts of this case, the trial court ruled correctly in determining that the State had met its burden of "going forward with evidence in connection with excluding periods from computation in determining whether or not the time limitations under [the Speedy Trial Act] have been complied with"; and thus in excluding from its computation pursuant to G.S. 15A-701 the period of delay between defendant's indictment on 29 May 1979 and the stipulation of readiness for trial dated 16 July 1979, during which time the State had reason to believe defendant was in the process of securing counsel for her defense. With this exclusion, defendant was tried within the period prescribed by G.S. 15A-701. This assignment of error is, therefore, overruled. We would caveat, however, that our holding is limited to the peculiar facts of this case and should not be construed as establishing a general exemption from the provisions of the Speedy Trial Act, regardless of the circumstances, of periods of time attributable to the securing of defense counsel.

[3] Defendant assigns error to the trial court's having allowed several witnesses to testify that the credit card in question was

"stolen." With the exception of the final two instances, the trial court properly either sustained objections to this testimony or admitted it for the purpose of or subject to subsequent corroboration. The final two instances related to the introduction of State's Exhibit #2, a computerized "lost report" containing information concerning the credit card in question.

In *State v. Springer*, 283 N.C. 627, 197 S.E. 2d 530 (1973), Justice Huskins, speaking for our Supreme Court, set forth as follows the manner in which the admissibility into evidence of computerized business records must be determined:

> [P]rintout cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if otherwise relevant and material, if: (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.

Springer, 283 N.C. at 636, 197 S.E. 2d at 536.

The State's witness, Joseph W. King, a "Special Investigator" for Citibank Credit Services in New York, testified that the records here composing the "lost report" were maintained in the regular course of business at Citibank. He further testified as to the chain of events by which the information was obtained and keyed into the computer. He testified that the credit card in question was reported stolen on 26 February 1979, and that at that time Citibank, in the regular course of its business, entered the information concerning Mr. Hart's credit card into its computer. He laid a proper foundation by testifying as to his own familiarity with the record keeping practice of Citibank concerning the information in question, and by describing the process of obtaining and recording this information. We find this evidence sufficient to meet the requirements of *Springer* as set forth above, and to corroborate the testimony of previous witnesses who referred to the card as having been "stolen." This assignment of error is therefore overruled.

[4] Defendant assigns error to the admission into evidence of a statement which she made to a police officer that "she had taken the credit cards from Mr. Hart and that she was going to return them to him in a little while." Evidence adduced by the State at a voir dire hearing conducted prior to admission of the statement tended to show that defendant was taken to the Cary police station in the custody of a police officer. She was taken there for the purpose of trying to "correct the problem" by contacting Mr. Hart so the police could "bring him down to try to straighten the matter out." When the officer informed the defendant that he had been advised that there was no Mr. Hart working for Burroughs-Wellcome, contrary to defendant's representations, he thereupon placed her in an interview room and advised her of her rights. Defendant signed a waiver of rights form after the officer went over its contents with her, and she indicated she would talk to the officers without an attorney present. After the officer advised her of her rights and advised her that she was under arrest, defendant made the statement that she had taken the card from Mr. Hart but intended to give it back to him.

The evidence adduced at the voir dire hearing supports the factual findings made by the trial court to the effect that the defendant voluntarily visited the police station for the purpose of assisting the police in contacting Mr. Hart, her alleged husband; that when the police learned while she was there that the credit card had been stolen, they thereupon informed the defendant that the investigation had become accusatory; that the defendant was advised of her constitutional rights when the investigation became accusatory in nature; and that the defendant signed the waiver of rights form after being advised as to her rights and after inquiry as to whether she understood her rights. These and other factual findings fully support the conclusions of the trial court that the defendant understood her rights; that she purposely, freely, knowingly and affirmatively waived each of them; that any statement she made prior to execution of the waiver of rights form was voluntarily made to the police as she sought their assistance in clearing up the matter of her authority to use the credit card; and that any statement made after execution of the waiver of rights form was made knowingly and voluntarily. Nothing in the record of this case indicates an intent on the part of the officers involved

to circumvent the requirements of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), or to place the defendant under an involuntary compulsion to communicate inculpatory information. This assignment of error is overruled.

[5] Defendant assigns error to the trial court's denial of her motion to dismiss at the close of the State's evidence. The evidence, considered in the light most favorable to the State, was sufficient to establish each essential element of the offense charged and the defendant as the perpetrator thereof. This assignment of error is overruled.

Defendant's final assignment of error relates to the trial court's summary of the evidence and application of the law thereto. We have examined the portion of the charge complained of, and we find no prejudicial error.

We find that the defendant had a trial free from prejudicial error.

No error.

Chief Judge MORRIS and Judge HEDRICK concur.

TERESA FLEMING v. JACKIE W. FLEMING

No. 8028DC383

(Filed 4 November 1980)

1. **Divorce and Alimony § 24.4– registration of foreign child support order – personal jurisdiction unnecessary**

Personal jurisdiction is unnecessary for mere registration of a foreign support order under the Uniform Reciprocal Enforcement of Support Act, and language in the trial court's confirmation order purporting to find personal jurisdiction was superfluous and did not bind defendant in subsequent enforcement proceedings.

2. **Divorce and Alimony §§ 21.8, 24.4– foreign alimony and child support orders – enforcement hearing – right to attack jurisdiction of foreign court**

The trial court's superfluous conclusion that an Arizona court had personal jurisdiction over defendant to enter orders requiring payment of alimony and child support did not prevent defendant from defending at an enforcement hearing on the basis of Arizona's lack of jurisdiction over his person; however, defendant failed to include in the record anything of the proceedings at the enforcement hearing, and no error will be found where

jurisdiction was presumed and the record is devoid of any effort to show lack of jurisdiction.

3. **Divorce and Alimony §§ 21.8, 24.4– foreign alimony and child support orders – full faith and credit**

Arizona decrees for alimony and child support were entitled to full faith and credit in determining arrearages since a decree for the future payment of alimony or child support is, as to installments past due and unpaid, within the protection of the full faith and credit of the Constitution unless by the law of the state in which the decree was rendered its enforcement is so completely within the discretion of the courts in that state that they may annul or modify the decree as to overdue and unsatisfied installments, and in Arizona installments of alimony and support payments become vested when they become due and the courts of that state have no power to modify the decree as to such past due installments.

4. **Divorce and Alimony §§ 21.8, 24.4– alimony and child support arrearages – foreign judgment res judicata**

An Arizona judgment was res judicata on the issue of arrearages due plaintiff for alimony and child support up to the date of entry of the judgment, and the trial court erred in failing to treat the judgment as res judicata.

5. **Divorce and Alimony §§ 21.8, 24.4– foreign order for alimony and child support – amount of arrearages**

Where Arizona decrees, which were entitled to full faith and credit, provided that plaintiff was entitled to $600 per month for alimony and $300 per month for child support, and an Arizona judgment entered on 30 May 1978 ordered defendant to pay arrearages due under the decrees, the trial court should have found that defendant owed plaintiff $17,100 (which was $900 multiplied by the nineteen months since the Arizona judgment) less the amount defendant had already paid plaintiff during the nineteen month period.

APPEAL by defendant from *Styles* and *Fowler, Judges.* Orders entered 30 October 1979 and 17 December 1979 in District Court, BUNCOMBE County. Appeal by plaintiff from *Fowler, Judge.* Order entered 17 December 1979 in District Court, BUNCOMBE County. Heard in the Court of Appeals in Waynesville on 28 August 1980.

The parties in this case were married in 1974 and adopted a son in 1975. They moved to Nogales, Arizona, in 1976 where the defendant operated a trucking business. They went to California later in 1976 in connection with defendant's trucking business, but plaintiff left and returned to the parties' home in Arizona within two weeks of going to California. Defendant remained in California.

Plaintiff instituted action for divorce in Arizona and over the course of the next two years obtained the following:

(1) An Arizona Decree of Dissolution dated 29 September 1976, dissolving the parties' marriage and awarding the plaintiff $600 a month alimony and custody of their son;

(2) An Arizona Order to Modify Decree of Dissolution dated 31 January 1978, ordering defendant to pay $300 a month in child support; and

(3) An Arizona Judgment dated 30 May 1978 ordering defendant to pay $9,120.50 in arrearages of the foregoing two orders. In none of these proceedings was process personally served on the defendant in the State of Arizona, nor did defendant make any appearance in the Arizona court.

Plaintiff registered the foreign judgments in Buncombe County pursuant to N.C. Gen. Stat. Ch. 52A, the Uniform Reciprocal Enforcement of Support Act (URESA). Defendant contested the registration on the ground that the Arizona court had lacked jurisdiction over his person. A hearing was held pursuant to which Styles, District Court Judge, entered an order dated 30 October 1979 confirming the registration of the foreign judgments, concluding that the Arizona court had personal jurisdiction over the defendant, and ordering that a hearing on enforcement of the registered orders be held on 7 December 1979.

At the enforcement hearing before Fowler, District Court Judge, plaintiff moved the court for a determination of arrearages due and owing under the Arizona orders. Plaintiff testified that since the initial Arizona decree in September of 1976 defendant had made payments to her in the following amounts for the respective calendar years: 1976 — $3,350.00; 1977 — $671.00; 1978 — $1,070.00; 1979 prior to filing of North Carolina litigation — $2,110.00; 1979 since filing of North Carolina litigation — $1,670.00; for a total payment, according to plaintiff's testimony of $8,808.00. [*Sic*, the actual total payment is $8,871.00. The record does not make clear whether the error in totalling up these figures was the plaintiff's or the judge's.] The defendant testified that since September 1976 he had made the following payments to plaintiff for spousal maintenance and child support: 1976 — $15,150.00; 1977 — $4,219.98; 1978 prior to the

Arizona judgment for arrearages — 0; 1978 after the Arizona judgment — $1,597.28; 1979 — $3,400.00; for a total payment, according to defendant's testimony, of $24,367.26.

The judge in an order dated 17 December 1979 denied plaintiff's request for arrearages and ordered the defendant to pay future payments under the Arizona orders into the office of the Clerk of Superior Court, Buncombe County, in the amounts specified in the foreign judgments.

Brock, Begley & Drye by Michael W. Drye for plaintiff appellant-appellee.

Redden, Redden & Redden by Randolph C. Romeo for defendant appellant-appellee.

CLARK, Judge.

Defendant bases his appeal on two questions. The first is whether Judge Styles erred in concluding at the confirmation hearing that the Arizona court had personal jurisdiction over the defendant. The second is whether that conclusion foreclosed the defendant from presenting at the enforcement hearing "matters that would be available to him as defenses in an action to enforce a foreign money judgment [*i.e.*, the lack of personal jurisdiction of the court rendering the original judgment]" as provided in G.S. 52A-30(c). We resolve both questions against the defendant.

[1] Judge Styles' conclusion that the Arizona court had personal jurisdiction over the defendant did not prejudice the defendant in the confirmation hearing. In a similar case, *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E. 2d 633 (1977), we held that registration and enforcement were entirely separate procedures under URESA, G.S. Ch. 52A. We further held that personal jurisdiction is unnecessary for mere registration of a foreign support order under URESA, G.S. 52A-29, and that language in a confirmation order purporting to find personal jurisdiction was superfluous and did not bind the defendant therein in the subsequent enforcement proceedings. *Pinner v. Pinner*, 33 N.C. App. at 207, 234 S.E. 2d at 636. Defendant was not prejudiced by Judge Styles' superfluous jurisdictional findings because they were unnecessary to the issue before the court and were therefore of no effect upon the rights of the parties in the subsequent enforcement hearing.

[2] Judge Styles' conclusion that the Arizona court had personal jurisdiction over the defendant did not prejudice the defendant in the enforcement proceedings. As previously indicated, the defendant was free to defend at the enforcement hearing on the basis of Arizona's lack of jurisdiction over his person. *Pinner v. Pinner, supra.* Defendant has failed to include in the record anything of the proceedings at the enforcement hearing. We are, therefore, unable to examine the record and determine whether the defendant properly raised the issue of personal jurisdiction at the enforcement hearing.

> "In challenging a foreign judgment a defendant has the right to interpose proper defenses. He may defeat recovery by showing want of jurisdiction either as to the subject matter or as to the person of defendant. *Hat Co., Inc. v. Chizik*, 223 N.C. 371, 26 S.E. 2d 871; *Casey v. Barker*, 219 N.C. 465, 14 S.E. 2d 429; *Dansby v. Insurance Co., supra.* However, jurisdiction will be presumed until the contrary is shown. *Levin v. Gladstein, supra.*"

Thomas v. Frosty Morn Meats, 266 N.C. 523, 526, 146 S.E. 2d 397, 400 (1966). No error will be found where jurisdiction was presumed and the record is devoid of any effort to show lack of jurisdiction.

Plaintiff appeals that portion of the Order of 17 December 1979, denying her arrearages under the Arizona decree and order to modify the decree. Plaintiff's appeal must be considered in three parts. First, we must determine whether the Arizona decrees are entitled to full faith and credit in determining arrearages. Second, we must consider whether the Arizona judgment of 30 May 1978 was *res judicata* as to arrearages up to that date. Third, we must determine whether plaintiff is entitled to arrearages for the period of 30 May 1978 to 17 December 1979.

[3] The full faith and credit clause in the United States Constitution, Article IV, Sec. 1, requires that the judgment of the court of one state must be given the same effect in a sister state that it has in the state where it was rendered. *Spence v. Durham*, 283 N.C. 671, 683, 198 S.E. 2d 537, 545 (1973), *cert. denied, sub nom Spence v. Spence*, 415 U.S. 918, 39 L. Ed. 2d 473, 94 S. Ct. 1417 (1974). A decree for the future payment of alimony or child support is, as to installments past due and unpaid,

within the protection of the full faith and credit clause of the Constitution unless by the law of the state in which the decree was rendered its enforcement is so completely within the discretion of the courts in that state that they may annul or modify the decree as to overdue and unsatisfied installments. *Sistare v. Sistare*, 218 U.S. 1, 54 L. Ed. 2d 905, 30 S. Ct. 682 (1910); *Lockman v. Lockman*, 220 N.C. 95, 16 S.E. 2d 670 (1941). It is clear from the case law of the State of Arizona that installments of alimony and support payments become vested when they become due and the courts of that state have no power to modify the decree as to such past due installments. *Adair v. Superior Court of Maricopa County*, 44 Ariz. 139, 33 P. 2d 995, 94 A.L.R. 328 (1934). It must also be noted that URESA provides that a properly registered foreign support order "shall be treated in the same manner as a support order issued by a court of this State." G.S. 52A-30(a). Judge Fowler then was bound by the Arizona decrees in determining the arrearages owing to plaintiff under the duly registered Arizona decrees.

[4] The judgment of 30 May 1978 is a final judgment entitled to full faith and credit, *Spence v. Durham, supra*, and is conclusive on the amount owed by defendant under the two decrees between the time of their entry in Arizona and the time of entry of the Arizona judgment for arrearages on 30 May 1978. " 'Under the full faith and credit clause of the Constitution of the United States, a judgment rendered by a court of one State is, in the courts of another State of the Union, binding and conclusive as to the merits adjudicated. It is improper to permit an alteration or re-examination of the judgment, or of the grounds on which it is based * * * .' " *Sears v. Sears*, 253 N.C. 415, 417, 117 S.E. 2d 7, 9 (1960), *quoting, Howland v. Stitzer*, 231 N.C. 528, 531, 58 S.E. 2d 104, 106 (1950). The trial judge erred in failing to treat the Arizona judgment for $9,120.50 as *res judicata* on the issue of arrearages due to the plaintiff up to 30 May 1978.

[5] With regard to the arrearages due plaintiff for the period between 30 May 1978 and 17 December 1979, the trial court was free to make an independent determination. In this determination, however, the court was bound to consider the properly registered Arizona decrees. As previously explained, these decrees were entitled to full faith and credit and were conclusive as to amounts past due. Under the Arizona decrees plaintiff

was entitled to $600.00 per month for alimony and $300.00 per month for child support in each of the 19 months since the entry of the 30 May 1978 Arizona judgment. Thus defendant's indebtedness to plaintiff for the period of 30 May 1978 to 17 December 1979 amounted to $17,100.00. The trial judge was not free, consistent with full faith and credit, to find any other figure as defendant's debt under the decrees.

The evidence of the defendant suggests that he paid to plaintiff $4,997.28 during the period in question; therefore, by his own testimony he established an arrearage of $12,102.72. We see no way the facts could justify any award of less than this amount. Admittedly, plaintiff's evidence, although admitting receipt of $1,070.00 in 1978, does not establish what portion of that sum was received before the 30 May judgment and what portion was received after; but even if the entire sum were credited to defendant's debt after the 30 May judgment, the defendant would still be $12,250.00 in arrears. We believe on remand that plaintiff should be allowed to show what portion of defendant's 1978 payments to her came before 30 May and what portion came after 30 May. Those payments made after 30 May should be credited against defendant's $17,100.00 debt for the 30 May 1978 to 17 December 1979 period, along with the 1979 payments made before 17 December.

Since this case is appealed by both parties and since our disposition is thereby somewhat fragmented, we will restate the relief we grant today. Defendant's assignments of error to both the 30 October 1979 order of Judge Styles and the 17 December order of Judge Fowler are overruled. Plaintiff's assignment of error to the portion of Judge Fowler's order of 17 December 1979 which denied her arrearages is sustained. On remand arrearages of $9,120.50 will be determined for the period of 29 September 1976 to 30 May 1978; and in determining arrearages for the period of 30 May 1978 to 17 December 1979, the court will take testimony to determine what payments defendant made to plaintiff during that 19-month period, said payments to be credited against the total debt for the same period of $17,100.00, and the difference constituting the additional arrearages to be charged to defendant along with the $9,120.50 already determined.

The order of 30 October 1979 is affirmed.

The order of 17 December 1979 is affirmed in part and reversed in part and remanded for further proceedings consistent with this opinion.

Judges MARTIN (Harry C.) and HILL concur.

JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA, COMPLAINANT, v. McWHIRTER GRADING COMPANY, INC., RESPONDENT.

No. 8010SC243

(Filed 4 November 1980)

1. **Master and Servant § 114– OSHA violation – appeal to Review Board – adequacy of Board's order**

In an appeal from a decision of a hearing examiner that respondent's violation of the Occupational Safety and Health Act was not repeated and serious and merited no penalty, the Safety and Health Review Board complied with its function and authority to "adopt, modify or vacate" the order of the hearing examiner, G.S. 95-135(i), where the Board's order restated the findings of fact made by the hearing examiner almost verbatim, narrated some of the evidence, and made additional findings, and where the decision portion of the order, although inartfully written, modified the order of the hearing examiner so as to conclude that the cited violation was repeated and serious and justified a penalty of $2,500.

2. **Master and Servant § 114– serious and repeated OSHA violation – sufficiency of evidence**

The evidence supported a determination by the Safety and Health Review Board that respondent was guilty of a "serious" and "repeated" OSHA violation in failing "to slope to adequate angle of repose or provide adequate shoring for sewer line trench in hard or compact soil more than five feet in depth at job site" on 21 April 1977 where it showed that the trench in question was eight feet deep and at least eight feet in length; there was no sloping or shoring or wall support of any kind; and respondent had paid a fine for failing properly to shore, slope or otherwise protect the sides of a trench in 1974, although the 1974 violation was for work in soft or unstable soil rather than in hard or compact soil.

APPEAL by respondent from *Hobgood (Hamilton H.), Judge.* Judgment entered 12 October 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 11 September 1980.

This action was instituted by the complainant through the issuance of a citation against the respondent. The citation charged respondent with a violation of the North Carolina

Occupational Safety and Health Act on 21 April 1977 by "failure to slope to adequate angle of repose or provide adequate shoring for sewer line trench in hard or compact soil more than five feet in depth at job site." The citation included a notation that the alleged violation was "serious" and "repeated", and also included a proposed penalty of $1,800.00.

A hearing was held before the Safety and Health Review Board hearing examiner. At the hearing, the State's evidence showed that on or about 18 November 1974 the sides of a trench excavated by respondent, McWhirter Grading Company, Inc., collapsed, killing one of the respondent's employees. Following an inspection of the site by a Safety Officer of the OSHA Division of the North Carolina Department of Labor, respondent was issued a citation for two violations of the Occupational Safety and Health Act of North Carolina. Respondent's trench failed to comply with the following standards:[1] "Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them." 29 C.F.R. 1926.652(b) (1979); and "Additional precautions by way of shoring and bracing shall be taken to prevent slides or cave-ins when excavations or trenches are made in locations adjacent to backfilled excavations, or where excavations are subjected to vibrations from railroad or highway traffic, the operation of machinery, or any other source." 29 C.F.R. 1926.652(e) (1979). The respondent did not contest the 1974 citation and respondent paid the proposed penalty of $500.00.

[1]G.S. 95-127(15) contains the definition of "standards," as follows:

> (15) The term "occupational safety and health standards" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, safety devices, operations or processes reasonably necessary and appropriate to provide safe and healthful employment and places of employment, and shall include all occupational safety and health standards adopted and promulgated by the Secretary which also may be and are adopted by the State of North Carolina under the provisions of this Article. This term includes but is not limited to interim federal standards, consensus standards, any proprietary standards or permanent standards, as well as temporary emergency standards which may be adopted by the Secretary, promulgated as provided by the Occupational Safety and Health Act of 1970, and which standards or regulations are published in the Code of Federal Regulations or otherwise properly promulgated under the federal act or any appropriate federal agencies.

The State's evidence further showed that on 21 April 1977, another of respondent's construction sites was visited by an OSHA Division Safety Officer. This inspection revealed an employee of respondent working in a trench eight feet deep, four feet wide and forty-five feet long. A thirty inch pipe had already been laid in approximately thirty-five of the trench's forty-five feet. The sides of the trench were neither shored nor sloped.[2]

Following the hearing, the hearing examiner made detailed findings of fact and concluded that although respondent did violate 29 C.F.R. 1926.652(c), such violation was neither repeated nor serious. The hearing examiner held that because the 1974 and the 1977 violations were of different subsections of the Act, the 1977 violation was not "repeated" as defined by statute and that the 1977 violation did not fit the statutory definition of "serious", because there were sufficient personnel and equipment at the site to "uncover a man very, very rapidly if there were a cave-in" and because the decision not to shore or slope was made by the foreman without the knowledge of the employer. The examiner ordered that the citation be affirmed but struck the proposed penalty.

On petition of the complainant, the full Safety and Health Review Board reviewed the decision and order of the hearing examiner and heard arguments from complainant and respondent. The Review Board then issued a decision in which it "overturned" the hearing examiner's order, "reinstated" the citation and assessed respondent with a penalty of $2,500.00 for a repeated and serious violation. In its decision, the Board discussed in detail the contentions of the parties and related those contentions to the evidence.

Pursuant to G.S. 95-141, respondent sought judicial review of the decision of the Board. The matter was heard in Superior

[2]In accordance with the provisions of G.S. 95-131, Part 1926 of Title 29 of the Code of Federal Regulations has been adopted and promulgated by the Commissioner of Labor. 29 C.F.R. 1926.652(c) provides:

> Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above the 5-foot level may be sloped to preclude collapse, but shall not be steeper than a 1-foot rise to each ½-foot horizontal. When the outside diameter of a pipe is greater than 6 feet, a bench of 4-foot minimum shall be provided at the toe of the sloped portion.

Court and from the judgment of the Superior Court affirming in its entirety the Review Board's decision, respondent appeals.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Lennon, for the State.

Ervin, Kornfeld & MacNeill, by John C. MacNeill, Jr., for respondent appellant.

WELLS, Judge.

[1] Respondent first argues that the Superior Court erred in affirming the Review Board's decision because the Board did not make the appropriate findings of fact and conclusions of law to support its decision.

G.S. 95-135(d), in pertinent part, provides as follows:

> (d) Every official act of the Board shall be entered of record and its hearings and records shall be open to the public. The Board is authorized and empowered to make such procedural rules as are necessary for the orderly transaction of its proceedings. Unless the Board adopts a different rule, the proceedings, as nearly as possible, shall be in accordance with the Rules of Civil Procedure, G.S. 1A-1. . . .

G.S. 95-135(i), in pertinent part, provides as follows:

> (i) A hearing examiner appointed by the chairman of the Board shall hear, and make a determination upon any proceeding instituted before the Board and may hear any motion in connection therewith, assigned to such hearing examiner, and shall make a report of any such determination which constitutes his final disposition of the proceedings. . . . Upon review of said report and determination by the hearing examiner the Board may adopt, modify or vacate the report of the hearing examiner and notify the interested parties. . . .

The Board has adopted rules of procedure pursuant to the authority granted in G.S. 95-135(d). *See* Title 13, ch. 7B, sec. 600, N.C. Administrative Code Rules. Rules of Procedure .0601 and .0602, in pertinent part, provide as follows:

.0601 DECISIONS OF HEARING EXAMINER

(a) The decision of the hearing examiner shall include findings of fact, conclusions of law, and an order.

(b) The hearing examiner shall sign and date the decision. Upon issuance of the decision, jurisdiction shall rest solely in the board, and all motions, petitions and other pleadings filed subsequent to such issuance shall be addressed to the board.

.0602 REVIEW

. . . .

(e) Upon review of any decision of a hearing examiner, the board may adopt, modify or vacate the decision of the hearing examiner and notify the interested parties. . . .

Pursuant to the statute and the rules adopted by the Board, it is the function and duty of the hearing officer to conduct the initial hearing and make the requisite findings of fact and conclusions of law. The record clearly shows and there seems to be no dispute that these requirements were complied with. The statute and the rules contemplate that the Board in reviewing the order of the hearing examiner need not itself make findings of fact or conclusions of law separate from those contained in the order of the hearing examiner, but may "adopt, modify or vacate" the order of the hearing examiner. G.S. 95-135(i).

The next phase of the question before us is whether the action of the Review Board comports with or fulfills the stated function and authority of the Board to "adopt, modify or vacate" the decision of the hearing examiner. Following respondent's petition for review, the Board issued its notice of hearing. Following the hearing, the Board entered its written decision. The Board's "decision" contains a section entitled "Statement of Facts" and a section entitled "Decision of the Review Board." In its statement of facts, the Board's decision restated the findings of fact made by the hearing examiner almost verbatim, narrated some of the evidence, and made additional findings. In so doing, it has both adopted and modified the findings of fact portion of the examiner's order.

The decision section of the Board's "decision" is inexpertly written. It contains discussions, arguments, contentions, evidence, and conclusions, all of which are intermixed and thrown together in somewhat random fashion. Inartful though it is, that section of the decision does acceptably serve to modify the

order of the hearing examiner so as to conclude that the cited violation was repeated and serious, justifying the additional penalty assessed. This assignment is overruled.

[2] Respondent next argues that there was no evidence to support the Board's findings and conclusions that respondent's employees were deliberately endangered and that respondent's foreman blatantly disregarded the requirements of the Act. While there seems to be some merit to this portion of respondent's argument, we find that if there was error in including these disputed statements in the Board's decision, it was harmless error because the evidence supports the Board's conclusion that the cited violation was "repeated" and "serious".

The definition of a serious violation is found in G.S. 95-127(18), as follows:[3]

> (18) A "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use at such place of employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.

It is stated in 45 A.L.R. Fed. 785, at § 2 (1979) that:

> An employer may be found to have committed a serious violation either of the Act's general duty clause, requiring an employer to furnish a place of employment free from recognizable hazards likely to cause death or serious physical harm to his employees, or of a violation [of] the specific safety or health standard promulgated under the OSHA. Most of the latter types of serious violations have occurred with respect to regulations requiring that trenches and excavations in which employees work be properly shored, sloped, or otherwise protected, and regulations requiring the use of equipment or devices to protect employees from the danger of falling.

[3]G.S. 95-127(18) is substantially identical to Sec. 17(k) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 666(j).

See also Sec. 8 for annotation of trench or excavation cases. The trench in question was eight feet deep and at least eight feet in length. There was no shoring or wall support of any kind, nor any sloping. Such evidence supports the Board's finding and conclusion that the violation was serious.

Respondent argues that it was not guilty of a repeated violation because the previous violation found against it was for work in soft or unstable soil while the violation in this case was for work in hard, compact soil. We do not believe that the Act should be so narrowly construed. While the element of risk between the two types of soil may reasonably require differing types of precautions, the basic risk or danger to the employee is the same: collapse of the trench or excavation wall. Such was the case here and we find that the evidence supports the Board's conclusion in this respect.

Finally, respondent argues that it should be excused in this case because the acts or omissions of its job superintendent on this occasion were not imputable to it. While we recognize that the acts or omissions of unsupervised employees may on occasion not be reasonably imputed to an employer under the Act, in the case *sub judice*, there was evidence that the decision as to the use of shoring or sloping was delegated by respondent to its job superintendent, and therefore, this argument must be rejected.

Considering the whole record before the Superior Court, *see Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977), the trial court was justified in affirming the decision of the Review Board and we accordingly find

No error.

Judges ARNOLD and ERWIN concur.

STATE OF NORTH CAROLINA v. KAREEM ABDU ALEEM AND RUBEN BENJAMIN SNIPES

No. 8010SC449

(Filed 4 November 1980)

1. **Insurance § 112.1; Conspiracy § 6– filing false insurance claim – conspiracy to do so – sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for filing a false insurance claim and conspiracy to do so where it tended to show that defendants appeared individually and together to file repeated claims for identical damage to the same automobile; there were inexplicable frequent transfers of title to the car; and the in-court identification of the two defendants and testimony by several witnesses was adequate to link defendants to the illicit acts.

2. **Criminal Law § 99.6– clarification of witness's testimony – no expression of opinion**

The trial judge did not make statements in the presence of the jury tending to add to the probative force of a witness's testimony, thereby expressing an opinion as to the credibility of the witness, where the trial judge merely clarified what a witness had already stated, that he did not recognize either defendant, but knew one defendant by name.

3. **Criminal Law § 68– filing false insurance claim – release and cash settlement request – admissibility to show identity of defendant**

In a prosecution for filing a false insurance claim on an automobile and conspiracy to do so, the trial court did not err in admitting into evidence a release and a cash settlement request showing there was no lien on the car and that coverage would remain in force, since the exhibit was circumstantially relevant in establishing the identity of one defendant as one of the conspirators.

APPEAL by defendants from *Hobgood (Hamilton H.), Judge.* Judgments entered 19 December 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 7 October 1980.

Defendants, Kareem Abdu Aleem and Ruben Benjamin Snipes, who are brothers, were tried jointly. Defendant Aleem was charged by indictment with conspiring, with defendant Snipes and others, to present a fraudulent insurance claim to the United States Liability Insurance Company for payment of property damage to a 1972 Chevrolet Monte Carlo automobile. Aleem pleaded not guilty. The jury returned a verdict of guilty as charged. A judgment of imprisonment was entered and defendant Aleem appeals.

Defendant Snipes was charged by indictments for insurance fraud and for conspiring, with defendant Aleem and others, to present a fraudulent insurance claim. Snipes pleaded not guilty. The jury found him guilty on both charges and judgments of imprisonment were entered. Defendant Snipes appeals.

The state's evidence tends to show that a 1972 Chevrolet Monte Carlo was purchased by a Richard Macke in January 1978. In September of that year Macke was involved in an accident which crushed the front end of the automobile. Macke subsequently sold the vehicle in a damaged condition. The automobile was later titled, at various times, in the name of each of the defendants, a third brother, Barry Lee Snipes, and others.

On 7 November 1978, the district claims manager of Nationwide Insurance Company, William S. Howard, went to identify and inspect the 1972 Monte Carlo, which was insured in the name of Kareem Abdu Aleem. The vehicle had damage to the front end, and Aleem had filed a claim under the policy. A claims adjuster for the insurance company met with a man who identified himself as Aleem and settled the claim for $1,150 plus towing expenses.

A secretary for Long's Insurance Agency, Sylvia Solomon, took an application for insurance on the automobile from a person identified as Barry Lee Snipes on 18 December 1978. On 28 December 1978, Barry Lee Snipes presented a claim and was reimbursed for repair to the windshield of the insured vehicle. On 15 January 1979, a person who identified himself as Barry Lee Snipes came to the office to make a claim for damage to the front end of the vehicle. Witness Solomon made an in-court identification of Aleem as the person who in fact made the claim. Aleem signed the claim as Barry Lee Snipes and the insurance company paid him $1,033.50.

Lawrence Boles, manager of Highway Used Parts, testified that a man identified in court as defendant Aleem had represented himself to be "Snipes" when he came to Boles's garage to inquire about storing a car in early January 1979. The same man later delivered the car to the garage and picked it up with a wrecker about twelve days later. The front end of the automobile was wrecked when it was brought in and taken away.

Edwin Kirn, an insurance adjuster, recalled two claims on the vehicle in question. The first claim was submitted on 22 January 1979 on a policy issued to Barry Lee Snipes. Kirn inspected the automobile at Highway Auto Used Parts. He had a telephone conversation with a person who identified himself as Barry Lee Snipes and agreed to pay Snipes $1,068.50. A proof of loss statement signed "Barry Snipes" was returned to Kirn's office. A secretary from that office identified the draft used in settlement of the claim. She testified that she delivered the draft on 5 February 1979 to a person who identified himself as Barry Lee Snipes, but she did not recognize that person in the courtroom.

An insurance agent and broker, Billy B. Jennings, identified defendants Snipes and Aleem as persons who came to his office on 16 March 1979 to apply for insurance on the 1972 Monte Carlo. Jennings transferred the automobile title from Aleem to Snipes on that occasion and issued collision insurance to Snipes from the United States Liability Insurance Company. On 23 March 1979 defendant Snipes filed a notice of loss document for damage to the insured vehicle.

Upon redirect examination, Edwin Kirn testified that he was again assigned to investigate loss on the 1972 Monte Carlo on 28 March 1979. He recognized it as the same vehicle and the same damage as the claim he had previously investigated and paid. He reported the situation to his boss, Harry Eaton. Eaton testified that he spoke on the telephone to a man who identified himself as Ruben Benjamin Snipes, and requested Snipes to come to Raleigh to make a statement regarding his claim. Snipes agreed and made a signed statement which said he had acquired the automobile in good condition. Snipes described the circumstances surrounding the damage he claimed he had recently incurred. Eaton contacted the North Carolina Department of Insurance, requesting its assistance in investigating the matter. After numerous telephone conversations with defendant Snipes, Eaton informed him that the claim would not be honored because Eaton knew what was going on. He told Snipes to have his brother Barry return the $1,033.50 previously paid for the same damage. That amount was later returned.

An employee of the adjustment agency, Charles Thompson, testified that a man who identified himself as Ruben Snipes

returned the $1,033.50 to him and signed a receipt. After receiving a signed statement from Snipes that he wished to withdraw his claim, Thompson drew up a withdrawal document.

An investigator for the Department of Insurance testified as to his investigation of the claims on the automobile in question. Six claims were filed by the three brothers between October 1978 and March 1979.

Photographs of the 1972 Monte Carlo, taken during the various investigations, were entered as exhibits.

Defendants presented no evidence. Each defendant made a motion for nonsuit at the close of the state's evidence, which the court overruled. After the verdicts and judgments, defendants' motions to set aside the verdicts, for new trial, and in arrest of judgment were also denied.

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

Hatch, Little, Bunn, Jones, Few & Berry, by E. Richard Jones, Jr., for defendant Aleem.

J. Franklin Jackson for defendant Snipes.

MARTIN (Harry C.), Judge.

Both defendants assign as error the trial court's denial of their motion for nonsuit on the grounds of insufficiency of evidence to sustain a verdict. Defendants contend that the evidence was insufficient to link defendants to the transactions which gave rise to the charge of conspiracy, that there was insufficient proof to show an agreement between the parties, and that the circumstantial evidence offered by the state did not point unerringly to the existence of a conspiracy.

When the state attempts to prove a criminal conspiracy, "it must show an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way." *State v. Jones*, 47 N.C. App. 554, 559, 268 S.E. 2d 6, 10 (1980). *Accord, State v. Parker*, 234 N.C. 236, 66, S.E. 2d 907 (1951); *State v. Whiteside*, 204 N.C. 710, 169 S.E. 711 (1933); *State v. Wrenn*, 198 N.C. 260, 151 S.E. 261 (1930).

An agreement between the parties charged is an essential element of conspiracy. In *State v. Phillips*, 240 N.C. 516, 521, 82

S.E. 2d 762, 766 (1954), the Supreme Court of North Carolina quoted the language of the Supreme Court of Indiana in *Johnson v. State*, 208 Ind. 89, 194 N.E. 619:

> "There must be an agreement or joint assent of the minds of two or more before there can be a conspiracy. Such agreement or joint assent of the minds need not be proved by direct evidence. ... There must be, however, an agreement, and there must be such evidence to prove the agreement directly or such a state of facts that an agreement may be legally inferred. Conspiracies cannot be established by a mere suspicion, nor does evidence of mere relationship between the parties or association show a conspiracy."

Direct proof of conspiracy is rarely available, so the crime must generally be proved by circumstantial evidence. *State v. Cooley*, 47 N.C. App. 376, 268 S.E. 2d 87, *disc. rev. denied, appeal dismissed*, 301 N.C. 96 (1980). Because the presence of a common design is often extremely difficult to detect, a conspiracy "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, supra* at 712, 169 S.E. at 712. Factors which may be considered include the results accomplished, the situation of the parties, their antecedent relationships, the surrounding circumstances and the inferences legitimately deducible therefrom. *Id.* The circumstantial evidence must point unerringly to the illegal combination, *Wrenn, supra*, and create in the minds of the jurors a moral certainty of the defendants' guilt, to the exclusion of any other reasonable hypothesis. *Parker, supra. Accord, State v. McCullough*, 244 N.C. 11, 92 S.E. 2d 389 (1956). *See also, State v. Webb*, 233 N.C. 382, 64 S.E. 2d 268 (1951); *State v. Miller*, 220 N.C. 660, 18 S.E. 2d 143 (1942); *State v. Madden*, 212 N.C. 56, 192 S.E. 859 (1937); *State v. Stiwinter*, 211 N.C. 278, 189 S.E. 868 (1937).

[1] In the case *sub judice* there was sufficient evidence to lead the jury to the conclusion that defendant Snipes was guilty of the crime of filing a false insurance claim and that both Snipes and Aleem were guilty of conspiring to so do. The state presented evidence of active participation by the defendants in transactions that could not arguably appear innocent. Their appearing individually and together to file repeated claims for identical damage to the same automobile, along with inexpli-

cable frequent title transfers, constitutes evidence that would impute wrongdoing. The in-court identification of the two brothers and testimony by several witnesses is adequate to link defendants to the illicit acts, negating their argument that guilt may have been attributed solely because of their relationship with each other.

"Upon motion for a nonsuit in a criminal action, the court must consider the evidence in the light most favorable to the State, and resolve all contradictions and discrepancies in its favor, giving it the benefit of every reasonable inference which can be drawn from the evidence." *State v. Cooley, supra* at 390-91, 268 S.E. 2d at 96. Defendants' motions for nonsuit were properly denied.

[2] Defendants' second assignment of error is that the judge made statements in the presence of the jury tending to add to the probative force of a witness's testimony, thereby expressing an opinion as to the credibility of the witness. The incident to which defendants except occurred during the cross-examination of Jerry Thompson Dunn:

> I talked to Mr. Aleem at my office in Burlington. As to which one of these three men I did talk to, I wouldn't recall really.
>
> Q. You don't know?
>
> COURT: He knows a man by the name, that gave his name as Kareem Abdu.

Defendants argue that "[t]he Court, in effect, provided a positive identification of the appellant where none existed," and added credibility to the witness. Defendants, in their briefs, correctly cite statutes and cases supporting the rule which prohibits a judge from expressing opinion as to the credibility of a witness. However, in this instance Judge Hobgood merely clarified what the witness had already stated, that he did not recognize either defendant, but knew Aleem only by name. A judge may question a witness to clarify his testimony and to provide the jury with guidance in their considerations. *See State v. Alston*, 38 N.C. App. 219, 247 S.E. 2d 726 (1978), *cert. denied*, 296 N.C. 586 (1979); *State v. White*, 37 N.C. App. 394, 246 S.E. 2d 71 (1978). It can hardly be considered prejudicial when the court intervenes slightly to interpret the examination of a

witness to ensure that the jury understands that the testimony was only a name recognition of a defendant, not a personal nor in-court identification. This assignment of error is overruled.

[3] Finally, defendants argue it was erroneous to admit into evidence state's Exhibit Number 11, "a release in the amount of $1,198.00 and a cash settlement request showing there is no lien on the car and the coverage will remain in force." Defendants contend that the exhibit was irrelevant and prejudicial. We find no merit in defendants' argument. The document was signed in the name of Kareem Abdu Aleem by an individual identifying himself as the same. The exhibit is circumstantially relevant in establishing the identity of defendant Aleem as one of the conspirators. "[E]vidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." 1 Stansbury's N.C. Evidence § 77 (Brandis rev. 1973). Identity may be proved by circumstantial evidence in the same manner as other facts. *See State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503 (1970), *rev'd death penalty*, 403 U.S. 948, 29 L. Ed. 2d 860 (1971). Defendants make no showing that the document was unfairly prejudicial. Because of its relevancy, it was properly admitted into evidence.

We find that defendants received a trial free of prejudicial error.

No error.

Judges HEDRICK and MARTIN (Robert M.) concur.

THE FIRST NATIONAL BANK OF ANSON COUNTY, ADMINISTRATOR OF THE ESTATE OF JOHN GATEWOOD, DECEASED, PLAINTIFF AND BRIGHT M. GATEWOOD, ADDITIONAL PLAINTIFF v. NATIONWIDE INSURANCE COMPANY AND HORNWOOD, INC., DEFENDANTS

No. 8020DC222

(Filed 4 November 1980)

1. Insurance § 16– group life insurance policy – waiver of premiums upon disability – ambiguous provision – notice by employer required

In an action to recover on a group life insurance policy, the clause providing for waiver of premium in the event of total disability of a certificate holder was ambiguous as to the requirement for initial notice of the

disability and was susceptible to the interpretation by the court that the employer rather than the employee was required to notify defendant insurer of total disability, since the evidence tended to show that not only did the terms of the policy contemplate that employer would bear full responsibility for reporting certificate holder status to defendant insurer and for collecting and remitting all premiums, but also that in practice the certificate holders, including the deceased employee in question, dealt exclusively with employer, having no direct contact with defendant insurer whatsoever.

2. **Insurance § 29.1– beneficiary named in application for group life policy – replacement policy – beneficiary not changed**

In an action to recover on a group life insurance policy where the contract allowed the certificate holder to make valid designation of a beneficiary "on a form ... satisfactory to the company," the deceased employee's enrollment and register card which served as his application for coverage, as well as his designation of beneficiary, applied by its terms to the group insurance for which the employee was then or might become eligible under policies issued to employer by defendant insurance company; there was testimony that the parties considered the employee's enrollment card as still effective with regard to the new policy which replaced the policy in effect at the time the employee prepared the enrollment card; the employee never took steps to change his designation of beneficiary; and where no designation is contained in the contract, the designation of a beneficiary in the application controls.

APPEAL by defendants Nationwide Insurance Company, Hornwood, Inc., and plaintiff, The First National Bank of Anson County, Administrator of the Estate of John Gatewood, Deceased, from *Honeycutt, Judge.* Judgment entered 4 October 1979 in District Court, ANSON County. Heard in the Court of Appeals 10 September 1980.

This action was brought by plaintiff Bank, as administrator of the estate of John Gatewood, against defendant Nationwide to recover on a group life insurance policy. Gatewood's employer, Hornwood, was subsequently joined as a defendant, and Gatewood's widow, Bright M. Gatewood, was subsequently joined as a plaintiff. The action was heard by the trial judge, without a jury.

Hornwood, Inc. operates a textile plant in Anson County. Decedent John Gatewood was employed by Hornwood on 30 April 1971. Upon his employment, John Gatewood was enrolled as a certificate holder for life insurance coverage under a group insurance policy issued by defendant Nationwide to defendant Hornwood. As the policyholder, Hornwood forwarded the pre-

miums for all its employees to Nationwide. Hornwood also notified Nationwide each month of the names and changes in status of its employees.

On 13 November 1973 in the course of his employment, John Gatewood suffered a serious accident which rendered him totally disabled. Gatewood began receiving worker's compensation on 14 November 1973. Gatewood's employment with Hornwood was terminated on 7 August 1974.

Although Hornwood's personnel manager knew of Gatewood's injury and his receipt of worker's compensation, no notice of his disability was filed with Nationwide. In its August 1974 report to Nationwide, Hornwood listed Gatewood's employment as terminated rather than describing Gatewood as disabled. Until that time, Hornwood continued paying premiums for Gatewood's coverage.

Gatewood died on 9 December 1975. Nationwide received notice of Gatewood's death and earlier disability in January 1976. Plaintiffs asserted that the insurance policy was in full force and effect with regard to Gatewood on 9 December 1975, by operation of the Waiver of Premium Clause, discussed below.

The trial court entered judgment that defendant Nationwide was liable to plaintiff Bright Gatewood for the policy proceeds. Plaintiff Bank and defendant Nationwide moved to set the judgment aside and for a new trial. These motions were denied and they appeal, plaintiff Bank appealing from entry of judgment in favor of plaintiff Bright Gatewood.

E.A. Hightower for additional plaintiff appellee.

Henry T. Drake for plaintiff appellant Bank.

Taylor & Bower, by George C. Bower, Jr., for defendant appellants.

WELLS, Judge.

Basic to a determination of this case is the construction of the first sentence of the Waiver of Premium Clause. The policy provided as follows:

WAIVER OF PREMIUM IN EVENT OF TOTAL DISABILITY

> If a Certificateholder becomes totally disabled prior to his 60th birthday and satisfactory proof is furnished within one year after he becomes totally disabled and while the Policy is in force, that his total disability has continued uninterruptedly for a period of at least six months and to the date that proof is furnished, the Company will continue the Life Insurance on the Certificateholder without payment of premium during the further uninterrupted continuance of his total disability. If the Certificateholder dies during such a period of total disability but prior to the date that satisfactory proof of total disability is furnished, the Company will pay an amount equal to that which would have been continued if satisfactory proof of his total disability had been furnished. The amount of insurance continued or paid will be the amount for which he was insured on the date he became totally disabled, subject to any reduction at a specified age or other specified time as stated in the Schedule of Benefits.
>
> If a Certificateholder dies while insurance is being continued in accordance with this provision, the Company will pay the amount then being continued on his life, provided notice of his death is given to the Company's home office within one year after the date of his death.
>
> Proof of the continuance of total disability satisfactory to the Company must be submitted to the Company's home office on request, but not more often than once a year after total disability has continued for two years. The Company may, at its own expense, examine the Certificateholder when and so often as it may reasonably require, but not more often than once a year after disability has continued for two years.
>
> . . . .

Defendants contend that the sentence clearly created a condition precedent to the insurer's liability, requiring that the employee-insured furnish proof of his disability to defendant Nationwide's home office within the specified time. On this ground, defendants assign error to the trial court's denial of defendants' motions to dismiss at the close of plaintiff's evidence and at the close of all evidence, and for denial of defendants' motion for judgment notwithstanding the verdict.

As the finder of fact in this non-jury trial, the judge found this sentence to be ambiguous and susceptible of explanation by extrinsic evidence. The trial court made findings of fact

> that the only contact or communication relative to or concerning the policy between Nationwide Insurance Company and Hornwood, Inc. or between said insurance company and employees of Hornwood, Inc. were [*sic*] by Hornwood, Inc.;
>
> that under the terms of the policy the certificate holder was not required to make any reports or keep any records but that all of those duties and responsibilities were placed on the policyholder according to the terms of the policy;
>
> . . . .
>
> That prior to his death, the certificate holder, John Gatewood, was not, under the terms of the policy, required to notify the defendant, Nationwide Insurance Company, of his total disability;
>
> That under the terms of the policy satisfactory proof was furnished to the defendant, Hornwood, Inc., that John Gatewood, certificate holder, was totally disabled.
>
> That under the terms of the policy, the only requirement of the certificate holder was that the certificate holder furnish proof of total disability to the company, Nationwide Insurance Company, upon request.

Upon his findings of fact, the trial court entered the following pertinent conclusions:

> Upon the foregoing findings of fact, the Court concludes as matters of law that the section of the policy entitled "Waiver of Premium in Event of Total Disability" applies and no premiums were required to be paid to maintain the policy in force after August 1, 1974 because of his continued total disability for more than six months' time and his accidental death occurring prior to the insurance company's receiving notice of his total disability;
>
> And that by virtue of said section the policy was in full force and effect at the time of John Gatewood's death on December 9, 1975;

And that the Group Policy of Insurance as it related to John M. Gatewood, Class C certificate holder, was in full force and effect on the date of his death, December 9, 1975;

An insurance policy is a contract between the parties, and the intention of the parties is the controlling guide in its interpretation. *Hawley v. Insurance Co.*, 257 N.C. 381, 387, 126 S.E. 2d 161, 167 (1962). Insurance policies must be given a reasonable interpretation. Where there is an ambiguity and the policy provision is susceptible of two interpretations, one of which imposes liability upon the company and the other does not, the provision will be construed in favor of coverage and against the company. *Williams v. Insurance Co.*, 269 N.C. 235, 238, 152 S.E. 2d 102, 105 (1967); *Insurance Co. v. Surety Co.*, 46 N.C. App. 242, 244, 264 S.E. 2d 913, 915 (1980). The words in the policy having been selected by the insurance company, any ambiguity or uncertainty as to their meaning must be resolved in favor of the beneficiary and against the company. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E. 2d 518, 522 (1970). If there be an ambiguity in the language of the policy and the language is reasonably susceptible to either of the constructions for which the parties contend, the intent and meaning is a question of law for the court. *Id.*, 172 S.E. 2d at 522.

[1] The trial court's findings of fact on this aspect of the case are clearly supported by the evidence and are therefore conclusive on appeal. *Transit, Inc. v. Casualty Co.*, 285 N.C. 541, 547, 206 S.E. 2d 155, 159 (1974); *Bank v. Insurance Co.*, 42 N.C. App. 616, 622, 257 S.E. 2d 453, 457 (1979); *Windfield Corp. v. Inspection Co.*, 18 N.C. App. 168, 175, 196 S.E. 2d 607, 611 (1973). In seeking to determine the intent of the parties, as that intent lends enlightenment to the meaning of the terms of the Waiver Clause, the trial court considered evidence showing that not only did the terms of the policy contemplate that Hornwood would bear full responsibility for reporting certificate holder status to Nationwide and for collecting and remitting all premiums, but also that in practice, the certificate holders, including Gatewood, dealt exclusively with Hornwood, having no direct contact with Nationwide whatsoever. Such of this evidence bearing on intent and meaning as was extrinsic to the policy itself was clearly competent for these purposes. *See Goodyear v. Goodyear*, 257 N.C. 374, 380, 126 S.E. 2d 113, 118 (1962).

We agree that the terms of the Waiver Clause as to the requirement for initial notice of disability were ambiguous, susceptible to the interpretation reached by the trial court.

Defendant Nationwide argues that the opinions of our Supreme Court in *Dewease v. Insurance Co.*, 208 N.C. 732, 182 S.E. 447 (1935); *Ammons v. Assurance Society*, 205 N.C. 23, 169 S.E. 807 (1933), require judgment in its favor in this case. The clauses in those cases were worded differently from the clause in the case *sub judice* and we therefore believe those cases must be distinguished on the facts. *Also compare Fulton v. Insurance Co.*, 210 N.C. 394, 186 S.E. 486 (1936).

Defendants also assign error to other findings of fact of the trial court, relating to Gatewood's accident in the course of his employment and his resulting total disability, his accidental death within the allowable time period, Hornwood's actual knowledge of his total disability and that this knowledge was "satisfactory proof" as required by the policy. All of these findings were supported by competent evidence and are therefore binding on this Court. *Transit, Inc. v. Casualty Co., supra.* We affirm the trial court's determination that the group insurance policy, by operation of the Waiver of Premium Clause, was in effect as of the date of John Gatewood's accidental death.

[2] Plaintiff Administrator of Gatewood's Estate assigns as error the trial court's finding of fact that Gatewood had designated the additional plaintiff, Bright M. Gatewood, as the beneficiary under said policy. Plaintiff Administrator argues that the group insurance policy in effect on 29 April 1971 when Gatewood named Bright M. Gatewood his beneficiary in his application, was cancelled and replaced by a new policy from the same insurance company on 1 June 1972. Plaintiff Administrator suggests that the designation of Bright M. Gatewood as beneficiary on 29 April 1971 had no effect on the new group insurance policy in effect on the date of Gatewood's death. We disagree.

Plaintiff Administrator correctly argues that the person entitled to the proceeds of a life insurance policy must be determined in accordance with the contract. 2 Appleman, Insurance Law and Practice § 781, at 173-74; *see Duke v. Insurance Co.*, 286 N.C. 244, 247, 210 S.E. 2d 187, 189 (1974); *Bullock v. Insurance Co.*, 234 N.C. 254, 67 S.E. 2d 71 (1951). The contract in this case

allows the certificate holder to make valid designation of a beneficiary "on a form ... satisfactory to the Company". Gatewood's enrollment and register card that served as his application for coverage as well as his designation of beneficiary, applied, by its terms, to the group insurance for which Gatewood was then or *might become* eligible under policies issued to Hornwood by defendant insurance company. There was testimony that the parties considered Gatewood's enrollment card as still effective with regard to the new policy, and that Gatewood never took steps to change his designation of beneficiary. Where no designation is contained in the contract, the designation of a beneficiary in the application controls. 2 Appleman, Insurance Law and Practice § 771, at 139-40. The evidence clearly supports the trial court's findings of fact with respect to Bright M. Gatewood as the designated beneficiary of the policy, and these findings clearly support the verdict in her favor.

Affirmed.

Judges ARNOLD and ERWIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 OCTOBER 1980

DUNN v. DUNN No. 8020DC434	Moore (73CVD691)	Affirmed
FIKES v. PETERS No. 8010SC320	Wake (79CVS5238)	Affirmed
IN RE GRIGG No. 8026DC393	Mecklenburg (80SP183)	Appeal Dismissed
STATE v. ALLEN No. 8018SC446	Guilford (79CRS17361)	No Error
STATE v. BILLUPS No. 801SC563	Chowan (79CRS1783)	No Error
STATE v. CHAMBERS No. 803SC517	Pitt (78CRS6676)	No Error
STATE v. CHURCHILL No. 8010SC614	Wake (79CRS67044)	No Error
STATE v. EFIRD No. 8020SC306	Anson (79CRS1078)	No Error
STATE v. FLOOD No. 7927SC554	Gaston (78CRS26267)	No Error
STATE v. HAMM No. 808SC298	Greene (78CR2497)	No Error
STATE v. HELMS No. 8027SC345	Gaston (79CR11109)	No Error
STATE v. HOOKER No. 802SC455	Washington (80CRS43)	No Error
STATE v. MELVIN No. 804SC519	Sampson (79CRS10894)	No Error
STATE v. MOODY No. 807SC414	Wilson (78CRS11846)	No Error
STATE v. RIGGS No. 803SC467	Craven (79CRS14761)	No Error

STATE v. TAYLOR No. 8027SC498	Gaston (79CRS19199)	No Error

Filed 30 October 1980

MASSEY-FERGUSON CORP v. WOOLARD No. 802DC338	Beaufort (79CVD278)	Judgment Affirmed
STATE v. HINES No. 8012SC471	Cumberland (79CRS14499)	No Error

Due to a pagination error, pages 375 and 376 do not exist.

STATE OF NORTH CAROLINA v. W.M. BAILEY

No. 807SC441

(Filed 4 November 1980)

1. **Assault and Battery § 14.3; Indictment and Warrant § 17.2– felonious assault – variance in dates between indictment and evidence not fatal**

There was no fatal variance between an indictment charging that the date of a felonious assault was 17 April 1979 and evidence that the assault occurred on 17 February 1979 where the variance was caused by a clerical mistake in the indictment; the statute of limitations was not involved; all of the evidence at trial concerned an incident on 17 February; defense counsel's questioning of the witnesses clearly indicated that he was aware of the clerical error before trial; and defendant was not prejudiced in his preparation of an adequate defense by the variance.

2. **Criminal Law §§ 33.2, 34.7– felonious assault – prior misconduct toward victim – intent to kill – codefendant's confrontations with victim – motive**

In a prosecution for assault with a deadly weapon with intent to kill on 17 February 1979, testimony that defendant participated in a beating of the victim in December and went to the victim's home in January with a shotgun was relevant to prove his intent to kill the victim on 17 February. Furthermore, evidence of separate confrontations with the victim by a codefendant, the son of defendant, was competent to show the general ill will existing between defendant's family and the victim and defendant's motive for the assault.

3. **Criminal Law § 102.5– improper question by prosecutor – objection sustained – failure to instruct jury to disregard**

Defendant was not prejudiced when the prosecutor asked defendant on cross-examination, "You figure you can buy your way out of anything, don't you?" and the court sustained an objection to the question without instructing the jury on its own motion to disregard it, since the question did not have the degree of inflammatory impact sufficient to have seriously affected the outcome of the trial and the impropriety of the prosecutor's action in asking it was not gross.

4. **Criminal Law § 102.9– jury argument – characterization of defendants as "lawless people"**

In this prosecution for assault with a deadly weapon inflicting serious injury, the prosecutor's remarks in his jury argument that the defendants were "lawless people" who have "no regard for the law books or the laws that have been established" amounted to little more than an uncomplimentary characterization which was supported by the State's evidence, and the court's action in overruling defendant's objection to such argument did not constitute prejudicial error.

State v. Bailey

APPEAL by defendant from *Reid, Judge.* Judgment entered 20 December 1979 in Superior Court, NASH County. Heard in the Court of Appeals 6 October 1980.

This case was joined for trial with the case of *State v. Johnny Ray Bailey.* Both defendants were charged with an assault upon Glenwood Harris Perry. At the close of its evidence, the State took a voluntary dismissal in the case of J.R. Bailey. Defendant W.M. Bailey was convicted of assault with a deadly weapon inflicting serious bodily injury upon Perry in violation of G.S. 14-32(b). A four year sentence was suspended upon the conditions that defendant pay restitution to the victim for medical expenses and time lost at work, spend four weekends in the county jail, and not possess a firearm during the suspension.

The evidence discloses that, on 17 February 1979, Glenwood Harris Perry was shot in the lower leg with a .12 gauge shotgun, and that both defendant and his son, J.R. Bailey, were involved in the shooting. Eugene Perry testified that he saw defendant shoot his brother, Glenwood Perry. Defendant does not argue that the evidence was insufficient, as a matter of law, to convict him of a violation of G.S. 14-32(b). The facts, therefore, shall be set out only as necessary for an understanding of the issues raised on appeal.

Attorney General Edmisten, by Associate Attorney Robert L. Hillman, for the State.

Valentine, Adams and Lamar, by I.T. Valentine, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant brings several assignments of error which evolve into four basic issues. We shall consider these issues in the same order in which they developed at trial.

[1] The first question concerns a variance between the date of the offense charged in the bill of indictment, 17 April 1979, and the date of the events proven at trial, 17 February 1979. J.R. Bailey was arrested for the shooting on 18 February 1979. The indictment charged him with shooting Perry on 17 February 1979. Defendant is the father of J.R. Bailey. On 22 May 1979, defendant was arrested pursuant to a warrant which charged

him with shooting Perry on 17 April 1979. The indictment charged defendant for an incident on 17 April 1979. Only Deputy Sheriff Reams was able to give an explanation for the variance. He testified that the warrant incorrectly referred to the date of 17 April due to a clerical mistake by the magistrate.

The trial court properly denied defendant's motion for a directed verdict at the close of the State's evidence because of the variance in the dates. A variance between allegations in the indictment and the evidence in a criminal trial is ordinarily not fatal where the statute of limitations is not involved. *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972); *State v. Locklear*, 33 N.C. App. 647, 236 S.E. 2d 376, *review denied*, 293 N.C. 363, 237 S.E. 2d 851 (1977). In addition, G.S. 15-155 provides that no judgment upon any indictment shall be reversed "for stating the time imperfectly." The trial court found that the variance was caused by a clerical error in the indictment and concluded that the statute of limitations was not involved. Nevertheless, defendant now contends that he was unfairly surprised and unable to prepare for trial. He also argues that he was erroneously charged in the disjunctive or alternative because the State, by charging J.R. Bailey with shooting Perry on 17 February 1979, was saying that he, W.M. Bailey, did not shoot Perry on that date, especially since he was charged with shooting Perry on 17 April 1979. We are not persuaded by this reasoning.

In *State v. Swaney*, the Court held that "[t]he indictment should not charge a party disjunctively or alternatively, *in such a manner as to leave it uncertain what is relied on as the accusation against him.*" 277 N.C. 602, 612, 178 S.E. 2d 399, 405, *appeal dismissed*, 402 U.S. 1006, 91 S. Ct. 2199 (1971) (emphasis added). We fail to see how defendant could have been uncertain or surprised as to the circumstances relied on by the State to charge him. In his own testimony, defendant admitted he was present during the 17 February shootings. All of the evidence offered by the State and the defense concerned a shooting on 17 February. Deputy Sheriff Reams testified that during his investigation of the matter, he had never been told by any of the parties involved about an incident in April. Perry only testified about being shot on 17 February. Defense counsel asked several State witnesses whether they knew why defendant had been charged in the warrant and indictment for a shooting on 17

April 1979. Each responded that he only knew about a shooting on 17 February. Defense counsel's repeated questioning in this regard clearly indicates that he was aware of the clerical error before trial. We hold that the variance was not fatal in this case, and defendant was not prejudiced in his preparation of an adequate defense. *State v. Locklear*, 33 N.C. App. 647, 236 S.E. 2d 376, *review denied*, 293 N.C. 363, 237 S.E. 2d 851 (1977); *State v. Lemmond*, 12 N.C. App. 128, 182 S.E. 2d 636 (1971).

[2] The second question is whether it was proper for the State to introduce evidence of prior altercations between the defendants and Perry. Defense counsel repeatedly objected to the admission of such evidence. Nevertheless, Perry was permitted to testify that J.R. Bailey came to his house and threatened to kill him for going with his sister in November 1978. He also said that the codefendant was following him on the evening of 15 December 1978. They both got out of their vehicles at a crossroads where Perry told him "you got to cut this mess out. I am not bothering you, your family, your sister, nobody . . . . I don't want you following me." According to Perry, the codefendant cursed him and began beating on him with his fists. Perry further stated:

> We were still fighting when W.M. Bailey came up . . . . When W.M. Bailey came up on this occasion, I said, "Peter, you have got to get Johnny Ray to cut this stuff out, just quit this stuff." Peter did not say anything but walked up to me with a pocket knife in his hand, and hit me where it busted the skin. It almost knocked me out and I had to have stitches. I knew they were beating me, but I could not feel it. Johnny was holding me and W.M. Bailey was doing the kicking.

Perry also testified that J.R. Bailey called him at home on 1 January 1979 and said "he was going to mess me up." Perry said that on the same day, Larry Bailey came to his house, and the following occurred:

> While Larry was talking, I was looking out at the truck and saw W.M. Bailey get out of the truck door on the passenger side with a gun. I saw him walk around to the back of the truck and could see by the taillights that he had a gun.

> W.M. Bailey is the same man as the Defendant and is also known as Peter Bailey. I cannot tell you what kind of gun he had in his hand. It could have been a rifle or a shotgun, because it had a long barrel. Larry Bailey told Peter Bailey, "Peter, get ... back in that truck." Peter did not get back into the truck, so Larry went around the truck and put him back into the truck.

Three other witnesses, Perry's wife and brother and the sheriff, gave testimony tending to corroborate Perry's testimony about encounters with defendants.

Defendant argues that testimony about those events constituted evidence of collateral matters intended to discredit and impeach him. Defendant relies solely on *State v. Godwin*, 224 N.C. 846, 32 S.E. 2d 609 (1945), in which the defendant was tried for assault with a deadly weapon with intent to kill, and a witness was permitted to testify about defendant's use of "vile and profane language" on unrelated occasions. *Godwin* can be distinguished from the instant case because the testimony about prior incidents between defendant and Perry was admissible "within the rule that proof of the commission of other like offenses may be admitted to show the *scienter*, intent and motive when the crimes are so connected or associated that the evidence will throw light on the question under consideration." 224 N.C. at 848, 32 S.E. 2d at 610. *See* 1 Stansbury, N.C. Evidence § 92 (Brandis rev. 1973).

Defendant was charged with a violation of G.S. 14-32(a). The State attempted to prove the essential element of intent to kill. The testimony that defendant participated in the beating of Perry in December and went to his home in January with a shotgun was relevant to prove his intent to kill Perry on 17 February 1979. In *State v. Benthall*, a prosecution for assault with a deadly weapon, the prosecutrix was permitted to testify that defendant had shot her on four previous occasions. This Court upheld the admission of the testimony because "[i]t was relevant to show that defendant shot the prosecutrix intentionally rather than accidentally." 20 N.C. App. 167, 168, 201 S.E. 2d 34, 35 (1973). Defendant, however, additionally contends that the trial court erred in failing to instruct the jury, even absent a special request, that evidence of J.R. Bailey's separate confrontations with Perry should not be considered as against

him. We do not agree. The codefendant's encounters with the prosecuting witness tended to show the general ill will existing between their families and defendant's motive for the assault. J.R. Bailey was angry with Perry, a married man, for going with his younger sister. Apparently, defendant, the father of the girl, was also angry with Perry, and he testified that it made him mad. The motive for a crime may be shown even though it is not a necessary element of the offense charged. *State v. Ruof*, 296 N.C. 623, 252 S.E. 2d 720 (1979); *State v. Adams*, 245 N.C. 344, 95 S.E. 2d 902 (1957). We, therefore, overrule all of defendant's exceptions to the evidence of prior altercations.

[3] The third issue is whether the solicitor's cross-examination of defendant was so prejudicial as to require a new trial. The pertinent portions are:

> Q. And you say you were convicted of three speeding tickets and bootlegging and you have paid a fine in every case?
>
> A. Yes, sir. I have never fought none of them in court.
>
> Q. Do what?
>
> A. I have never fought one of them in court.
>
> Q. Because you always paid your way out of it, didn't you?
>
> MR. VALENTINE: Objection to the reference, "paid his way out of it."
>
> A. I just didn't figure it was worth going to court against.
>
> MR. VALENTINE: I think that it is an unseemly thing for the District Attorney to . . .
>
> OVERRULED
>
> Q. You figure you can buy your way out of anything, don't you, Mr. Bailey?
>
> OBJECTION
>
> SUSTAINED
>
> MR. VALENTINE: I believe I want to be heard out of the presence of the Jury on that.

It was, of course, proper to cross-examine defendant about his prior criminal convictions. 1 Stansbury, N.C. Evidence § 112 (Brandis rev. 1973). The dispute centers on the question to defendant "You figure you can buy your way out of anything, don't you, Mr. Bailey?" Defendant argues that even though his objection to this question was sustained, he was prejudiced by the very nature of the question itself and the failure of the judge to instruct the jury to disregard it.

A cardinal rule of appellate review is that the scope of cross-examination is firmly lodged in the trial judge's discretion, and his rulings thereon will not be disturbed unless the verdict was improperly influenced. *State v. Parker*, 45 N.C. App. 276, 262 S.E. 2d 686 (1980). We disapprove of the solicitor's question and hold that the trial judge correctly sustained defendant's objection thereto. The question did not, however, have the degree of inflammatory impact sufficient to have seriously affected the outcome at trial. *See State v. Locklear*, 294 N.C. 210, 241 S.E. 2d 65 (1978) [solicitor asked defense witness "you are lying through your teeth and you know you are playing with a perjury count; don't you?"]; and *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975). In addition, since the impropriety was not gross, the judge did not abuse his discretion in failing to caution the jury to disregard it on his own motion.

> The conduct of a trial and the prevention of unfair tactics by all connected with the trial must be left in a large measure to the discretion of the trial judge, and it is the duty of the trial judge to intervene when remarks of counsel are not warranted by the evidence and are calculated to prejudice or mislead the jury.

State v. Holmes, 296 N.C. 47, 50, 249 S.E. 2d 380, 382 (1978). Defendant was at liberty to request a cautionary instruction after his objection was sustained, and having failed to do so, he has not shown any prejudicial error in the cross-examination.

[4] The final issue is whether the court erred in overruling defendant's objection to the solicitor's argument that "the defendants were lawless people, had no regard for the law books or the laws that have been established; and that in the course of his argument he picked up a law book and slammed it down on the desk." Only this portion of the argument appears in the record for our review. The latitude permitted in jury argument

is controlled by the judge's discretion. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). Ordinarily, his discretion is not reviewable "unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations." *State v. Taylor*, 289 N.C. 223, 227, 221 S.E. 2d 359, 362 (1976). A new trial is awarded only in cases of extreme abuse in the argument. *State v. Davis*, 45 N.C. App. 113, 262 S.E. 2d 329 (1980) [reference to defendant as a "mean S.O.B."]; *State v. Swink*, 29 N.C. App. 745, 225 S.E. 2d 646 (1976) [reference to defendant as a "professional criminal"]. The reference to "lawless people" here, however, amounts to little more than an uncomplimentary characterization which was amply supported by the State's evidence that defendant shot Perry, inflicting serious bodily injury, on 17 February 1979. *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 92 S. Ct. 2873 (1972); *State v. Wortham*, 287 N.C. 541, 215 S.E. 2d 131 (1975). We, therefore, decline to grant a new trial on this ground. *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974), *death sentence vacated*, 428 U.S. 902, 96 S. Ct. 3203 (1976); *State v. Mink*, 23 N.C. App. 203, 208 S.E. 2d 522, *cert. denied*, 286 N.C. 340, 211 S.E. 2d 215 (1974).

We have carefully reviewed all of defendant's assignments of error and find

No error.

Chief Judge MORRIS and Judge WELLS concur.

STATE OF NORTH CAROLINA v. OTIS S. COOKE

No. 804SC312

(Filed 4 November 1980)

1. Disorderly Conduct and Public Drunkenness § 1– public intoxication – necessity for specified disruptive conduct

Mere public intoxication standing alone is no longer unlawful, and in

order for there to be a chargeable offense, the intoxicated person must be disruptive in one or more of the ways described in G.S. 14-444(a)(1)-(5).

2. **Disorderly Conduct and Public Drunkenness § 5; Arrest and Bail § 3.9– intoxication and disruptiveness in public – insufficient evidence for conviction – probable cause for arrest**

The statute making it unlawful for any person in a public place to be intoxicated and disruptive by "cursing or shouting at or otherwise rudely insulting others," G.S. 14-444(a)(4), was not violated by defendant's conduct in standing in a motel parking lot in an intoxicated condition, looking up toward the sky, and shouting "God is alive" and "God is in heaven" and other words which sounded like a foreign language. However, a complaint received by officers about defendant's conduct from a motel occupant, combined with the officers' observations of defendant's conduct, gave the officers reasonable grounds to suspect that defendant was in violation of the statute and probable cause to arrest him.

3. **Assault and Battery § 14.6– assaults on law officers – sufficiency of evidence**

The State's evidence was sufficient to support defendant's convictions of assaults on two officers in the performance of their duties where it tended to show that defendant forcefully resisted his lawful arrest by the officers and assaulted the officers in doing so.

4. **Searches and Seizures § 8– search incident to lawful arrest**

Marijuana found on defendant's person was lawfully seized pursuant to a search incident to defendant's lawful arrest.

APPEAL by defendant from *Llewellyn, Judge.* Judgment entered 17 October 1979 in Superior Court, ONSLOW County. Heard in the Court of Appeals 10 September 1980.

On 5 June 1979, at about 1:15 a.m., Deputy Sheriff Hines received a call from the Sheriff's Department dispatcher, requesting that he respond to a complaint at the Red Carpet Inn on Highway 17 South of Jacksonville. The Red Carpet Inn is a motel which also has some efficiency apartments. Hines called Deputy Sheriff Samuel Jarman and told him the complaint involved a man shouting in the parking lot of the motel. Jarman arrived first. He observed defendant standing in the parking lot, looking up toward the sky, shouting and saying that "God is alive."

After observing defendant at close range for about a minute, Jarman called Hines to join him. Hines arrived shortly thereafter. Hines and Jarman got out of their cars and approached defendant. Hines heard defendant shouting and saying "God is alive and God is in heaven." He was shouting

some other words which sounded to Hines and Jarman like a foreign language. The two officers smelled the odor of alcohol about defendant. To them, his eyes appeared wild and glassy looking.

They asked defendant to identify himself but he did not respond to their request. Hines informed defendant he was under arrest and asked defendant to accompany him to the patrol car. Defendant stopped shouting and complied with the request. At the car, Hines asked defendant to place his hands on the car so he could be searched. Defendant complied. When the search was completed, Hines took defendant by the arm and attempted to handcuff him. Defendant jerked away and turned around to face Hines. Defendant assumed what appeared to be a karate stance but said nothing. At this point Hines sprayed defendant with mace, a chemical substance similiar to tear gas. Defendant then struck Hines, knocking him off his feet, and ran toward and into a nearby apartment. The two officers followed defendant into the apartment. Defendant then attacked the officers. The officers responded with force, but they were able to subdue defendant only after a third officer arrived and assisted them. Defendant was then taken to Onslow County Memorial Hospital, where Officer Jarman arrested him and charged him with assaulting a police officer and resisting arrest. At this time, Jarman informed Hines that the defendant was talking, and Hines then searched defendant and found marijuana in his clothing.

Defendant was charged under a warrant with and was tried and convicted in the district court of assaulting a law enforcement officer while the officer was attempting to discharge a duty of his office, in violation of G.S. 14-33(b)(4) and with possession of a controlled substance, marijuana, in violation of G.S. 90-95(d)(4); was charged under a warrant with and was tried and convicted of assault on a law enforcement officer while the officer was attempting to discharge a duty of his office and for resisting arrest; and was charged under a warrant with and was tried and convicted of appearing drunk and disruptive in a public place and of resisting arrest. The warrant on the charge of appearing drunk and disruptive charged defendant was using vile and vulgar language in the presence of two or more citizens. Before trial, the district attorney filed a statement of

charges in which he alleged that defendant appeared intoxicated and disruptive in a public place by shouting at the Red Carpet Inn, insulting and disturbing occupants of the motel.

From the judgments entered in the district court, defendant appealed to the superior court, where he pled not guilty to and received a trial *de novo* on all charges. In the superior court, the trial judge entered a directed verdict of not guilty to both charges of resisting arrest. The jury returned guilty verdicts on all of the other charges. From judgment entered on the verdicts in the superior court, defendant has appealed to this Court.

Attorney General Rufus L. Edmisten, by Associate Attorney General Thomas J. Ziko, for the State.

Fred W. Harrison for the defendant appellant.

WELLS, Judge.

Defendant brings forward two assignments of error, the first relating to the search incidental to his arrest which disclosed his possession of marijuana, the second relating to the trial court's denial of his motions to dismiss. We will discuss these assignments in reverse order.

[2] Defendant argues that he was not violating G.S. 14.444(a)(4) by shouting in the parking lot so that his conduct was not such as to give the officers probable cause to arrest him, that his arrest was illegal, and that all charges against him should have been dismissed.

We consider first the question of whether defendant's conduct was such that the officers had reasonable grounds for believing that he was violating G.S. 14-444(a)(4) and thus committing an offense in their presence. This appears to be a case of first impression before our Courts.

Article 59 of Chapter 14 of the General Statutes was enacted by the 1977 Session of the General Assembly, *see* 1977 N.C. Sess. Laws, 2d Sess., ch. 1134. Its companion, Article 7B of Chapter 122 of the General Statutes, was also enacted under Chapter 1134 of the 1977 N.C. Session Laws. Both Articles are entitled Public Intoxication, and together, they set out the public policy of this State in dealing with persons intoxicated in public. In the same enactment, the General Assembly repealed

former Article 42 of Chapter 14, entitled Public Drunkenness. A comparison of the provisions of the old and the new statutes quickly reveals the intent of the General Assembly to remove public intoxication from the list of statutory crimes in North Carolina.

Old G.S. 14-334 and 14-335, in pertinent part, provided as follows:

> Public drunkenness and disorderliness. — It shall be unlawful for any person to be drunk and disorderly in any public place or on any public road or street in North Carolina; person or persons convicted of a violation hereof shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days in the discretion of the court.
>
> Public drunkenness. — (a) If any person shall be found drunk or intoxicated in any public place, he shall be guilty of a misdemeanor and upon conviction or plea of guilty shall be punished by a fine of not more than fifty dollars ($50.00) or by imprisonment for not more than 20 days in the county jail.

New Article 59, in its entirety, provides as follows:

Public Intoxication.

§ 14-443. Definitions. — As used in this Article:

(1) "Alcoholism" is the state of a person who habitually lacks self-control as to the use of intoxicating liquor, or uses intoxicating liquor to the extent that his health is substantially impaired or endangered or his social or economic function is substantially disrupted; and

(2) "Intoxicated" is the condition of a person whose mental or physical functioning is presently substantially impaired as a result of the use of alcohol; and

(3) A "public place" is a place which is open to the public, whether it is publicly or privately owned.

§ 14-444. Intoxicated and disruptive in public. —

(a) It shall be unlawful for any person in a public place to be intoxicated and disruptive in any of the following ways:

(1) Blocking or otherwise interfering with traffic on a highway or public vehicular area, or

(2) Blocking or lying across or otherwise preventing or interfering with access to or passage across a sidewalk or entrance to a building, or

(3) Grabbing, shoving, pushing or fighting others or challenging others to fight, or

(4) Cursing or shouting at or otherwise rudely insulting others, or

(5) Begging for money or other property.

(b) Any person who violates this section shall be guilty of a misdemeanor punishable by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than 30 days. Notwithstanding the provisions of G.S. 7A-273(1), a magistrate is not empowered to accept a guilty plea and enter judgment for this offense.

§ 14-445. Defense of alcoholism. — (a) It is a defense to a charge of being intoxicated and disruptive in a public place that the defendant suffers from alcoholism.

(b) The presiding judge at the trial of a defendant charged with being intoxicated and disruptive in public shall consider the defense of alcoholism even though the defendant does not raise the defense, and may request additional information on whether the defendant is suffering from alcoholism.

§ 14-446. Disposition of defendant acquitted because of alcoholism. — If a defendant is found not guilty of being intoxicated and disruptive in a public place because he suffers from alcoholism, the court in which he was tried may retain jurisdiction over him for up to 15 days to determine whether he is an alcoholic in need of care as defined by G.S. 122-58.22 or 122-58.23. The trial judge may make that determination at the time the defendant is found not guilty or he may require the defendant to return to court for the determination at some later time within the 15-day period.

§ 14-447. No prosecution for public intoxication. — (a) No person may be prosecuted solely for being intoxicated in a public place. A person who is intoxicated in a public place and is not disruptive may be assisted as provided in G.S. 122-65.11.

(b) If, after arresting a person for being intoxicated and disruptive in a public place, the law-enforcement officer making the arrest determines that the person would benefit from the care of a shelter or health-care facility as provided in G.S. 122-65.11, and that he would not likely be disruptive in such a facility, the officer may transport and release the person to the appropriate facility and issue him a citation for the offense of being intoxicated and disruptive in a public place.

[1] Thus, by repealing the old and enacting the new, the General Assembly made clear its intent that mere public intoxication standing alone was no longer to be considered unlawful and further, that for there to be a chargeable offense, the intoxicated person must be disruptive *in one or more of the ways described in* G.S. 14-444(a), subsection (1) through (5).

The provisions of G.S. 14-447 to the effect that no person may be *prosecuted* solely for being intoxicated in a public place make it abundantly clear that no person may be *arrested* solely for being intoxicated in a public place. Those who are intoxicated but not disruptive may be *assisted* but not arrested. G.S. 122-65.11.

[2] We hold that defendant's observed conduct on the occasion of his initial arrest was not in violation of G.S. 14-444(a)(4) and that this charge against him should have been dismissed. We hold, nevertheless, that the complaint received by the officers, combined with the conduct they observed, gave them reasonable grounds to suspect that defendant was in violation of the statute and that they therefore had probable cause to make the arrest.

Our Supreme Court has stated that probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.

> "The existence of 'probable cause,' justifying an arrest without a warrant, is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It is a pragmatic question to be determined in each case in the light of the particular circumstances *and the particular offense* involved." [Emphasis supplied.]

State v. Harris, 279 N.C. 307, 311, 182 S.E. 2d 364, 367 (1971).

[3] It is clear from the evidence that defendant forcefully resisted his arrest and in doing so, assaulted Officers Hines and Jarman. There was more than sufficient evidence to convict on these charges, and defendant's assignment of error on these charges is overruled.

[4] Defendant's final assignment of error concerns the introduction — over defendant's objection — of evidence of defendant's possession of marijuana. In that the search of defendant was carried out incident to a lawful arrest, this assignment is overruled. *See State v. Wooten*, 34 N.C. App. 85, 237 S.E. 2d 301 (1977).

In that defendant's convictions of violation of G.S. 14-444(a)(4) and of assaulting the officers were consolidated for judgment and sentence and as the convictions of assault support the judgment and sentence, defendant is not entitled to relief. *See State v. Jeffries*, 17 N.C. App. 195, 193 S.E. 2d 388 (1972), *cert. denied*, 282 N.C. 673, 194 S.E. 2d 153 (1973).

No error.

Judges ARNOLD and ERWIN concur.

RAINTREE CORP. v. CITY OF CHARLOTTE

No. 8026SC354

(Filed 4 November 1980)

1. Declaratory Judgment Act § 9– money judgment granted in declaratory judgment action – waiver of right to notice

In a declaratory judgment action in which plaintiff sought an interpretation of a contract for sewer services, since defendant stipulated as to

the exact amount of the "tapping privilege fees" collected by it and to the precise total amount of accumulated interest on the payments made under protest and did not object to the procedure of entering a judgment for money in the declaratory judgment proceeding, defendant waived the requirement of G.S. 1-259 that it be served with a petition and notice before the court would have authority to grant further relief.

2. **Municipal Corporations § 22.2– contract for sewer services– tapping privilege fee not permitted**

Where the stipulation made by the parties established that the contract of their predecessors in interest was to be subject to the then existing water and sewer policy as it related to the payment of sewer connection fees and not to the payment of any "tapping privilege fee," and the stipulations further demonstrated that the "tapping privilege fee" was not instituted until a different water and sewer policy was adopted four years later, the trial court could find by competent evidence that the contract did not allow for "tapping privilege fees" to be assessed by defendant against plaintiff.

3. **Municipal Corporations § 22.2– contract for sewer services – assessment of tapping privilege fee not allowed – contract not ultra vires**

A contract for sewer services entered into by the parties' predecessors, which was interpreted by the trial court to prohibit assessment of "tapping privilege fees" against plaintiff, was not *ultra vires* and therefore unenforceable, since a water and sewer policy adopted by defendant in 1975 provided that "subdivisions developed solely with developer funds and donated to the city without cost are not subject to tapping privilege fees," and the parties stipulated that plaintiff's predecessor in interest constructed "at its sole expense" all the necessary sewerage facilities on its property and that defendant automatically became the owner and operator of those facilities upon ther completion.

4. **Declaratory Judgment Act § 9; Interest § 1– declaratory judgment action – contract for construction of sewer services – improper tapping privilege fee charged – award of interest proper**

In a declaratory judgment action in which plaintiff sought an interpretation of a contract for sewer services, the trial court properly awarded pre-judgment interest, since plaintiff made "tapping privilege fee" payments under protest, and defendant did not have authority to collect such sums.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 19 February 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals on 9 October 1980.

This is a declaratory judgment action in which plaintiff seeks an interpretation of a contract for sewer services dated 26 January 1971 between the Ervin Company, plaintiff's predecessor in interest, and Mecklenburg County, defendant's predeces-

sor in interest. The parties stipulated that the issues to be resolved by the court were as follows:

(a) May the City properly charge Raintree Corp. a higher sewer service connection fee than was in effect and being charged on January 26, 1971?

(b) May the City properly charge Raintree Corp. the tapping privilege fee prescribed for the first time by its May, 1975 Water and Sewer Policy?

The parties further stipulated, among other things, as follows:

(1) Defendant, through its department the Charlotte-Mecklenburg Utility Department, has the responsibility for providing sanitary sewer services in Mecklenburg County and has assumed the contract in question in carrying out that responsibility; (2) in accordance with the terms of the contract, the Ervin Company "at its sole expense" constructed all necessary sewer facilities within the boundaries of the subdivision Ervin was developing, and "the facilities are now in operation, being operated, maintained, and owned by the defendant"; (3) under paragraph 8 of the contract, the sewer facilities constructed were subject to the then-existing sewer policies of Mecklenburg County "concerning sewer connections as they relate to payment of tap fees"; (4) "[t]he only sewer fee established and in effect on January 26, 1971 was a service connection charge to connect a sewer lateral into the street main, . . ." said charge designed to cover the cost of construction to connect the lateral to the main; (5) on 19 May 1975 defendant adopted a new water and sewer policy, still in effect, which provided for two types of fees, one being a sewer service connection fee for connecting a sewer lateral to a sewer main, and the other being a "tapping privilege fee" for financing sewer extensions for new development; (6) the sewer service connection fee under this new policy was greater than the amount of the fee in effect when the contract in question was entered; (7) plaintiff had paid and was still paying the increased sewer service connection fee and the tapping privilege under protest; (8) the total sum of tapping privilege fee payments by plaintiff from 15 August 1977 to 19 November 1979 was $19,920; and (9) "if interest were to be computed thereon at the rate of six percent (6%) per annum from the date of each payment through February 15, 1980, the amount of accrued interest would be $1,799.81."

The trial judge made findings which in effect incorporated the stipulations and concluded as follows:

1. Under the Sewer Contract the City may charge Raintree Corp. a higher sewer service connection fee, based generally on the construction costs of connecting a lateral line into a street main, than was in effect and being charged on January 26, 1971 because paragraph 8 on page 3 of the Sewer Contract provides that the developer will follow established policy with regard to sewer service connection fees.

2. Under the Sewer Contract the City may not charge Raintree Corp. the tapping privilege fee prescribed for the first time by its May, 1975 Water and Sewer Extension Policy because paragraph 1 on page 2 of the Sewer Contract provides that the Raintree sewer system will be subject to the January 26, 1971 County sewer policy.

3. While there are certain obligations to which a municipality cannot by contract bind itself, the obligations undertaken by the County in the Sewer Contract are valid and enforceable as to the County and its successor, the City.

4. Between August 15, 1977 and November 19, 1979 Raintree Corp., under protest, paid the City tapping privilege fees in the amount of $19,920.00, to which the City is not entitled and which the City is obligated to refund to Raintree Corp. with interest.

From a judgment upholding defendant's right to charge a higher sewer service connection fee, prohibiting defendant from charging plaintiff tapping privilege fees, and allowing plaintiff to recover "all tapping privilege fees paid in the amount of $19,920.00 plus interest in the amount of $1,799.81 ..." and costs, defendant appealed.

Horack, Talley, Pharr, and Lowndes, by Robert C. Stephens and Thomas J. Ashcraft, for the plaintiff appellee.

City Attorney Henry W. Underhill, Jr., by Assistant City Attorneys Richard D. Boner and David M. Smith, for the defendant appellant.

HEDRICK, Judge.

[1] We note at the outset that this is a declaratory judgment proceeding wherein the court entered a judgment that not only declared the rights of the parties under the contract, but also entered a monetary judgment for plaintiff. While neither party has raised the question of the propriety of a monetary judgment in a declaratory judgment proceeding, we deem it proper to point out that G.S. § 1-259 provides that upon petition and notice, the court can grant further relief "whenever necessary or proper" in a declaratory judgment proceeding, and such relief can be a judgment for money. 22 Am. Jur. 2d, Declaratory Judgments § 100; 26 C.J.S. Declaratory Judgments § 162. Since defendant stipulated as to the exact amount of the "tapping privilege fees" collected by defendant, and to the precise total amount of accumulated interest on the payments made under protest, and did not object to the procedure of entering a judgment for money in the declaratory judgment proceeding, we hold that defendant waived the requirement of G.S. § 1-259 that it be served with a petition and notice before the court would have authority to grant further relief.

[2] By his first assignment of error, defendant argues that the trial court's determination that the contract did not permit the city to charge plaintiff with a "tapping privilege fee" is not supported by the record. We disagree. The findings of the trial court are conclusive and binding on appeal when supported by competent evidence. *Seders v. Powell*, 298 N.C. 453, 259 S.E. 2d 544 (1979); *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975).

The stipulations made by the parties in the present case establish that the contract was to be subject to the then-existing water and sewer policy as it related to the payment of sewer connection fees, and not to the payment of any "tapping privilege fee." The stipulations further demonstrate that the "tapping privilege fee" was not instituted until a different water and sewer policy was adopted in 1975. Based on these stipulations, the trial court could find by competent evidence that the contract did not allow for "tapping privilege fees" to be assessed against plaintiff. This assignment of error is meritless.

[3] Defendant next argues by his second and fourth assignments of error that the trial court's interpretation of the con-

tract has the "primary effect of limiting the County's (and City's) authority to set fees *vis a vis* Raintree Corp.", and that therefore the contract in the present case is *ultra vires*, and cannot be enforced by plaintiff. We do not agree. G.S. § 153-284, as it was at the time the contract was entered, provided in pertinent part as follows:

> The board of commissioners of any county is hereby authorized to:
>
> (1) Acquire, lease as lessor or lessee, construct, reconstruct, improve, extend, enlarge, equip, repair, maintain and operate any ... sanitary sewerage system or parts thereof, either within or without the boundaries of the county, ... and
>
> (2) To make and enter into all contracts and agreements necessary or incidental to the execution of the powers herein provided, including the contracting or otherwise providing for the leasing, repairing, maintaining and operating of any such system or systems or parts thereof.

G.S. § 153-286, as it was at the time the contract was entered, provided in pertinent part as follows:

> The board of commissioners of any county may fix, and may revise from time to time, rents, rates, fees, and charges for the use of and for the services furnished or to be furnished by any such [sanitary sewerage] system or systems. ...

Although there is no question that a county or municipality has the power to enter contracts, if the county or municipality enters a contract which restricts it in the performance of its governmental function or in the exercise of its legislative authority, such a contract is *ultra vires* and is of no legal effect. *Bessemer Improvement Co. v. City of Greensboro*, 247 N.C. 549, 101 S.E. 2d 336 (1958); *Madry v. Town of Scotland Neck*, 214 N.C. 461, 199 S.E. 618 (1938); *Rockingham Square Shopping Center, Inc. v. Town of Madison*, 45 N.C. App. 249, 262 S.E. 2d 705 (1980).

In the present case, the trial judge's interpretation of the contract does not restrict the county or the city in the exercise of its legislative authority, since defendant chose in its discretion not to subject developers in situations similar to plaintiff to

the assessment of "tapping privilege fees." In the water and sewer policy adopted by defendant on 19 May 1975, the following appears under a section entitled "Special Considerations": "F. . . . Subdivisions developed solely with developer funds and donated to the city without cost are not subject to tapping privilege fees. . . ." The parties stipulated, and the court found, that the Ervin Company, plaintiff's predecessor in interest, constructed "at its sole expense" all the necessary sewerage facilities on its property, and that defendant is now the owner and operator of those facilities. Furthermore, the contract in question indicated that upon completion of the facilities, the county's ownership of them was "automatic," and no provision was made for any compensation to plaintiff. We therefore hold that the contract in question was not *ultra vires*, and was enforceable as interpreted by the trial judge. These assignments of error are without merit.

[4] Defendant next contends, based upon his fifth, sixth, and seventh assignments of error, that the trial judge erred "in awarding interest in the amount of $1,799.81 to Raintree Corp." Essentially, defendant argues that pre-judgment interest is not recoverable on monetary judgments in declaratory judgment proceedings, that the facts of the case do not justify an award of such interest, and that there are no findings or conclusions setting forth the grounds for the award of such interest. We disagree. While we have found no cases in this jurisdiction directly dealing with an award of interest as part of supplemental relief in a declaratory judgment proceeding, other jurisdictions have allowed such an award. *See*, e.g., *National Fire Insurance Co. of Hartford v. Board of Public Instruction of Madison County, Florida*, 239 F. 2d 370 (5th Cir. 1956); *Fairchild Stratos Corp. v. Siegler Corp.*, 225 F. Supp. 135 (D.C. Md. 1963); *New Haven Water Co. v. City of New Haven*, 40 A. 2d 763, 131 Conn. 456 (1944). Also, since the North Carolina Declaratory Judgment Act is to be liberally construed, G.S. § 1-264; *York v. Newman*, 2 N.C. App. 484, 163 S.E. 2d 282 (1968), we are reluctant to disapprove of the trial judge's grant of supplemental relief in this case. Moreover, there are many analogous situations under North Carolina law in which a party can recover pre-judgment interest on moneys found to have been paid to and improperly held by another party, the most notable examples being actions for money had and received, *see Dean v.*

Mattox, 250 N.C. 246, 108 S.E. 2d 541 (1959), and action by taxpayers seeking refunds for property taxes that are found to be unlawful, *see* G.S. § 105-381(d). Since, under the circumstances of this case, plaintiff has made the "tapping privilege fee" payments under protest, and defendant does not have authority to collect such sums, we hold that the court properly awarded pre-judgment interest.

We further hold that the stipulations, and the findings and conclusions based on those stipulations, support the award of interest. These assignments of error have no merit.

Affirmed.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

RUTH W. EASTER, ADMINISTRATRIX OF THE ESTATE OF BOBBY LEE EASTER, DECEASED v. LEXINGTON MEMORIAL HOSPITAL INC.; DR. JAMES A. CLINE; DR. LLOYD D. LOHR; DR. C.F. MEADE; LEXINGTON CLINIC FOR WOMEN, P.A.; AND NORTH CAROLINA BAPTIST HOSPITALS, INC.

No. 8022SC363

(Filed 4 November 1980)

Physicians, Surgeons and Allied Professions § 16.1– medical malpractice action – no doctor-patient relationship

In a medical malpractice action to recover for the death of plaintiff's intestate from tetanus in conjunction with other injuries, the evidence on motion for summary judgment failed to show that a doctor-patient relationship ever existed between defendant and plaintiff's intestate, and summary judgment was properly entered for defendant, where it tended to show that plaintiff's intestate was brought to a hospital emergency room, along with several other patients, for injuries sustained in a hotel fire; the intestate was suffering second and third degree burns, lacerations and abrasions, and a broken arm; defendant was the physician on duty in the emergency room; an obstetrician who was skilled in the treatment of burns offered his assistance to defendant; defendant pointed in the direction of the intestate and suggested that the obstetrician "see that one over there"; the obstetrician volunteered his help to the intestate and the intestate consented; the obstetrician questioned the intestate concerning the need for tetanus shots and ordered tetanus toxoid on the basis of his answers; and a recital in the hospital records that defendant "saw the patient in the emergency room" was based on the erroneous assumption that defendant treated the intestate since defendant was on duty in the emergency room.

Easter v. Hospital

APPEAL by plaintiff from *Washington, Judge.* Judgment entered 15 November 1979 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 10 October 1980.

This is an appeal by plaintiff from the entry of summary judgment in favor of Dr. James A. Cline in a wrongful death action alleging medical malpractice against several defendants. Plaintiff's intestate, along with several other persons, was burned in a hotel fire and treated at Lexington Memorial Hospital Emergency Room. Five days later, after developing tetanus, decedent was transferred to the North Carolina Baptist Hospital and subsequently died of tetanus complicating a configuration of other injuries. Plaintiff brings this action alleging negligence by the defendants in supplying medical care to plaintiff's intestate. All parties filed answer denying negligence. The defendant Cline filed motion for summary judgment, which was allowed. Subsequently, plaintiff filed a motion to set aside the summary judgment as to Dr. Cline, and this motion was denied. Plaintiff appeals. The action remains pending against the defendants other than Dr. Cline.

Michael J. Lewis and Teresa G. Bowden for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by Jackson N. Steele and J. Robert Elster, for defendant appellee Dr. James A. Cline.

HILL, Judge.

The sole question before this Court is whether the trial court erred in granting the defendant Cline's motion for summary judgment and thereafter failing to set aside said judgment.

Evidence offered at the hearing on motion for summary judgment tended to show that the plaintiff's intestate was brought to the emergency room of Lexington Memorial Hospital [hereinafter Lexington], along with several other patients, for injuries sustained in a fire at a local hotel. Mr. Easter was suffering second and third degree burns, lacerations and abrasions, and a broken arm. Forsyth Emergency Services, P.A., was under contract with Lexington to render emergency room care to the extent that facilities were available and to the

extent that one qualified physician would be capable of rendering such service. Dr. James A. Cline, an employee of Forsyth Emergency Services, P.A., Inc., was on duty.

Dr. Lohr, an obstetrician-gynecologist, who had specialized in the treatment of burns, was at the hospital checking his patients. He saw the fire victims being wheeled on stretchers into the emergency room. Seeing there were too many people for one person to handle, Dr. Lohr offered his assistance to Dr. Cline, who pointed in the direction of Mr. Easter and said: "Why don't you see that one over there?"

Dr. Cline never told Dr. Lohr to do anything. Rather, Dr. Cline pointed in Mr. Easter's direction as a suggestion. Dr. Lohr advised Mr. Easter that he was not working in the emergency room but had volunteered to help. Mr. Easter said, "Thank you." Dr. Lohr was under the impression that Dr. Cline had seen Mr. Easter, but never saw Dr. Cline in decedent's presence.

Upon questioning, it was determined that Mr. Easter had no family in the general area who could be called in for consultation. As a part of his treatment, Dr. Lohr asked Mr. Easter if he had received tetanus shots before, and Mr. Easter replied that he was not sure, but thought so. Mr. Easter advised Dr. Lohr that he had been in the army and also had suffered a traumatic amputation of his left arm. Thereupon, Dr. Lohr ordered tetanus toxoid which the doctor felt was sufficient immunization.

After emergency treatment, Dr. Lohr asked Dr. Cline what was to be done with Mr. Easter. Dr. Cline stated that the patient was to be admitted to Lexington under the supervision of Dr. Meade. The hospital records indicate that Dr. Cline's name was inserted as the physician in charge of Easter and then removed, and the name of Lohr/Meade inserted. Dr. Cline did not ask anything about the nature and extent of Mr. Easter's injuries.

The only statement anywhere in the record to the effect that Dr. Cline rendered medical treatment to Bobby Lee Easter is a recital in the admission note and discharge summary prepared by Dr. Meade after Mr. Easter's admission to the hospital. Those records recite Dr. Meade's understanding of the history of Mr. Easter's injury and treatment in the emergency

room, and state: "Dr. Cline saw the patient in the emergency room." By way of sworn affidavit, Dr. Meade acknowledged that those recitals were in error and were simply assumptions on his part at the time because he knew that Dr. Cline was on duty in the emergency room that evening and had treated some of the other victims of the hotel fire. Dr. Meade affied that he had mistakenly assumed Dr. Cline had treated Easter. The hospital records indicate a charge was made by Dr. Lohr for his services which was paid by Mr. Easter. However, Dr. Lohr denied making a charge and says such charges were made by persons other than himself. The notations on the hospital records have not been traced to Dr. Cline in any way.

The hospital had a mass disaster plan, which could have been initiated by Dr. Cline. However, in the opinion of Dr. Lohr, with his volunteering, it was not necessary to initiate the program.

We are aware that Rule 56 provides that before summary judgment may be had, the materials filed must show affirmatively that not only would the moving party be entitled to judgment based on the evidence within the material, but such materials must show there can be no other evidence from which a jury could reach a different conclusion. *Millsaps v. Contracting Co.*, 14 N.C. App. 321, 188 S.E. 2d 663, *cert. denied* 281 N.C. 623 (1972).

We have examined the record and find no evidence that a doctor-patient relationship ever existed between Dr. Cline and Mr. Easter. An emergency existed, and Mr. Easter had been wheeled into the emergency room. Still, Dr. Cline had no duty to leave the person he was treating at the moment to examine Easter. Another physician, Dr. Lohr, recognized the emergency and volunteered his help to both Dr. Cline and Mr. Easter. Dr. Cline simply pointed to Mr. Easter, and Mr. Easter consented to treatment by Dr. Lohr.

Plaintiff contends that since Dr. Cline was an employee of Lexington, then Dr. Lohr was Dr. Cline's assistant and an agent of Lexington. We find nothing in the record in this case to support respondeat superior liability on Dr. Cline. *See Rucker v. Hospital*, 285 N.C. 519, 206 S.E. 2d 196 (1974).

Neither do we agree that Dr. Cline was negligent in failing to see Mr. Easter. There were several patients in the emergency room. Dr. Lohr, a physician skilled in treating burns, had volunteered to see Mr. Easter. There is no evidence that declaring an emergency would have provided better treatment. Declaring an emergency may have brought in more doctors, but Mr. Easter already had one — Dr. Lohr. No act or omission to act by Dr. Cline was the proximate cause of Mr. Easter's developing tetanus. Dr. Lohr questioned Mr. Easter as to the need for tetanus shots and made a decision based on answers given by Mr. Easter. This was his decision based on his judgment alone.

Dr. Cline's defense rests on his claim that he did not see Mr. Easter. Dr. Meade, a defendant (now deceased), supports the claim by affidavit, and Dr. Lohr by interrogatories. We find no evidence in rebuttal. Plaintiff contends these are interested parties, and their testimony is insufficient on a motion for summary judgment. Our Supreme Court has held that summary judgment may be granted for the party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976).

An examination of the record leads us to the conclusion that, at most, only latent doubts may exist as to the testimony offered by Dr. Cline through affidavits and interrogatories.

Nor are we impressed with plaintiff's argument that discovery had not been completed and that plaintiff had also opposed the motion by Rule 56 affidavit. Ordinarily, the completion of discovery is required prior to granting summary judgment in a medical malpractice suit so that the party can explore issues of malpractice. *Joyner v. Hospital*, 38 N.C. App. 720, 248 S.E. 2d 881 (1978). In this case, we observe that motion for summary judgment was filed 22 March 1979. Twice, on motion of plaintiff, the hearing was continued and orders permitting extension of time for discovery were allowed granting plaintiff

up through 7 September 1979. The court appears generous to plaintiff in her requests.

The judgments entered in this cause are

Affirmed.

Judges ARNOLD and MARTIN (Harry C.) concur.

JANET CAROLYN R. CROMER (HERMAN) v. JACK S. CROMER

No. 8010DC478

(Filed 4 November 1980)

1. **Divorce and Alimony § 23– motion to increase child support – defendant in Hawaii – personal jurisdiction in N.C. court**

The trial court properly exercised personal jurisdiction over defendant in plaintiff's action for increased child support and for attorney fees, and properly issued further orders for garnishment and for defendant's arrest, since the documents filed in this cause did not initiate a new cause of action; in defendant's earlier confession of judgment for the support of his two minor children, he stated that he was formerly a resident of Wake County, N.C.; the judgment further stated that the amount of support paid by defendant should be subject to change from time to time, based upon the income of defendant and the needs of the children; the judgment was a court decree of the Wake County District Court; and jurisdiction over the person of defendant began and remained with the N.C. court when defendant knowingly and voluntarily signed the confession of judgment pursuant to G.S. 1A-1, Rule 68.1. Furthermore, defendant was properly served by mail where a copy of the motion in the cause, notice of the initial hearing, the order to appear and produce documents, and the order denying defendant's motion for a stay were mailed to defendant at his last known address.

2. **Divorce and Alimony § 24.3; Judgments § 11– confession of judgment for child support – judgment binding**

There was no merit to defendant's contention that his confession of judgment and subsequent entry of judgment were defective and not binding on him, since defendant acknowledged in the instrument that he had read it and the matters contained therein were true to the best of his knowledge; for years defendant paid the monthly installments for child support without challenge to the judgment; and defendant's challenge to the confession of judgment did not show fraud, mistake or oppression.

3. **Army and Navy § 1; Divorce and Alimony § 24.5– motion to increase child support – motion to stay hearing pursuant to Soldiers and Sailors Civil Relief Act – denial proper**

In a hearing on plaintiff's motion to increase child support, the trial

judge did not abuse his discretion in denying defendant's motion to stay the proceedings pursuant to the Soldiers and Sailors Civil Relief Act of 1940, though defendant was on active duty with the U.S. Navy in Hawaii and stated that he was unable to attend the hearing on plaintiff's motion, since the trial judge found that defendant was voluntarily enlisted and had no plans to retire for the next seven years; defendant was entitled to thirty days' leave each year; and defendant had military transportation available to him at reduced or no cost.

APPEAL by defendant from *Parker (John H.), Judge.* Order entered 5 March 1980 in District Court, WAKE County. Heard in the Court of Appeals 10 October 1980.

This is a civil action for an increase in child support. Plaintiff and defendant were divorced in 1971. On 21 June 1971 the defendant confessed judgment for support of his two minor children, although the judgment was not filed until 16 May 1974. The judgment provided for child support payments of $250 per month, and further provided that the amount was subject to change, based upon the income of the defendant and the needs of the children. Plaintiff, on 25 September 1979, filed a motion in the cause and a notice of hearing. An order for defendant to appear in the district court was also issued on that date. The notice of hearing set the time of hearing for 5 November 1979. Plaintiff also filed a certificate of service indicating that copies of the motion, notice and order had been mailed to the defendant at his last known address.

By letter dated 26 October 1979 addressed to the presiding judge of the Wake County District Court, the defendant requested a stay of proceedings pursuant to the Soldiers and Sailors Civil Relief Act of 1940, stating that he was on active duty with the United States Navy in Hawaii and unable to attend the November hearing. Defendant's letter acknowledged: "I have been summoned to appear as a named defendant in the matter of *Cromer v. Cromer,* file No. 79CVD5719."

On 6 November 1979, the presiding judge entered an order denying defendant's motion and ordered the defendant to appear in the Wake County District Court on 21 November 1979. The defendant did not appear. On 27 November 1979, the presiding judge issued an order for the arrest of the defendant and an order providing for an increase in the child support payments to $525 per month, requiring the defendant to pay all medical and

dental expenses incurred by either of the children, and ordering the defendant to pay plaintiff's attorney the sum of $500. Defendant was not present or represented at the hearing.

On 10 January 1980, the plaintiff initiated garnishment proceedings against the defendant based on the order of 27 November 1979. The defendant did not respond to or otherwise participate in the garnishment proceedings. On that same date, in a special appearance under G.S. 1A-1, Rule 12(b), defendant filed a motion to dismiss this action, contending the court had not acquired personal jurisdiction. A supplement to the motion to dismiss was filed 19 February 1980.

On 5 March 1980, the trial judge denied defendant's motion to dismiss and issued an order of garnishment of 40% of the defendant's net disposable earnings. Defendant's appeal was entered on the same day.

Tharrington, Smith & Hargrove, by J. Harold Tharrington and Carlyn G. Poole, for plaintiff appellee.

Hatch, Little, Bunn, Jones, Few & Berry, by John B. Ross, for defendant appellant.

HILL, Judge.

[1] Defendant contends the trial court erred in refusing to dismiss plaintiff's action for increased child support and for attorney fees, and in issuing the further orders for garnishment, and for his arrest for the reason that defendant has not been properly served. Defendant's contention raises the issue of whether the trial court properly exercised jurisdiction over the person of the defendant. We find the defendant's contention to be without merit. The trial court properly exercised personal jurisdiction.

The defendant is a chief petty officer in the U.S. Navy, stationed aboard the U.S.S. Skate (SSN-578) in Pearl Harbor. Defendant claims Wyoming as his official residence. The notice of hearing was mailed to the U.S.S. Sea Dragon (SSN-584).

Defendant contends this proceeding is a new civil action and that G.S. 1A-1, Rule 4(j) requires that initial pleadings, when mailed to an out-of-state defendant, be mailed by "registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee only."

> "[W]here a statute provides for service of summons ... by designated methods, the specified requirements must be complied with or there is not a valid service." (Citation omitted.)

Guthrie v. Ray, 293 N.C. 67, 69, 235 S.E. 2d 146 (1977). Defendant argues that service of process on him was ineffective because he was not served in accordance with the statutory requirement.

In the confession of judgment, defendant states that he was formerly a resident of Wake County, North Carolina, and is now on active duty with the U.S. Navy. The judgment further states that the amount of support paid by defendant "shall be subject to change from time to time, based upon the income of the defendant and the needs of the children." The judgment was a court decree of the Wake County District Court.

The documents filed in this cause do not initiate a new cause of action and need not meet the same requirements as service of process in a new cause. It is well settled that a judgment concerning the custody or support of a minor child is not final but may be altered by the showing of a substantial change of circumstances. *Stanback v. Stanback*, 287 N.C. 448, 456, 215 S.E. 2d 30 (1975). Jurisdiction over the person of the defendant began and remained with the North Carolina court when the defendant knowingly and voluntarily signed a confession of judgment pursuant to G.S. 1A-1, Rule 68.1. *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E. 2d 876 (1961).

G.S. 1A-1, Rule 5(b) provides, among other things, that:

> With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served ... service upon ... a party may also be made by delivering a copy to him or by mailing it to him at his last known address ....

Regarding service by mail, Rule 5(b) states that it is complete "upon deposit of the pleading or paper enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service." The certificate of service and affidavit provided by plaintiff's attorney plainly indicate that a copy of the motion in the cause, notice of the initial hearing, the order

to appear and produce documents, and the 6 November order denying defendant's motion for a stay were mailed to the defendant at his last known address, the U.S.S. Sea Dragon. The defendant does not deny receipt of the papers and, in fact, acknowledges receipt. Defendant was properly served.

[2] Defendant argues next that the confession of judgment and the subsequent entry of judgment are defective and not binding on him. However, defendant acknowledged in the instrument that he had read it and the matters contained therein were true to the best of his knowledge. For years defendant paid the monthly installments for child support without challenge to the judgment.

In *Whitehead v. Whitehead*, 13 N.C. App. 393, 399, 185 S.E. 2d 706 (1972), this Court held that a husband who has ratified, accepted or acquiesced in a child support decree by confession is estopped to challenge the validity of the judgment on the ground of informalities or irregularities in either the confession of judgment or the decree itself. To be effective the challenge to the confession of judgment must show fraud, mistake or oppression. *See also Pulley, supra.* Defendant has not pleaded any of these defenses. The defendant was properly before the court and under its jurisdiction.

Defendant argues further that the presiding judge of the Wake County District Court erred when he found that defendant's letter of 26 October 1979 seeking relief under the Soldiers and Sailors Civil Relief Act of 1940, 50 U.S.C. App., Section 521 [hereinafter Act], constituted a voluntary appearance and denied his motion for a stay. We do not address the issue of whether the letter constituted a general appearance. As we stated earlier, the district court gained personal jurisdiction of defendant when the confession of judgment was signed.

[3] We do not find error in the presiding judge's action denying defendant's application pursuant to the Act. "The Act cannot be construed to require continuance on mere showing that the defendant [is] . . . in the military service." *Boone v. Lightner*, 319 U.S. 561, 87 L. Ed. 1587, 63 S. Ct. 1223, *reh. denied* 320 U.S. 809 (1943). "While the Act mandates a continuance . . . where military service would cause a party to be absent, it also empowers the trial judge to deny the continuance if, in his opinion, 'the

ability of the ... defendant to conduct his defense is not materially affected by reason of his military service.' " *Booker v. Everhart*, 33 N.C. App. 1, 8, 234 S.E. 2d 46 (1977), *rev'd on other grounds* 294 N.C. 146, 240 S.E. 2d 360 (1978).

The presiding judge found that defendant is voluntarily enlisted and has no plans to retire for the next seven years. The judge further found that defendant is entitled to thirty days' leave each year and has military transportation available to him at reduced or no cost. Based on the facts, the judge did not abuse his discretion in denying the stay. In fact, it appears to this Court that the judge was generous in delaying the hearing until 21 November 1979, and that defendant's use of the Act was dictated by strategy rather than the necessities of military service. Such use was improper. *See Booker*, at p. 9.

For the reasons set out above, the orders of the presiding judge addressed herein are affirmed.

The orders of the trial court are

Affirmed.

Judges ARNOLD and MARTIN (Harry C.) concur.

FIRST CITIZENS BANK AND TRUST COMPANY v. CANAL INSURANCE COMPANY

No. 808SC279

(Filed 4 November 1980)

Insurance § 77– automobile theft policy – evidence showing property abandoned – no recovery under policy

In an action to recover under an insurance policy for the theft of a tractor and trailer, plaintiff's evidence showed at best a permanent abandonment of the insured property by its owner under circumstances such as to leave the ultimate fate of the property in the realm of pure speculation, and the trial court therefore erred in finding that the property was stolen and in entering judgment for plaintiff.

APPEAL by defendant from *Bruce, Judge*. Judgment entered 8 November 1979 in Superior Court, WAYNE County. Heard in the Court of Appeals 17 September 1980.

Plaintiff bank brought this action to recover the sum of $16,265.00, alleged to be the fair market value of a tractor-trailer owned by Edgar Strickland, on which plaintiff had a lien by virtue of a loan made by plaintiff to Strickland. In its answer, defendant admitted that it had issued a policy of insurance on the tractor-trailer, naming Strickland as the insured and naming plaintiff as the loss payee. The policy included coverage for theft.

The matter was heard by the trial court without a jury. Plaintiff presented three witnesses who testified as to the events surrounding the alleged theft of the tractor-trailer. The insurance policy was introduced. Defendant presented no evidence. The trial court entered judgment for plaintiff, from which defendant has appealed.

Barnes, Braswell & Haithcock, P.A., by W. Timothy Haithcock, for plaintiff appellee.

Dees, Dees, Smith, Powell & Jarrett, by William W. Smith and Michael M. Jones, for defendant appellant.

WELLS, Judge.

The judgment of the trial court included *inter alia* the following finding of fact: "13. The International tractor and Brown trailer were stolen between February 4, 1977 and April 27, 1977 by an unknown person or persons."

Defendant argues on appeal that the evidence did not support the above quoted finding of fact. We agree. Plaintiff presented the testimony of three witnesses: Strickland, the owner of the truck; Jack Roger Westmoreland, an independent insurance adjuster who investigated the alleged theft for defendant; and Charlie David Bennett, manager of plaintiff's Installment Loan Department in Goldsboro.

Strickland testified that on the 2nd or 3rd of February 1977, he was hauling a load of potatoes from Mars Hill, Maine to Baltimore, Maryland. It was snowing heavily at the time and the temperature was down to about sixty degrees below zero. The truck engine blew up outside of Mars Hill, about two miles from Smith's Truck Stop, at about six or seven o'clock. Strickland called a wrecker and had the unit towed to Smith's Truck Stop where he requested and was given permission to park the

tractor, about fifty or sixty feet from the "shop". Strickland rode with a man in another rig who delivered the potatoes to Baltimore. After unloading the potatoes, they took the trailer to Union 76 Truck Stop on John F. Kennedy turnpike, near Baltimore. From there, Strickland rode with a friend to New York, thence to Bethlehem, Pennsylvania, and then back to Goldsboro, North Carolina. Strickland agreed to pay the man who drove him to Baltimore to deliver the trailer back to Mars Hill, Maine. That man was not identified by Strickland. Neither could Strickland identify the person he talked to at Smith's Truck Stop about leaving the tractor there. Strickland never returned to Smith's Truck Stop to retrieve the unit. Strickland did not testify as to whether he ever reported the loss of the unit to defendant.

Westmoreland testified that he was employed on 21 April 1977 to investigate the loss. He went to Smith's Truck Stop in Mars Hill, Maine, and to Presque Isle, Maine, but he did not find the tractor or the trailer. As a result of his investigation, he recommended that defendant deny the claim. From his investigation, he could not find any evidence of a theft loss.

Bennett testified that he learned of the loss of the tractor-trailer in February of 1977 and reported it to defendant sometime in April 1977. Bennett identified and testified as to a complaint filed by plaintiff in July 1977 in a bankruptcy proceeding instituted by Strickland, in which plaintiff sought to have Strickland's truck loan debt to plaintiff declared non-dischargeable. Plaintiff, in its complaint, alleged that Strickland either knew of the whereabouts of the vehicle or that in the alternative, he had abandoned it. Plaintiff further alleged that Strickland never reported the loss of the vehicle to defendant or to the police.

The policy provision as to theft is as follows: "Coverage D – Theft (Broad Form) To pay for loss or damage to the automobile, hereinafter called loss, caused by theft, larceny, robbery, or pilferage."

This appears to be a case of first impression before our courts. Defendant cites *Auto Co. v. Insurance Co.*, 239 N.C. 416, 80 S.E. 2d 35 (1954) and *Adler v. Insurance Co.*, 280 N.C. 146, 185 S.E. 2d 144 (1971) as being instructive. The facts in *Auto Co.*

show coverage under an automobile theft clause identical to the one in the case now before us. An employee of the plaintiff's was instructed to drive one of plaintiff's cars to a garage for repairs. The employee took a diversionary trip to his home and while on the return trip to plaintiff's place of business had an accident. The employee was charged with and convicted of a violation of G.S. 20-105, which in pertinent part provided that: "[a]ny person who drives or otherwise takes and carries away a vehicle, not his own, without the consent of the owner thereof, and with intent to temporarily deprive said owner of his possession of such vehicle, without intent to steal the same, is guilty of a misdemeanor." Our Supreme Court held that such a taking did not show a felonious taking within the meaning ordinarily connoted by the terms "theft" or "larceny". In the opinion, Justice Johnson restated the common law definition of larceny as follows:

> Larceny, according to the common-law meaning of the term, may be defined as the felonious taking by trespass and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use.

Auto Co. v. Insurance Co., supra, at 418, 80 S.E. 2d at 37.

We do not find *Auto Co.* apposite here. In *Auto Co.* the taking was only temporary and no intent on the part of the "taker" to deprive the insured of its property was demonstrated. Neither was there any showing in *Auto Co.* of an act, or of acts, of abandonment of the vehicle by the insured.

For different reasons, we find *Adler* inapposite here. *Adler* involved the mysterious disappearance of two diamond rings from the insured's home. Not only was there no evidence of abandonment, but the physical dimensions of the missing items made them susceptible to being mislaid or lost.

We have examined cases from other jurisdictions and have found no case having factual circumstances analogous to those here. What distinguishes this case is the extraordinary behavior of Strickland, the owner of the rig. His testimony shows that he was self-employed and engaged in trucking for a living. He testified that he had been in business for better than twenty

years. He testified that the fair market value of his rig was between twelve and seventeen thousand dollars. Strickland testified that instead of returning with his trailer to Mars Hill where he left his tractor, he turned his trailer over to a total stranger to deliver it to Mars Hill for him. He left the tractor at a truck stop after receiving the "permission" of a total stranger. He could not supply the names of either of these persons. He never returned to Mars Hill to check on his property and never reported its loss to any law enforcement agency or to his insurance carrier. It is clear from the testimony of the witness Bennett that at one time, plaintiff deemed Strickland's story incredible. The only evidence offered by plaintiff bearing directly on the issue of theft was that of Westmoreland, the independent insurance adjuster, who after going to Maine and investigating the alleged theft said "I could not find any evidence of a theft loss."

Plaintiff's evidence, taken in the light most favorable to it, shows at best a permanent abandonment of the insured property by its owner under circumstances such as to leave the ultimate fate of the property in the realm of pure speculation.

We hold that plaintiff's evidence does not raise an inference of theft as the more reasonable hypothesis for the loss of the insured property, and that the evidence does not support the trial judge's disputed finding of fact upon which judgment for plaintiff was predicated. Under such circumstances, the judgment of the trial court cannot stand. *Morse v. Curtis*, 276 N.C. 371, 172 S.E. 2d 495 (1970).

Our holding on the issue of theft makes it unnecessary for us to reach defendant's other assignments of error.

Reversed.

Judges ARNOLD and ERWIN concur.

RANNBURY-KOBEE CORPORATION, A NORTH CAROLINA CORPORATION v. MILLER MACHINE COMPANY, INC., A NORTH CAROLINA CORPORATION

No. 8022SC327

(Filed 4 November 1980)

1. **Trial § 10.3– declaration that witness is expert – presence of jury – expression of opinion**

In the trial of plaintiff's action to recover damages for defendant's alleged breach of contract in the design and manufacture of a wrapping machine and defendant's action against plaintiff to recover the balance due for the wrapping machine, the trial court's declaration in the presence of the jury that defendant's president and chief witness was "an expert in the field of machine design" constituted an expression of opinion on the credibility of the witness in violation of G.S. 1A-1, Rule 51(a).

2. **Damages § 16.3– loss of profits – insufficient evidence**

In an action to recover damages for defendant's alleged breach of contract in the design and manufacture of a wrapping machine, evidence that plaintiff had to withdraw bids because of late delivery and defects in the machine would not support a claim for lost profits, since plaintiff would have to show that it was unable to perform actual contracts because of the late delivery and defects in order to support its claim.

APPEAL by plaintiff from *Walker (Hal H.), Judge.* Judgment entered 16 November 1979 in Superior Court, IREDELL County. Heard in the Court of Appeals on 7 October 1980.

The plaintiff seeks to recover damages from defendant for breach of contract, alleging defects in the design and manufacture of a "universal wrapping machine" which defendant agreed to make for an estimated price of $3,500.00 and to deliver by 1 September 1978. Plaintiff alleges that defendant charged plaintiff a total of $7,495.61 for the machine and did not make delivery until 21 September 1978. Plaintiff filed his action in District Court. The defendant thereafter instituted action in Superior Court alleging plaintiff breached the contract by failing to pay $5,495.61 of the $7,495.61 purchase price. The cases were consolidated for trial in Superior Court.

Plaintiff's evidence at trial tended to show: That the machine had been inoperable when delivered because the moving parts were galling and freezing; that the machine was put in good working order at a cost to plaintiff of $1,624.27; that the estimated cost of $3,500.00 was a variable figure, but that de-

fendant had never given any indication until he delivered the machine that the cost would exceed twice the estimate; and that plaintiff had paid $2,000.00 to the defendant during the construction of the machine, which defendant had credited against its bill for $7,495.61.

Defendant's evidence tended to show: That defendant notified plaintiff during the construction of the machine that they were incurring increased costs for labor and materials; that the machine operated smoothly when tested by defendant prior to delivery to plaintiff; and that plaintiff voiced satisfaction with the machine on 19 September after witnessing a test of the machine at the defendant's machine shop and requested delivery.

The jury answered the issues against the plaintiff and returned a verdict for the defendant in the amount of $5,224.89.

Pope, McMillan, Gourley & Kutteh by William H. McMillan for plaintiff appellant.

McElwee, Hall, McElwee & Cannon by E. Bedford Cannon; and R.A. Collier, Sr., for defendant appellee.

CLARK, Judge.

[1] At the trial Claude Miller, President of defendant corporation, was the principal witness for the defense. After extensive questioning about his training and experience, he was offered as an expert in the field of machine design. The trial judge twice made the following statement in the presence of the jury: "The court finds [Miller] is an expert in the field of machine design." Plaintiff assigns this statement as reversible error in that it expressed the judge's opinion as to the credibility of the witness. We agree with plaintiff.

In *Galloway v. Lawrence*, 266 N.C. 245, 145 S.E. 2d 861 (1966), our Supreme Court was presented with a similar situation. The defendant in *Galloway* was a physician being sued for malpractice. He was tendered as a medical expert to testify in his own defense and the judge, in the presence of the jury, said: "Let the record show that the court finds as a fact that Dr. Lawrence is a medical expert, to-wit: an expert physician in surgery." *Id.* at 250, 145 S.E. 2d at 866. The court, per Justice Lake, found reversible error, stating:

> "The ruling should have been put into the record in the absence of the jury for it was an expression of opinion by the court with reference to the professional qualifications of the defendant. It might well have affected the jury in reaching its decision that the child was not injured by the negligence of the defendant. There was no error in permitting the defendant to testify as an expert witness . . . . The court's finding should not, however, have been stated in the presence of the jury."

Id. The court held such an expression in the presence of the jury to be in violation of G.S. 1-180 (now G.S. 1A-1, Rule 51(a), N.C. Rules Civ. P.) which prohibits the trial judge from expressing an opinion on the weight to be given to particular evidence.

We believe the rationale in *Galloway* applies equally in the instant case. Just as in *Galloway*, the ultimate issue in the case *sub judice* is controlled by whether the defendant used requisite skill and care in performing a task. In *Galloway* the task was in the nature of medical treatment; in the instant case the task was in the area of machine design and manufacture; but in both cases

> "comments by the able and learned trial judge ... dealt with the very questions which the jury was called upon to decide and were clearly prejudicial to the plaintiffs. The professional ability and skill of the defendant ... are questions for the jury, not for this Court or for the judge presiding at the trial."

Id. at 251, 145 S.E. 2d at 866.

Defendant asserts that *Galloway* is inapplicable to this case because Miller is not a party to the action. The record establishes the following:

(1) Miller was the president of the Miller Machine Company, Inc.

(2) Miller negotiated the contract with plaintiff Rannbury-Kobee.

(3) Miller designed the machine according to plaintiff's specifications.

(4) The actual work on the machine was supervised by Miller.

(5) Miller tested the machine.

(6) Miller told plaintiff of the cost overruns.

(7) Miller delivered the machine.

(8) Miller billed the plaintiff for the machine.

Further, Miller was never asked a hypothetical question or examined on any matter calling for an expert opinion, but testified only to things he had personally seen and heard in his dealings with plaintiff. The absence of a need to qualify Miller as an expert witness makes defendant's motive questionable and aggravates the harm to plaintiff in having the principal opposition witness declared an expert machinist in the presence of the jury. Under these circumstances we find that the declaration of the court in the presence of the jury that Miller was an expert constituted an expression of opinion on the credibility of the witness in violation of G.S. 1A-1, Rule 51(a).

[2] The foregoing reversible error requires a new trial but discussion of plaintiff's argument that the trial court erred in refusing to admit evidence tending to show plaintiff's loss of business profits may be beneficial upon retrial. We find no error on the record before us; however, the ruling of the trial court would not be controlling on retrial if the plaintiff offers evidence of lost profits which meet the required standard of reliability.

Lost profits are a legitimate element of damages for breach of contract.

> " 'If a regular and established business is wrongfully interrupted, damage thereto can be shown by proving the usual profits for a reasonable time anterior to the wrong complained of.' "

Steffan v. Meiselman, 223 N.C. 154, 159, 25 S.E. 2d 626, 629 (1943). Here, however, plaintiff has no regularly established pattern of business profits upon which to base its claim for lost profits. Lacking such, the claim becomes more difficult to prove.

Plaintiff may base its claim for lost profits upon other factors, but these factors must be equally as reliable as a proven record of profits and may not involve conjecture or speculation. *Id.* at 159, 25 S.E. 2d at 630. One such method of establishing lost profits would appear to be to show contracts which the plaintiff had entered into, which it was unable to perform because of late delivery and defects in the wrapping machine. Plaintiff's evidence (offered out of the presence of the jury) was to the effect that it had to withdraw *bids* because the machine was not operational. There was no evidence that any bid by plaintiff was ever accepted, although plaintiff's president testified that he believed the bids would have been accepted had plaintiff been capable of performing. By the time plaintiff finally entered into a firm contract with a customer, the wrapping machine was fully operational.

We do agree with the trial judge that the foregoing evidence failed to make out with sufficient certainty the plaintiff's loss of profits due to the delay in its commencement of operations.

Other assignments of error are not discussed since they are not likely to recur upon retrial.

Reversed and Remanded.

Judges WEBB and WHICHARD concur.

MARGARET SELLS EMANUELSON v. E.C. GIBBS, JR. AND wife, JANET H. GIBBS

No. 801DC219

(Filed 4 November 1980)

Dedication §§ 2.2, 3– dedication of streets in subdivision – acceptance – sufficiency of acts

A lane which served as a boundary to plaintiff's property was a street dedicated to the public use, and the trial court erred in concluding that defendants had the right to mark the boundary lines of the lane with posts, since defendants, developers of the subdivision in which plaintiff's land was located, duly recorded a plat showing the property in the subdivision, including the lane, in the office of the Register of Deeds of Currituck County; the plat bore a certification of ownership and dedication signed by defendants and certification of the county clerk stating that the Board of County Com-

missioners approved the plat for recording and accepted the dedication of roads and rights-of-way; and the proviso of the clerk's stamp that the Board of Commissioners assumed no responsibility for the maintenance of streets in the subdivision until it was in the public interest to do so did not nullify the Board's express acceptance of defendants' offer to dedicate the land to public use.

APPEAL by plaintiff from *Chaffin, Judge.* Judgment rendered 10 December 1979 in District Court, CURRITUCK County. Heard in the Court of Appeals 10 September 1980.

This is a civil action brought by the plaintiff, Margaret Sells Emanuelson, requesting a mandatory injunction ordering defendants, E.C. Gibbs, Jr. and Janet H. Gibbs, to remove posts the defendants placed in the right-of-way of Acorn Lane, a street which serves as a boundary to plaintiff's property. The posts, according to plaintiff, block access to Acorn Lane from her property.

Defendants are the developers of Old Oak Estates subdivision and owned the property in question prior to the conveyance to plaintiff in 1973. Both parties agree plaintiff has access to her property via state road 1100, but differ as to whether or not plaintiff has rights in Acorn Lane. From a judgment denying the relief requested, plaintiff appeals.

Leroy, Wells, Shaw, Hornthal, Riley & Shearin, by Norman W. Shearin, Jr. and Dan L. Merrell, for plaintiff appellant.

O.C. Abbott, P. A., by O.C. Abbott and James A. Beales, Jr., for defendant appellees.

ARNOLD, Judge.

Plaintiff requests a mandatory injunction ordering defendants to remove the posts placed by defendants in the right-of-way of Acorn Lane. Defendants contend they have the right to mark the right-of-way of Acorn Lane on plaintiff's property because plaintiff has no rights in the street. We hold that Acorn Lane is a street dedicated to the public use and that the trial court erred in finding and concluding defendants "have the right to mark the boundary lines of Acorn Lane."

The record reveals that defendants, developers of Old Oak Estates subdivision, duly recorded a plat showing the property in the subdivision, including Acorn Lane, in the office of the

Register of Deeds of Currituck County. The plat bears a certification of ownership and dedication signed by defendants and certification of the county clerk stating that "the Board of County Commissioners approved [the] plat for recording and accepted the dedication of [illegible] roads and rights-of-way, but assume no responsibility to maintain the same until, in the opinion of the governing body it is in the public interest to do so."

Defendants, through recordation of the subdivision plat containing a reference to Acorn Lane and selling lots pursuant to the plat, made an offer of dedication of Acorn Lane to public use. *Owens v. Elliott*, 258 N.C. 314, 128 S.E. 2d 583 (1962). Moreover, defendants further expressed their intent to dedicate the street to the public on the face of the plat itself. The Board of County Commissioners expressly accepted defendants' offer of dedication as evidenced by the clerk's certification also on the face of the recorded plat.

North Carolina has no statutory scheme for dedication of streets, therefore the common law analogy of contract law requiring an offer of dedication by the landowner and an acceptance of the offer by the public remains in effect. 41 N.C.L. Rev. 875, 876 (1963). While defendants' offer in this case is unmistakable, they question the effectiveness of the acceptance by the Board of County Commissioners. As stated in *Owens v. Elliott*, *supra* at 317, 128 S.E. 2d at 586, "[a]n acceptance by the public of an offer to dedicate a street or road must be by the proper public authorities . . . in some recognized legal manner." The Board of County Commissioners, as governing body of the county, represents a "proper public authority." The clerk's stamp on the face of the recorded plat as evidence of the Board's acceptance presumptively satisfies the requirement that acceptance be in "some recognized legal manner."

Specifically, defendants allege that the proviso in the clerk's stamp that the Board assumes no responsibility for the maintenance of the street until it is in the public interest to do so nullifies the Board's acceptance. This is not the law of North Carolina. Express acceptance of an offer to dedicate land to the public use is sufficient to establish completed dedication. None of the authorities cited by defendants in support of their position involved an express acceptance of the offer of dedication by

a public authority. *Owens v. Elliott, supra,* and other cases cited by defendants, involved either implied acceptance by the public in general through the theory of public user, or no evidence of acceptance by anyone. Implied acceptance is not an issue in the case *sub judice,* in light of the express acceptance by the Board.

Confusion in the law of acceptance of dedication by a public authority has resulted from consolidation of all cases dealing with dedication regardless of the goals of the litigants. In the early law of dedication in North Carolina where a private citizen sought to prevent a subdivision developer from blocking access to a street by withdrawing the offer of dedication of the street pursuant to G.S. 136-96, he could prove dedication to the public use through the theory of public user — that is, by showing an offer of dedication and an acceptance of the offer by the public in that the street was traveled by the general public. However, if the litigant sought to impose a duty of maintenance of a street upon a public authority, more than mere use by the public was required to prove dedication. The courts sought to protect public authorities from unreasonable burdens of maintenance by requiring some act signaling acceptance of the duty by the authority. 41 N.C.L. Rev. 875 (1963).

These two distinct rules, one dealing with the right of the public to use a street or road and the other concerning the state or local governments' duty to "keep up" a roadway, were consolidated through the years so that recent cases have evolved three methods by which a street can become a public way. This rule is articulated in *Owens v. Elliott, supra* at 317, 128 S.E. 2d at 586:

> According to the current of decisions in this Court there can be in this State no public road or highway unless it be one either established by public authorities in a proceeding regularly instituted before the proper tribunal or one generally used by the public and over which the public authorities have assumed control for the period of twenty years or more; or dedicated to the public by the owner of the soil with the sanction of the authorities and *for the maintenance and operation of which they are responsible.* (Emphasis by the Court.)

The policy behind this additional requirement of responsibility for maintenance was to protect the state and local govern-

ments from the onerous burden of liability for the maintenance of every back road in the State which some property owner might decide to dedicate. 41 N.C.L. Rev. at 878. The question of whether Currituck County is responsible for the upkeep of Acorn Lane is not involved in this appeal. Further, "the creation of a right in the public to use a dedicated street does not necessarily impose a concomitant duty on the public to maintain it." 41 N.C.L. Rev. at 879, citing *Gilbreath v. City of Greensboro*, 153 N.C. 396, 69 S.E. 268 (1910).

Plaintiff, as owner of land which abuts a public way, has a right of access to the public street in the nature of an easement appurtenant, which may not be interfered with by defendants. *Snow v. Highway Commission*, 262 N.C. 169, 136 S.E. 2d 678 (1964). Plaintiff's request for an injunction ordering defendants to remove the posts from the right-of-way of Acorn Lane should have been granted.

Reversed and remanded.

Judges ERWIN and WELLS concur.

BOARD OF LIGHT AND WATER COMMISSIONERS OF THE CITY OF CONCORD v. PARKWOOD SANITARY DISTRICT, RICHARD KEASLER, BENNY WEAVER AND ARCHIE BARNHARDT

No. 8019SC351

(Filed 4 November 1980)

Injunctions § 3– improper preliminary mandatory injunction

The trial court erred in entering a preliminary mandatory injunction requiring defendant sanitary district to pay arrearages for past sewage and water services furnished by plaintiff city and to continue paying for such services in the future since plaintiff has an adequate remedy at law for money damages, injuries to plaintiff are not so pressing, immediate, irreparable and clearly established as to justify a preliminary mandatory injunction, and plaintiff had a right under its contract with defendant, which it waived, to discontinue supplying water to defendant upon nonpayment of water or sewage charges.

APPEAL by defendants from *Davis, Judge*. Order filed 25 January 1980 in Superior Court, CABARRUS County. Heard in the Court of Appeals 9 October 1980.

Plaintiff, Board of Light and Water Commissioners of the City of Concord (hereinafter "Board"), brings this action to recover payment for water and sewage services rendered by Board to defendants, and for a mandatory injunction to compel defendants to pay plaintiff the amount of charges billed and due for the utility services so rendered. The defendant Parkwood Sanitary District (hereinafter "Parkwood") is a municipal corporation furnishing sewage and water services on a retail basis to residents of Parkwood, which is contiguous to the city of Concord. The individual defendants are members of the Board of the Parkwood Sanitary District.

Parkwood has filed an answer to plaintiff's complaint and a response to the motion for a preliminary injunction. In substance, Parkwood denies that it is indebted to plaintiff and contends that plaintiff has an adequate remedy at law in an action for money due and therefore a preliminary injunction is improper. Defendant Parkwood also counterclaims for overcharges allegedly made by plaintiff. Parkwood contends this resulted from a failure of plaintiff to accurately allocate sewage charges between Parkwood and Royal Oaks Sanitary District. Plaintiff had entered into a contract to provide sewage services for Royal Oaks, a district adjoining Parkwood. Parkwood and Royal Oaks were served through a common sewage line at their boundary.

Since 31 August 1959, plaintiff has been furnishing water and sewage services to Parkwood under a contract which provides, in part, that plaintiff may discontinue supplying water because of nonpayment of water or sewage charges. At the hearing, plaintiff's evidence showed Parkwood owed plaintiff $55,361.91. On 11 January 1980 Parkwood delivered $23,052.58 to plaintiff as an advancement, without prejudice, on any amount it might owe plaintiff.

The trial court entered an order containing the following findings: Parkwood owed plaintiff $55,361.91 for services through December 1979 and there was no issue as to the propriety of these charges. Prior to November 1978 plaintiff billed Parkwood for one-third of the sewage charges and Royal Oaks for two-thirds of the charges. The Board does not furnish any water to Royal Oaks. Beginning November 1978, at the request of Parkwood, the Board billed Parkwood for all the sewage

charges and Parkwood billed Royal Oaks for a portion of the charges under an agreement between them. Royal Oaks has held in escrow amounts due for sewage services rendered to it since September 1979 and should be a party to the action. Parkwood has continued to collect from its customers for services rendered during the period in dispute. It would be hazardous to the health of Parkwood's customers to discontinue the water and sewage services. Plaintiff has no adequate remedy at law and an injunction should issue requiring Parkwood to pay the charges to plaintiff pending the outcome of this action. Parkwood's counterclaim concerns alleged overpayments prior to November 1978.

A preliminary injunction was issued requiring Parkwood to pay all charges in arrears and to continue to pay for the water and sewage services pending further orders of the court. Plaintiff was restrained from discontinuing sewage and water services to Parkwood pending further order of the court. From this order, defendants appeal.

Williams, Willeford, Boger, Grady & Davis, by Samuel F. Davis, Jr. and John Hugh Williams, for plaintiff appellee.

Hartsell, Hartsell & Mills, by William L. Mills, Jr., Fletcher L. Hartsell, Jr., and William L. Mills III, for defendant appellants.

MARTIN (Harry C.), Judge.

Defendants argue that the trial court erred in entering the preliminary injunction. Injunction is an equitable remedy exercised *in personam* and will be granted only when irreparable injury is both real and immediate. *Membership Corp. v. Light Co.*, 256 N.C. 56, 122 S.E. 2d 761 (1961). Where there is a full, complete and adequate remedy at law, the equitable remedy of injunction will not lie. *Durham v. Public Service Co.*, 257 N.C. 546, 126 S.E. 2d 315 (1962); *Whitford v. Bank*, 207 N.C. 229, 176 S.E. 740 (1934). In *Durham*, the Supreme Court held it was error to enjoin the Public Service Company from collecting increased rates for natural gas while the petition for the increased rates was pending. Customers of the gas company in the city of Durham could sue for return of any excess payments if the rate was not approved.

The relief ordered by the court in this case is a mandatory injunction, requiring defendants to pay the determined arrearages and to continue payment of bills for water and sewage services in the future. Ordinarily, a mandatory injunction will not issue except where the threatened injury is immediate, pressing, irreparable and clearly established. *Highway Com. v. Brown,* 238 N.C. 293, 77 S.E. 2d 780 (1953). In order for a preliminary mandatory injunction to be issued, there must generally be a clear showing of substantial injury to plaintiff if the existing status is allowed to continue till final hearing. *Lloyd v. Babb,* 296 N.C. 416, 251 S.E. 2d 843 (1979).

In *Clinard v. Lambeth,* 234 N.C. 410, 418, 67 S.E. 2d 452, 458 (1951), we find:

> "A mandatory injunction requires the party enjoined to do a positive act, and since this may require him to destroy or remove certain property, which upon a final hearing he may be found to have the right to retain, it is not so frequently used as a temporary or preliminary order. As a rule such an order will not be made as a preliminary injunction, except where the injury is immediate, pressing, irreparable and clearly established, or the party has done a particular act in order to evade an injunction which he knew had been or would be issued. As a final decree in the case it would be issued as a writ to compel compliance in the nature of an execution ... The mandatory injunction is distinguished from a mandamus, in that the former is an equitable remedy operating upon a private person, while the latter is a legal writ to compel the performance of an official duty." McIntosh's N.C. P. & P. in Civil Cases, Sec. 851, p. 972.

An injury is considered irreparable when money alone cannot compensate for it. *Gause v. Perkins,* 56 N.C. 177 (1857); *Frink v. Board of Transportation,* 27 N.C. App. 207, 218 S.E. 2d 713 (1975).

Applying these rules of law to this case, we do not find the injuries plaintiff complains of to be so pressing, immediate, irreparable and clearly established as to justify the extraordinary equitable remedy of a preliminary mandatory injunction. If plaintiff is successful in its suit, it can be fully compensated by money damages. We note that plaintiff has a right under its

contract with Parkwood to discontinue supplying water to Parkwood upon nonpayment of water or sewage charges. Plaintiff has elected to waive this right, unless sanctioned by the court, for the general welfare of the people involved, a laudable action on its part. However, it cannot by waiving a legal right create a condition of irreparable harm for the purpose of procuring the issuance of a mandatory injunction.

Plaintiff has the burden of establishing the necessary preliminary equities for the extension of this equitable relief. *Herff Jones Co. v. Allegood*, 35 N.C. App. 475, 241 S.E. 2d 700 (1978). The facts found by the trial court do not support its conclusion of irreparable injury to plaintiff. The trial court erred in issuing the preliminary mandatory injunction.

That portion of the trial court's order making Royal Oaks Sanitary District an additional party to the action is affirmed. The pleadings raise a genuine controversy between Royal Oaks and Parkwood which cannot be conclusively resolved without Royal Oaks as a party. N.C. Gen. Stat. 1A-1, Rule 19(b).

Likewise, we affirm that portion of the court's order requiring plaintiff to continue furnishing water and sewage services to defendants pending the final determination of the action. Plaintiff has judicially stipulated that the interruption of these services by plaintiff would be hazardous to the health of the public and constitute irreparable harm to defendants and their customers.

That portion of the order filed 25 January 1980, in the nature of a preliminary mandatory injunction, requiring defendants to pay the arrearages for past sewage and water charges and ordering them to continue paying for such services in the future, is vacated. The remainder of the order is affirmed and the cause is remanded to the Superior Court of Cabarrus County.

In our discretion we order the costs of the appeal to be taxed equally between plaintiff and defendants. Rule 35(a), N.C.R. App. Proc.

Vacated in part and affirmed in part.

Judges HEDRICK and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. STEVEN EDWARDS

No. 809SC526

(Filed 4 November 1980)

1. **Criminal Law § 91– Speedy Trial Act – delay between indictment and initial calling of case – dismissal of charge**

The trial court should have granted defendant's motion to dismiss the charge against him for failure to comply with the Speedy Trial Act where defendant was indicted on 20 February 1979; an attorney was appointed to represent him on 31 May 1979; the case was first calendared for trial at the 8 August 1979 session, a time well beyond the 120 day limitation imposed by G.S. 15A-701(a1)(1); the case ultimately was tried at the 8 October 1979 session; and the State produced no evidence to sustain its burden of going forward with evidence to justify excluding a portion of the period which elapsed between defendant's indictment on 20 February 1979 and the initial calling of the case for trial at the 8 August 1979 session.

2. **Criminal Law § 91– Speedy Trial Act – other proceedings concerning defendant – delay in appointment of counsel – exclusion of time – necessity for cause by defendant**

A record indication of a period of delay between indictment and appointment of counsel, standing alone, is not sufficient to meet the burden imposed on the State by G.S. 15A-703 of "going forward with evidence" to show that a period should be excluded from computation under the Speedy Trial Act pursuant to the exemption of G.S. 15A-701(b)(1) for "other proceedings concerning the defendant." Rather, there must also be some factual basis in the record for a determination that the delay in appointing counsel was in some way occasioned by the defendant to merit exclusion under this provision.

3. **Criminal Law § 91– Speedy Trial Act – delay because of limited court sessions**

The mere taking of judicial notice of the number of court sessions held in the county of venue between indictment and the first calling of the case for trial was not sufficient to support exclusion from computation under the Speedy Trial Act of any specific "period of delay" pursuant to G.S. 15A-701(b)(8), since there must be some factual basis in the record for a determination that the case could not reasonably have been tried during the scheduled sessions in order for such exclusion to apply.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 9 October 1979 in Superior Court, VANCE County. Heard in the Court of Appeals 14 October 1980.

Defendant was indicted for armed robbery on 20 February 1979. On 2 April 1979 defendant filed *pro se* a motion and request for a speedy trial. Mr. Charles W. Williamson, attorney at law of Henderson, North Carolina, was appointed to represent defendant on 31 May 1979.

The case was calendared for trial at the 8 August 1979 term of Vance County Superior Court before Judge Anthony Brannon. When it was called for trial at that term, the District Attorney orally moved for a continuance citing the absence of a witness who was in the State of Alaska. Defense counsel objected to the motion being granted and moved that the case be dismissed for failure to comply with the Speedy Trial Act. The court denied the motion to dismiss and ordered that the case be tried sometime in the calendar year 1979. The order also provided that the time between its entry on 9 August 1979 and 17 October 1979 be excluded in determining whether a trial had been held within the time limits established by G.S. 15A-701.

The case was tried at the 8 October 1979 Session of Vance County Superior Court before Judge Bradford Tillery. Prior to trial defendant renewed his motion to dismiss for failure to comply with the Speedy Trial Act. The motion was denied. Defendant was tried by a jury and convicted.

From a judgment of imprisonment, defendant appeals.

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

Harvey D. Jackson, for defendant appellant.

WHICHARD, Judge.

G.S. 15A-703 imposes on a defendant charged with a criminal offense the burden of proof in supporting a motion to dismiss for failure to comply with the time limits for trial specified by G.S. 15A-701. It gives the State, however, "the burden of going forward with evidence in connection with excluding periods from computation of time in determining whether or not the time limitations ... have been complied with." G.S. 15A-703.

In *State v. Rogers*, 49 N.C. App. 337, 271 S.E. 2d 535 (1980) (filed simultaneously herewith) the trial court conducted a hearing on the defendant's motion to dismiss for failure to comply with the Speedy Trial Act. At the hearing the State offered evidence tending to show that the defendant there had given the State reason to believe she was in the process of securing counsel for her defense during the period which the State sought to have excluded from the Speedy Trial Act computations. Although the trial court there entered no

findings of fact and no conclusions of law, this court found the evidence produced by the State at the hearing sufficient to support the trial court's ruling that the State had met its burden of going forward with evidence to support the exclusion of the period in question.

[1] By contrast, nothing in the record of this case provides us with a factual basis for determining that the State met the burden imposed on it by G.S. 15A-703. The defendant was indicted 20 February 1979. His case was first calendared for trial at the 8 August 1979 session, a time well beyond the 120 day limitation imposed by G.S. 15A-701(a1)(1).[1] The case ultimately was tried at the 8 October 1979 session. The order excluding the period between 9 August 1979 and 17 October 1979 because of absence of a witness for the State related to a period when the 120 days prescribed for trial already had elapsed. The record reveals no evidence produced by the State for the purpose of sustaining its burden of going forward with evidence to justify excluding a portion or portions of the period which elapsed between defendant's indictment on 20 February 1979 and the initial calling of the case for trial at the 8 August 1979 session. In the absence of such evidence, G.S. 15A-703 mandates dismissal of the charge on motion of the defendant.

[2] The record does reveal that counsel was appointed to represent defendant on 31 May 1979, 100 days after defendant was indicted. Unlike the record in the *Rogers* case, however, nothing in the record here indicates that the period of delay in appointing counsel was in any way occasioned by the defendant so that it could be excluded under the statutory exemption for "other proceedings concerning the defendant." G.S. 15A-701(b)(1). A record indication of a period of delay between indictment and appointment of counsel, standing alone, is not sufficient to meet the burden imposed on the State by G.S. 15A-703 of "going forward with evidence" to show that a period should be excluded from computation. There must also be some factual basis in the record for a determination that the delay in appointing counsel was in some way occasioned by the defendant to merit exclusion under this provision. To allow the State to exclude the

[1]G.S. 15A-701(a1)(1) mandates trial of criminal defendants indicted between 1 October 1978 and 1 October 1980 within 120 days of indictment if, as here, indictment is the last occurrence in a series of events designated in the statute.

period of time between indictment and appointment of counsel, regardless of the occasion for the delay, could serve to "defeat the very principles of speedy trial which the statute seeks to protect." *State v. Ward*, 46 N.C. App. 200, 205, 264 S.E. 2d 737, 740 (1980).

[3] The record also indicates that the trial court here took judicial notice "that there had been four regularly scheduled sessions of Vance County Criminal Superior Court between the February term, when the Grand Jury found a true bill, and the August term, when the case was first called for trial." It made no findings, however, relating to the court's ability to try this case during those four scheduled sessions. G.S. 15A-701(b)(8) provides for the exclusion of "[a]ny period of delay occasioned by the venue of the defendant's case being within a county where due to limited number of court sessions scheduled for the county, the time limitations of this section cannot reasonably be met." The mere taking of judicial notice of the number of court sessions held in the county of venue between indictment and the first calling of the case for trial was not sufficient to support exclusion from computation under the Speedy Trial Act of any specific "period of delay." Some factual basis in the record for a determination that the case could not reasonably have been tried during the scheduled sessions was also required.

The record here contains no factual basis for a finding that the State met its burden of going forward with evidence to support exclusion of a portion or portions of the period which elapsed between defendant's indictment on 20 February 1979 and the first calling of the case for trial at the 8 August 1979 Session. Consequently, the judgment entered against defendant must be vacated and the case remanded to the Superior Court of Vance County for entry of an order granting defendant's motion to dismiss for failure to comply with the Speedy Trial Act. The trial court should consider the factors set forth in G.S. 15A-703 in determining whether the order should be entered with or without prejudice.

This disposition of the case renders unnecessary consideration of defendant's other assignments of error.

Vacated and remanded.

Judges CLARK and WEBB concur.

GUILFORD COUNTY AND CITY OF HIGH POINT, PLAINTIFFS v. CLARENCE C. BOYAN AND WIFE, MARGARET W. BOYAN; LEE F. STACKHOUSE, TRUSTEE FOR CLARENCE C. BOYAN AND WIFE, MARGARET W. BOYAN; JIMMY D. RIDGE; AND PIEDMONT HARDWOOD LUMBER COMPANY, DEFENDANTS

No. 8018DC386

(Filed 4 November 1980)

1. **Municipal Corporations § 28– lien for water and sewer assessment – prior identical action dismissed with prejudice – lien not enforceable**

Plaintiff city could not enforce a lien for an assessment against a lot where plaintiff had previously brought an action to enforce a lien based on the identical assessment; the previous action was terminated by plaintiff's taking a voluntary dismissal with prejudice; and a third party purchased the lot before the dismissal was amended to show it was without prejudice.

2. **Municipal Corporations § 28– lien for water and sewer assessment – bona fide purchaser of land for value**

In an action to enforce a lien for water and sewer assessments, there was no merit to plaintiff's contention that one defendant was not a bona fide purchaser for value of the land in question, since testimony by the original owner that he sold the property to the third person supported a finding that the third person gave value for the property, and the fact that the public record showed the previous action for enforcement of the lien had been dismissed with prejudice supported the finding that the third person was a bona fide purchaser.

3. **Municipal Corporations § 28– lien for water and sewer assessment – attorney fee not part of costs in action to recover**

In an action to enforce a lien for water and sewer assessments where plaintiff had previously brought an action to enforce a lien based on the identical assessment which was terminated by plaintiff's taking a voluntary dismissal with prejudice, the trial court did not abuse its discretion by not allowing an attorney's fee to be taxed as part of the costs. G.S. 105-374(i).

APPEAL by plaintiff City of High Point from *Pfaff, Judge.* Judgment entered 7 December 1979 in District Court, GUILFORD County. Heard in the Court of Appeals 14 October 1980.

This is the second time the matters in controversy in this case have been to this Court. *See Guilford County v. Boyan*, 42 N.C. App. 627, 257 S.E. 2d 463 (1979). This action was commenced on 24 January 1975 to foreclose liens for taxes and water and sewer assessments. The claims for tax liens have been settled and are not involved in this appeal. The defendants pled that the claim to enforce a lien for the water and sewer assessments

was *res judicata* and barred. It was established by the pleadings and admissions that an action was commenced in November 1970 by the City of High Point against the defendants Boyan for the assessments involved in the case *sub judice*. On 5 October 1971 the plaintiff took a voluntary dismissal with prejudice pursuant to G.S. 1A-1, Rule 41(a)(1)(i). The defendants Boyan, by warranty deed recorded on 31 December 1974, conveyed the property upon which the lien was claimed to the defendant Jimmy D. Ridge. On 5 October 1976, the court allowed the plaintiff's motion to amend the dismissal taken on 5 October 1971 to read that it was "without prejudice."

On 12 October 1979, the plaintiff made a motion for summary judgment upon which the court did not rule. The case was tried by the court without a jury. After hearing the evidence, the court found as a fact that Jimmy D. Ridge was a bona fide purchaser for value. It concluded that, at the time of the purchase of the property, the voluntary dismissal with prejudice was a final judgment, and that the City of High Point was not entitled to a lien. The action was dismissed. Plaintiff City of High Point appealed.

Hugh C. Bennett, Jr. for plaintiff appellant.

Boyan and Loadholt, by Clarence C. Boyan and Kathleen Nix Loadholt, for Clarence C. Boyan and Margaret W. Boyan, and W. Edmund Lowe, for Jimmy D. Ridge, defendant appellees.

WEBB, Judge.

The plaintiff City of High Point brings forward three assignments of error. It first contends the court erred by not ruling on its motion for summary judgment. We do not believe this assignment of error presents any question for review. The case was tried. This eliminated the need for a hearing on the motion for summary judgment.

[1] The plaintiff's second assignment of error is to the judgment dismissing the action. An action to enforce a lien for an assessment is an action *in rem*. A personal judgment cannot be had against the landowner. *Charlotte v. Kavanaugh*, 221 N.C. 259, 20 S.E. 2d 97 (1942); Webster, *Real Estate Law in North Carolina*, § 372, p. 501 (1971). If any judgment may be had it must be against the property. The question posed by this

assignment of error is whether the City of High Point may enforce a lien for an assessment against a lot when the City has previously brought an action to enforce a lien based on the identical assessment, the previous action has been terminated by the City's taking a voluntary dismissal with prejudice and a third party has purchased the lot before the dismissal was amended to show it was without prejudice. We hold that the City may not enforce such a lien. Jimmy D. Ridge had a right to rely on the entry of a dismissal with prejudice at the time he purchased the property, and he may use this dismissal to support a plea of *res judicata* as to the enforcement of a lien against his property. Since an action to enforce a lien for an assessment is an *in rem* action, the court properly dismissed the action against the Boyan defendants who no longer had an interest in the property.

[2] The plaintiff excepted and assigned error to the court's finding that Jimmy D. Ridge was a bona fide purchaser for value. Clarence C. Boyan testified that he sold the property to Jimmy D. Ridge. This evidence supports a finding that Jimmy D. Ridge gave value for the property. The fact that the public record showed the previous action had been dismissed with prejudice supports the finding that Jimmy D. Ridge was a bona fide purchaser.

Plaintiff contends that *Seattle v. Kelleher*, 195 U.S. 351, 25 S. Ct. 44, 49 L.Ed. 232 (1904) is precedent for a holding that Jimmy D. Ridge cannot be a bona fide purchaser for value. In *Kelleher* there had been no action to enforce the assessment which was terminated with a final judgment. That distinguishes it from the case *sub judice*.

[3] The plaintiff's last assignment of error is to the court's failure to allow a reasonable attorney's fee. G.S. 105-374(i) gives the court the power in its discretion to allow a reasonable attorney's fee to be taxed as a part of the costs in actions to foreclose tax liens. In this action the costs were taxed against the plaintiff. We hold the court did not abuse its discretion by not allowing an attorney's fee to be taxed as part of the costs.

Affirmed.

Judges CLARK and WHICHARD concur.

LOUIS FRANCIS, JR. v. JAMES RODNEY BRICKHOUSE

No. 801SC295

(Filed 4 November 1980)

Automobiles §§ 62, 83, 89.1– striking pedestrian in parking lot – negligence and contributory negligence as jury questions – last clear chance

In an action to recover for personal injury sustained by plaintiff when he was struck by defendant in a parking lot, the trial court erred in directing verdict for defendant and should have submitted to the jury issues as to defendant's negligence in accelerating his automobile in the parking lot when he saw a pedestrian, as to plaintiff's contributory negligence in walking across the driveway of the parking lot without taking a second look after he saw defendant turning at the back of the lot, and as to last clear chance since the lot was 195 feet deep and it was for the jury to decide whether defendant, by the exercise of reasonable vigilance, could have avoided hitting plaintiff who, due to his inattention, had placed himself in a position of helpless peril.

APPEAL by plaintiff from *Barefoot, Judge.* Judgment entered 30 November 1979 in Superior Court, CHOWAN County. Heard in the Court of Appeals 18 September 1980.

This is an action for personal injury. The plaintiff was struck by an automobile driven by the defendant in the lot of P and Q Supermarket in Edenton, North Carolina, at approximately 10:15 p.m. on 12 November 1978. The evidence showed that defendant drove his automobile into the parking lot from Broad Street. The automobile was stopped heading in an easterly direction toward the back of the parking lot. The plaintiff stood on the passenger side of the automobile and had a conversation with defendant's fiance who was seated on the passenger side. At this time, the defendant was seated on the driver's side of the automobile and was talking to some young men. Plaintiff testified that he drank two cans of beer earlier that day but had nothing to drink after he arrived at the parking lot at approximately 7:30 p.m. Plaintiff testified further that after he finished talking to defendant's fiance, he left "what would be the main driveway" in the parking lot and "was just standing around talking." He saw the defendant's automobile turning at the back of the lot as if to head back toward Broad Street. He did not look toward the back of the lot again but started walking across the lot. After he had walked approx-

imately eight feet, he was struck by the automobile being driven by the defendant.

Adrian Britton Phelps testified that she was riding with her former husband past the parking lot when she saw the plaintiff lying on the ground. They continued riding and returned to the parking lot a few minutes later. She testified over objection that she talked to the defendant's fiance who told her that the defendant saw Joe Twiddy in the parking lot and "just kidding" he accelerated the automobile, that Twiddy stepped back and before the defendant could brake the automobile, it struck the plaintiff.

The defendant offered evidence that he was driving at a speed of 15 to 20 miles an hour, that plaintiff was under the influence of alcohol and jumped in front of the automobile.

At the close of all the evidence, the court directed a verdict for the defendant.

Pritchett, Cooke and Burch, by William W. Pritchett, Jr., for plaintiff appellant.

Leroy, Wells, Shaw, Hornthal, Riley and Shearin, by Dewey W. Wells, for defendant appellee.

WEBB, Judge.

We note at the outset that the testimony of Adrian Britton Phelps as to what the defendant's fiance told her is hearsay and should have been excluded. It was not admissible as a spontaneous utterance. *See* 1 Stansbury's N.C. Evidence § 164, p. 554 *et seq.* (Brandis rev. 1973). In determining whether the defendant's motion for a directed verdict was properly allowed, we must consider this evidence although it was erroneously admitted. *Beal v. Supply Co.*, 36 N.C. App. 505, 244 S.E. 2d 463 (1978). We hold that considering the evidence in the most favorable light to the plaintiff, the jury could conclude that by accelerating his automobile when he saw Joe Twiddy, the defendant did something which a reasonable man would not have done which was a proximate cause of the plaintiff's injuries. In the light most favorable to the plaintiff, we hold that when the plaintiff saw the defendant's automobile turning at the back of the parking lot and walked across the driveway of the lot without looking back again, this was something a reasonable man would

not have done. *See Brooks v. Boucher*, 22 N.C. App. 676, 207 S.E. 2d 282, *cert. denied*, 286 N.C. 211, 209 S.E. 2d 319 (1974). Taking into account the plaintiff's evidence that defendant accelerated his automobile when he saw Joe Twiddy, we hold that all the evidence does not so clearly establish the plaintiff's negligence as a proximate cause of the collision that the jury could reach no other conclusion. This makes contributory negligence an issue for the jury. *See Ragland v. Moore*, 299 N.C. 360, 261 S.E. 2d 666 (1980). Even if the plaintiff had been looking at the approaching automobile, the sudden acceleration could have caused the injuries. In that case we cannot say the failure to look would be a cause without which the collision would not have occurred.

We also hold the court should have submitted an issue to the jury as to the last clear chance. The parking lot was 195 feet deep. The defendant turned his automobile at the back of the lot and started driving toward the front of the lot. There is evidence in the record that the plaintiff started walking across the driveway of the lot and was inattentive to the danger. We believe it is a jury question as to whether the defendant, by the exercise of reasonable vigilance could have avoided hitting the plaintiff, who, due to his inattention, had placed himself in a position of helpless peril. *See Exum v. Boyles*, 272 N.C. 567, 158 S.E. 2d 845 (1968).

For reasons stated in this opinion, the judgment directing a verdict in favor of plaintiff is reversed.

Reversed.

Judges VAUGHN and MARTIN (Robert M.) concur.

MEREDITH HINSON BAGGETT v. ELBERT L. PETERS, JR., COMMISSIONER, DIVISION OF MOTOR VEHICLES

No. 804SC397

(Filed 4 November 1980)

Automobiles § 2– driver's license – probation – accumulation of three points – points assessed as of date of commission of offense

In determining whether there has been a violation of a condition of probation of a driver's license that the licensee not accumulate as many as

three points during the probation period, G.S. 20-16(c) requires the Division of Motor Vehicles to assign points to the licensee's record for traffic convictions as of the date of the offense. Therefore, petitioner's license was properly suspended for a probation violation where four points were assigned to his driving record for two traffic offenses committed within the period of probation, although one conviction was not obtained until after his probation had expired.

APPEAL by respondent from *Rouse, Judge.* Judgment entered 26 February 1980 in Superior Court, SAMPSON County. Heard in the Court of Appeals 15 October 1980.

Respondent suspended petitioner's driver's license pursuant to G.S. 20-16 for a probation violation. Petitioner then applied for a hearing in the Superior Court. The court found that petitioner had not violated his probation and ordered immediate restoration of his driving privileges.

The facts are undisputed. Petitioner was convicted of speeding at 70 m.p.h. in a 55 m.p.h. zone on 20 June 1977 and, within a year, was also convicted of reckless driving on 3 May 1978. His driver's license was, therefore, subject to suspension under G.S. 20-16(a)(9). Hearings officer, J.L. Jackson, Jr., ordered probation in lieu of a sixty-day suspension.

Petitioner agreed to the following conditions for probation: that he not accumulate as many as three points, that he not be convicted of exceeding the speed limit by more than 15 miles per hour and in excess of 55 miles per hour, and that he not be convicted of any other speeding violation over 55 miles per hour and in excess of 15 miles per hour over the speed limit. The probation agreement further provided that violation of any of these terms would result in revocation or suspension of driving privileges for sixty days. The probationary period was from 22 June 1978 to 22 February 1979. Petitioner committed two offenses within this period. He exceeded a safe speed on 26 September 1978 and 21 December 1978. He was convicted for the first offense in the Wilson District Court on 27 October 1978. He was convicted for the second offense in Clinton District Court on 23 April 1979. Four points were assigned to his driving record as a result of these offenses.

On 14 May 1979, respondent sent petitioner an official notice and record of suspension of his driving privilege. The

basis for the suspension was petitioner's accumulation of more than three points during probation. In a subsequent hearing pursuant to G.S. 20-25, the Superior Court restored petitioner's license in its order of 26 February 1980 from which respondent now appeals.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin and Associate Attorney Jane P. Gray, for respondent appellant.

Paderick, Warrick, Johnson and Parsons, by W. Douglas Parsons, for petitioner appellee.

VAUGHN, Judge.

The sole issue in this appeal is whether petitioner accumulated as many as three points in traffic violations during the probationary period. Respondent's chief exception is to the court's conclusion as a matter of law

> That the provisions of North Carolina General Statute 20-16(c) providing for the assignment of points as of the date of the commission of the offense, applies only to the provisions of North Carolina General Statute 20-16(a)(5) through (a)(11), and does not apply to the accumulation of three or more points during a period of probation, which constitutes a violation of the conditions of probation.

This ruling was erroneous, and we reverse.

Petitioner's contention is that where the legislature "intended a sanction to be based on *commission* dates, they also clearly expressed so." This is true. G.S. 20-16(a)(1), (7); *see also Snyder v. Scheidt, Comr. of Motor Vehicles*, 246 N.C. 81, 97 S.E. 2d 461 (1957). It is also true that the legislature speaks in terms of conviction dates for other offenses. G.S. 20-16(a)(8)-(10a). We are not, however, concerned with the authority of the Division of Motor Vehicles to suspend the license of an operator under G.S. 20-16(a) in this case. It is uncontested that petitioner's license was duly subject to suspension on 22 June 1978 because he had been convicted, within a period of twelve months, of speeding in excess of 55 m.p.h. and reckless driving. G.S. 20-16(a)(9). In that situation, the Division could not order suspension unless there were two convictions within the period. It is to be distinguished from the question at bar where the Division

seeks only to enforce the unexpired period of the original suspension because of a probation violation. In this context, G.S. 20-16(c) is the controlling authority.

It is an elementary rule of statutory construction that words must be given their clear and plain meaning in light of discernible legislative intent. *Mazda Motors v. Southwestern Motors*, 296 N.C. 357, 250 S.E. 2d 250 (1979); *Food House, Inc. v. Coble, Sec. of Revenue*, 289 N.C. 123, 221 S.E. 2d 297 (1976). In precise language, G.S. 20-16(c) requires the Division to assign points to a driver's record for traffic convictions as of the date of the commission of the offense. The statute simply prevents assessment of points until after conviction so the driver may first contest the charge. Nevertheless, upon conviction, the assessment of points relates back to the date the offense was committed.

G.S. 20-16(c) also provides that the Division, in its discretion, may substitute a period of probation for suspension. Specifically, it states that "[a]ny violation of probation during the probation period shall result in a suspension for the unexpired remainder of the suspension period. Any accumulation of three or more points under this subsection during a period of probation shall constitute a violation of the condition of probation." Respondent argues that for purposes of finding a probation violation, points accumulate in the same way that they are assigned. We agree. The statute refers to the accumulation of points "*under this subsection.*" Subsection (c) assigns points as of the commission date. The legislature has, therefore, plainly indicated that during probation, points accumulate as they are assigned.

Petitioner committed two traffic offenses well within the period of probation. It is irrelevant that the second conviction was not entered until after his probation had expired. When the conviction was entered, points were assigned to his record as of the commission date under G.S. 20-16(c). Four points were assigned to his driving record which were effective for the probationary period. Thus, petitioner violated the probation condition that he not accumulate as many as three points. The Division of Motor Vehicles properly suspended his driving privileges for the unexpired remainder of the suspension period,

and it was error for the court to order restoration of those privileges.

In conclusion, we note that our interpretation of the statute is consistent with its policy. The hearing officer decided to place petitioner "on strict probation that it might serve as a deterrent to any further Motor Vehicle violations." It does not seem that petitioner was effectively deterred. We must agree with respondent that if points accumulated as of the conviction date, "individuals during probation who were arrested for a traffic violation, could postpone their trials to a date beyond the period of probation, and thus escape the effect of the sanction." Such a result would surely erode the policy of G.S. 20-16(c) which is to encourage the Division to order probation instead of suspension when it is a reasonable enforcement alternative.

The judgment appealed from is reversed.

Reversed.

Judges MARTIN (Harry C.) and WELLS concur.

JOSEPH BURTON, PETITIONER v. NEW HANOVER COUNTY ZONING BOARD OF ADJUSTMENT UNDER THE ZONING ORDINANCE OF NEW HANOVER COUNTY, TED GLOD, CHAIRMAN; EZRA HESTER, WILLIAM CRUMPLER, JOHN MAYE, AND KENNETH WILLIAMSON, RESPONDENTS

No. 805SC389

(Filed 4 November 1980)

1. **Municipal Corporations § 31– decision of county zoning board of adjustment – judicial review – sufficiency of record**

There is no merit to petitioner's contention that the superior court erred in finding that an order of a county zoning board of adjustment was supported by the evidence on the ground that the court did not have a complete record before it since (1) the applicable statute, G.S. 160A-388, contains no requirement that a "complete" record be submitted to the superior court for review, and (2) the record before the superior court was a full and complete record of the proceedings where it contained the minutes of a 12 June meeting of the zoning board of adjustment; the board deferred its decision until the 10 July meeting; the record contains the minutes and transcript of the 10 July meeting, at which petitioner's counsel was allowed to review previous testimony before the board and at which the board made findings of fact and conclusions; the record contains the minutes of a 7 August meeting at which the board formally adopted a summary of the evidence presented

and its findings of fact; the transcripts of the 12 June and 7 August meetings were not necessary since the minutes clearly reflected what occurred and petitioner was permitted at the 10 July meeting to review testimony from the 12 June meeting.

2. **Municipal Corporations § 30.21– hearing before board of adjustment – rules of evidence**

A municipal board of adjustment is not strictly bound by formal rules of evidence as long as the party whose rights are being determined has the opportunity to cross-examine adverse witnesses and to offer evidence in support of his position and in rebuttal of his opponent's. However, absent a stipulation or waiver, a board of adjustment may not base critical findings of fact as to the existence or nonexistence of a nonconforming use on unsworn statements.

3. **Municipal Corporations § 30.21– hearing before board of adjustment – waiver of sworn testimony – absence of prejudice from hearsay evidence**

Petitioner waived his right to insist upon sworn testimony in a hearing before a county zoning board of adjustment where his counsel made no objection to the board's failure to administer oaths to the witnesses and all of petitioner's evidence consisted of unsworn testimony. Furthermore, petitioner was not prejudiced by the admission of hearsay or other "improperly introduced" evidence where petitioner's counsel had ample opportunity to cross-examine adverse witnesses and to offer evidence in petitioner's behalf.

APPEAL by petitioner from *Bruce, Judge.* Order entered 27 November 1979 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals on 15 October 1980.

This is an appeal from an order entered by the superior court affirming the 7 August 1979 decision of the New Hanover County Zoning Board of Adjustment, which in turn upheld the decision of the New Hanover County Building Inspector that petitioner had extended the non-conforming use of his property in violation of the New Hanover County Zoning Ordinance.

Crossley and Johnson, by Robert W. Johnson, for the petitioner appellant.

Murchison, Fox and Newton, by Joseph O. Taylor, Jr., and James C. Fox, for the respondent appellees.

HEDRICK, Judge.

[1] By his first assignment of error, petitioner contends that the trial judge erred in reviewing the record and finding the order of the Board of Adjustment to be supported by the evidence when the court did not have a complete record before it.

This assignment of error is primarily based upon Exception No. 1 which pertains to the following stipulation made by the parties on 20 November 1979:

> It is stipulated that the attached papers are true and accurate records of the New Hanover County Board of Zoning Adjustment and are complete except that it does not contain a verbatim transcript of the testimony taken at the June 12, 1979 hearing in this matter, but there is a transcript of the testimony taken at the July 10, 1979, meeting.

Based on this stipulation, petitioner argues that the superior court violated G.S. § 150A-47 which in pertinent part provides:

> Within 30 days after receipt of the copy of the petition for review, ... the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceedings under review.

We disagree. First of all, we note that the cited section, part of the Administrative Procedure Act (Chapter 150A), does not apply to decisions made by town boards, including boards of adjustment. G.S. § 150A-2(1); *Coastal Ready-Mix Concrete Co., Inc. v. Board of Commissioners*, 299 N.C. 620, 265 S.E. 2d 379 (1980). The appropriate statute for our purposes is G.S. § 160A-388, which contains no parallel requirement that a "complete" record be submitted to the superior court for review. *See* G.S. § 160A-388(e). Nevertheless, in our opinion the record before the superior court was a full and complete record of the proceedings. The record contained the minutes of the 12 June 1979 meeting of the Zoning Board of Adjustment, at which the Board heard testimony on petitioner's appeal, but because of "insufficient information on the kind of business" petitioner was conducting on the property, a decision was deferred until the 10 July 1979 meeting of the Board. The record further contains the minutes and a transcript of the 10 July 1979 meeting, at which counsel for petitioner was allowed to review previous testimony before the Board, and at which the Board, after hearing extensive testimony from both sides, made findings of fact and concluded that the decision of the building inspector should be affirmed. In addition, the record contains the minutes of the 7 August 1979 meeting of the Board, at which the Board formally

adopted a summary of the evidence presented and its findings of fact. Obviously, transcripts of the 12 June 1979 and 7 August 1979 meetings are not necessary, as the minutes clearly reflect what occurred, and petitioner could not have been prejudiced by the omission of a transcript of the 12 June 1979 meeting, since he was allowed to review the testimony from that meeting at the 10 July 1979 meeting. Additionally, petitioner never complained about the inadequacy of the record until just prior to the hearing in the superior court. Furthermore, the decision of the Board was amply supported by the evidence in the record from the 10 July 1979 meeting. Petitioner's first assignment of error is therefore without merit.

[2] By his second, third, fourth, sixth, seventh, and ninth assignments of error, petitioner argues that the court erred in not reversing the Board's decision since the decision was not supported by competent evidence. Specifically, petitioner contends that "[A]ll evidence contained in the record sent up to the Superior Court for review was either (1) unsworn testimony; (2) newspapers, letters, and petitions which were hearsay; or (3) exhibits which had not been properly introduced under the rules of evidence . . ." and thus was incompetent to support the Board's decision. We disagree. Local boards, such as municipal boards of adjustment, are not strictly bound by formal rules of evidence, as long as the party whose rights are being determined has the opportunity to cross-examine adverse witnesses and to offer evidence in support of his position and in rebuttal of his opponent's. *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974). Absent a stipulation or waiver, however, a board of adjustment may not base critical findings of fact as to the existence or non-existence of a nonconforming use on unsworn statements. *Humble Oil & Refining Co. v. Board of Aldermen, supra; Jarrell v. Board of Adjustment*, 258 N.C. 476, 128 S.E. 2d 879 (1963).

[3] Nevertheless, a party may waive his right to insist that witnesses in a proceeding before a board of adjustment should be placed under oath, especially when he fails to object to unsworn testimony at the hearing. *Craver v. Board of Adjustment*, 267 N.C. 40, 147 S.E. 2d 599 (1966). In the present case, none of the witnesses who testified at the Board's hearings were sworn. Petitioner, however, made no objection to the Board's failure to

administer oaths to those testifying. Also, petitioner was represented by counsel, and had ample opportunity to cross-examine adverse witnesses and to offer evidence in his own behalf. Moreover, all the evidence in support of petitioner was unsworn testimony, and he therefore has no reason to complain about his opponent's use of such testimony. In our view, petitioner waived his right to insist upon the use of sworn testimony, and thus the Board's findings of fact could be based upon unsworn testimony. In addition, petitioner had sufficient opportunity to protect his right to offer evidence and cross-examine witnesses, and as a result he has not been prejudiced by the admission of hearsay or "improperly introduced" evidence. Consequently, the evidence presented was competent and since we have already found that the evidence in the record was sufficient to support the Board's decision, these assignments of error are meritless.

Affirmed.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. BOBBY MURPHY

No. 808SC545

(Filed 4 November 1980)

1. **Robbery § 4.2– common law robbery – sufficiency of evidence**

The State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of common law robbery where the victim testified that he knew the defendant and identified defendant as one of the four men who chased him, struck him in the head, and took his money, although the victim did not know which of the four struck him in the head or which one actually took his money.

2. **Criminal Law § 86.5– impeachment of defendant – prior criminal acts or degrading conduct**

The trial court in a robbery case properly permitted the prosecutor to cross-examine defendant for impeachment purposes about defendant's use of drugs and his efforts to forge a prescription for drugs.

APPEAL by defendant from *Peel, Judge*. Judgment entered 20 February 1980 in Superior Court, WAYNE County. Heard in the Court of Appeals 15 October 1980.

Defendant was convicted of common law robbery and assault inflicting serious injury. The trial court disregarded the assault verdict and sentenced the defendant to a term of imprisonment on the common law robbery charge. The state's evidence showed that defendant and three other persons chased after the prosecuting witness, Willie Taylor, about 1:30 in the nighttime. Willie was on his way home. He ran; they caught him and "clogged" him beside the head. Willie fell down and they took $30 or $35 from his pocketbook in his pants pocket. Willie was bleeding and was taken to the hospital where he stayed for a week. Willie knew that defendant was one of the four men but did not know the others.

Defendant's evidence showed that he remembered the day in question. It was Saturday and he was sick and in no shape to do anything. October 3rd was defendant's birthday and he had been given ten pints of wine that he drank on Friday afternoon before the day of the alleged robbery. He was at his sister's house all day Saturday and went to bed about 11:00. On Sunday, he still was in the house all day. He did not assault Willie.

From the judgment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

Hulse & Hulse, by Donald M. Wright, for defendant.

MARTIN (Harry C.), Judge.

[1] Defendant argues first that the evidence was insufficient to carry the state's case to the jury and that the trial court erred in denying his motion to dismiss. It is familiar law that upon this motion the court has the duty to consider the evidence in the light most favorable to the state, and give the state the benefit of all reasonable inferences that may be gathered from it. The evidence must be deemed true and discrepancies and contradictions are disregarded. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). However, there must be substantial evidence of all material elements of the crime charged to withstand the motion to dismiss. *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974); *State v. Spellman*, 40 N.C. App. 591, 253 S.E. 2d 320, *disc. rev. denied*, 297 N.C. 616 (1979). Circumstantial evidence as well as direct evidence may be considered upon

such motion. *State v. McKnight*, 279 N.C. 148, 181 S.E. 2d 415 (1971); *State v. Johnson*, 199 N.C. 429, 154 S.E. 730 (1930).

Applying these rules to the evidence in this case, we find plenary evidence to withstand defendant's motion to dismiss. The evidence clearly shows that Willie Taylor knew the defendant and identified him as one of the four men who ran after him and robbed him. Defendant was not merely present; he actively participated in the robbery by chasing Willie. True it is, Willie did not know which of the four "clogged" him in the head or which one took his money. This does not defeat the state's case. All four men were there, acting together in concert with a common plan and purpose to rob their victim. Under these circumstances it is not essential to the state's case that it prove who struck the blow or took the money. All participants are equally guilty in the eyes of the law. *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972); *State v. Lovelace*, 272 N.C. 496, 158 S.E. 2d 624 (1968). In order to show a community of unlawful purpose, it is not necessary to show an express agreement or understanding between the parties, nor is it necessary that it be shown by positive or direct evidence. Its existence may be inferred from all the circumstances accompanying the doing of the unlawful act, and from the conduct of defendant subsequent to the criminal act. Preconcert or a community of purpose may be shown by circumstances as well as by direct evidence. *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091, 47 L. Ed. 2d 102 (1976); *State v. Westbrook, supra.* There is ample evidence to show that defendant was present and actively engaged with his three cohorts in the chasing and robbing of Willie Taylor. *State v. Mitchell* and *State v. McKinzie*, 6 N.C. App. 755, 171 S.E. 2d 74 (1969). We also hold the evidence is sufficient for a rational trier of fact to find defendant guilty beyond a reasonable doubt of the crime of common law robbery according to the standards of *Jackson v. Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, *rehearing denied*, 62 L. Ed. 2d 126 (1979). The assignment of error is overruled.

[2] Defendant contends the trial court erred in allowing the prosecuting attorney to ask certain questions of defendant on cross-examination. These questions were for the purpose of impeaching defendant. They related to defendant's use of drugs

and his efforts to forge a prescription for drugs. We hold the questions were proper. It is permissible, for the purposes of impeachment, to cross-examine a defendant about disparaging acts he may have committed, both as to criminal acts and to degrading acts. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971); *State v. Page*, 31 N.C. App. 740, 230 S.E. 2d 433 (1976). The assignment of error is overruled.

We have carefully examined defendant's other assignments of error as to his post-verdict motions and the signing of the judgment, and they are overruled.

No error.

Judges VAUGHN and WELLS concur.

PHYLLIS D. DWORSKY AND HUSBAND, LEON DWORSKY v. THE TRAVELERS INSURANCE COMPANY, A CORPORATION

No. 8014SC349

(Filed 4 November 1980)

1. **Appeal and Error § 6.2– denial of discovery motion – no appeal**

In plaintiffs' action to recover hospital and medical expenses which defendant refused to pay where plaintiffs sought to compel production of a file maintained by defendant in connection with plaintiffs' insurance claim, plaintiffs' appeal from the trial court's order denying their motion must be dismissed, since plaintiffs did not show that the information sought was so crucial to the outcome of the case that denial of the motion would deprive them of a substantial right.

2. **Appeal and Error § 6.6– denial of motion to dismiss – no appeal**

Defendant's motion to dismiss plaintiffs' claim for treble damages was a Rule 12(b)(6) motion, and no appeal lay from a denial thereof.

APPEAL by plaintiffs from *Brewer, Judge*. Order entered 26 November 1979 in Superior Court, DURHAM County. Heard in the Court of Appeals 9 October 1980.

This is a civil action in which plaintiffs seek to recover $10,913 in hospital and medical expenses which defendant had refused to pay under a group hospitalization and medical insurance policy, and to recover treble damages and attorneys fees pursuant to G.S. §§ 75-1.1, 75-16. On 31 January 1979, plaintiffs

filed a motion for production of documents seeking to inspect and copy the file maintained by defendant in connection with plaintiffs' claim under the insurance policy. Judge McKinnon entered an order dated 14 September 1979 denying the motion on the ground that it was "overbroad." Plaintiffs made a request for production of documents on 28 September 1979 again seeking to inspect and copy the file, but excepting all attorney correspondence and any materials placed in the file after 12 September 1976. Defendant responded 4 October 1979, objecting to the request. Defendant also filed a Rule 12 (b)(6) motion to dismiss plaintiffs' claim for treble damages for failure to state a claim upon which relief could be granted. This motion was denied on 26 November 1979. On 26 November 1979, plaintiffs made a motion to compel production of the documents set forth in the 28 September 1979 request. From an order denying plaintiffs' 26 November 1979 motion, plaintiffs appealed.

Upchurch, Galifianakis and McPherson, by William V. McPherson, Jr., for the plaintiff appellants.

Spears, Barnes, Baker and Hoof, by Alexander H. Barnes, for the defendant appellee.

HEDRICK, Judge.

Plaintiffs' Appeal

[1] Assuming arguendo that Judge Brewer had authority to consider and rule on plaintiffs' second motion to compel production of documents after a similar motion had been earlier denied by Judge McKinnon, we are compelled to hold that the appeal from Judge Brewer's order denying the second motion must be dismissed. G.S. § 1-277(a) in pertinent part provides: "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; . . ." It has been held that orders denying or allowing discovery are not appealable since they are interlocutory and do not affect a substantial right which would be lost if the ruling were not reviewed before final judgment. *First Union National Bank v. Olive*, 42 N.C. App. 574, 257 S.E. 2d 100 (1979). If, however, the desired discovery would not have delayed trial or have caused the opposing party any un-

reasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is highly material to a determination of the critical question to be resolved in the case, an order denying such discovery does affect a substantial right and is appealable. *Tennessee-Carolina Transportation, Inc. v. Strick Corp.* 291 N.C. 618, 231 S.E. 2d 597 (1977). *See also Starmount Co. v. City of Greensboro,* 41 N.C. App. 591, 255 S.E. 2d 267 (1979). Nevertheless, orders regarding discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion. *Hudson v. Hudson,* 34 N.C. App. 144, 237 S.E. 2d 479, *disc. review denied,* 293 N.C. 589, 239 S.E. 2d 264 (1977).

In the present case, plaintiffs were seeking the entire contents of a file maintained by defendant in connection with plaintiffs' insurance claim, with the sole exception of attorney correspondence and materials placed in the file subsequent to 12 September 1976. While some relevant and material evidence may be contained in the file, plaintiffs are not entitled to a fishing expedition to locate it. G.S. § 1A-1, Rule 26(b)(1); *Willis v. Duke Power Co.,* 291 N.C. 19, 229 S.E. 2d 191 (1976). Moreover, the record in the instant case offers us no clue as to what relevant and material information, if indeed there is any, is sought. We must therefore conclude that plaintiffs have not shown that the information sought is so crucial to the outcome of this case that it would deprive them of a substantial right and thus justify an immediate appeal. *See Starmount Co. v. City of Greensboro, supra.* Accordingly, the trial judge has acted within his discretion and plaintiffs' appeal from his order will be dismissed.

Defendant's Cross-Assignment of Error

[2] Defendant cross-assigned error to the denial of his Rule 12(b)(6) motion to dismiss plaintiffs' claim for treble damages. No appeal lies from a denial of a Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted. *Smith v. State,* 289 N.C. 303, 222 S.E. 2d 412 (1976); *Godley Auction Co., Inc. v. Myers,* 40 N.C. App. 570, 253 S.E. 2d 362 (1979); *O'Neill v. Southern National Bank,* 40 N.C. App. 227, 252 S.E. 2d 231 (1979). Defendant's motion to dismiss plaintiffs' claim for treble damages was a Rule 12(b)(6) motion and therefore defendant's assignment of error to the denial thereof will be dismissed.

Both appeals are

Dismissed.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

DELPRINTING CORPORATION v. C. P. D. CORPORATION

No. 8026SC339

(Filed 4 November 1980)

Constitutional Law § 24.7; Process § 14.2– foreign corporation – in personam jurisdiction – minimum contacts – due process

The courts of this State had *in personam* jurisdiction over defendant, an Illinois corporation, where defendant agreed to purchase the assets and take over the liabilities of the church pictorial directories division of an N.C. corporation; the corporation had contracted with plaintiff for the production of certain church directories; defendant agreed that it would pay plaintiff for its work in printing the directories; such conduct fell within that covered by G.S. 1-75.4(5)(a); other conduct by defendant, including the writing of five memoranda on defendant's stationery requesting that plaintiff ship books to churches in five different states, would give the courts of this State *in personam* jurisdiction over defendant; and defendant had sufficient minimum contacts with N.C. so that the exercise of *in personam* jurisdiction would not violate due process of law.

APPEAL by defendant from *Howell, Judge.* Order entered 20 December 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 October 1980.

Plaintiff is a North Carolina corporation engaged in the printing business. Defendant is an Illinois corporation engaged in the business of publishing pictorial directories for churches. Defendant has excepted to and assigned as error certain findings of fact, conclusions of law and the order in which they are contained, denying defendant's motion to dismiss plaintiff's action against it for lack of personal jurisdiction.

Lindsey, Schrimsher, Erwin, Bernhardt, Hewitt & Beddow, by Fenton T. Erwin Jr. and Timothy Griffin, for plaintiff appellee.

Bradley, Guthery, Turner & Curry, by Paul B. Guthery Jr., for defendant appellant.

HILL, Judge.

We hold that Judge Howell was correct in denying defendant's motion. The court has personal jurisdiction over defendant.

The plaintiff North Carolina corporation claims that it and defendant Illinois corporation entered into a contract prior to 1 December 1974 whereby plaintiff agreed to perform work and services for defendant on a continuing basis. Plaintiff claims that it has performed the work and seeks recovery of close to $40,000 plus interest.

"[T]he test to determine if a corporation may be subjected to *in personam* jurisdiction in a foreign forum depends upon whether maintenance of the suit in the forum offends 'traditional notions of fair play and substantial justice.' " *Dillon v. Funding Corp.*, 291 N.C. 674, 678, 231 S.E. 2d 629 (1977), *citing International Shoe Co. v. Washington*, 326 U.S. at 316, 90 L.Ed. at 102, 66 S.Ct. at 158 (1945).

The first determination this Court must make is whether a North Carolina statute permits the courts of this State to entertain the action against defendant. *Dillon*, at p. 675. G.S. 1-75.4(5)(a) confers *in personam* jurisdiction in any action which:

> Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff;

The president of defendant C. P. D. Corporation, Kennie Turner, stated in an affidavit that his corporation was organized on 18 December 1974 under the laws of Illinois; that prior to the incorporation, at a meeting held on 13 December 1974, "certain individuals agreed to purchase the assets and take over the liabilities of the C. P. Directories Division of C. D. Stampley Enterprises, Inc." Stampley Enterprises was at that time a North Carolina corporation based in Charlotte and had contracted with plaintiff for the production of certain church pictorial directories. Turner goes on to affy that "[i]t was further agreed that C.P.D. Corporation upon its organization would pay Delprinting Corporation [plaintiff] for its work in printing these directories."

On 16 May 1975, plaintiff received a letter on C. P. D. Corporation stationery and signed by the president of C. P. D. The letter stated:

> Enclosed please find our check No. 2086 dated May 16, 1975, for the balance due on invoices per the attached list.
>
> Please have Mr. O'Dell [sic] take the necessary steps to see that *the agreement we signed with C. D. Stampley Enterprises, Inc.* is marked paid. Also . . . I would appreciate if you would have a copy of same delivered to Stampley and a copy sent to us. (Emphasis added.)

Upon examination of the "attached list," we find that, after the formation of defendant C. P. D., twenty checks were sent to plaintiff. The last check on the list is No. 2086. It is obvious that C. P. D. Corporation agreed with C. D. Stampley to pay its C. P. Directories Division's obligations to plaintiff. Such conduct falls within that covered by G.S. 1-75.4(5)(a).

Other conduct by C. P. D. Corporation would give the courts of this State *in personam* jurisdiction over C. P. D. in this action. We find five written memoranda on defendant's stationery requesting that plaintiff ship books to churches in five different states. The memoranda show a promise by defendant to pay plaintiff for shipping books from this State. Such conduct falls within that covered by G.S. 1-75.4(5).

The second determination this Court must make is whether the exercise of *in personam* jurisdiction by the courts of this jurisdiction pursuant to G.S. 1-75.4(5) would violate due process of law. We find no violation. The contacts with North Carolina that we have already set forth in this opinion constitute sufficient minimum contacts.

Defendant's argument that the trial court erred in making findings of fact and conclusions of law not supported by the record and in signing the order denying defendant's motion to dismiss for lack of personal jurisdiction is without merit.

The order of the trial court is

Affirmed.

Judges ARNOLD and ERWIN concur.

State v. Harris

STATE OF NORTH CAROLINA v. JAMES ALLEN HARRIS

No. 803SC443

(Filed 4 November 1980)

Criminal Law § 85.1– character witness– impeachment – calls reporting suspicion defendant was drug dealer

In a prosecution for felonious sale of narcotics and possession of narcotics with intent to sell, a police officer who testified as a character witness for defendant was properly cross-examined for impeachment purposes as to whether he had called an SBI agent several times to report his suspicion that defendant was dealing in drugs.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 30 October 1979 in Superior Court, PITT County. Heard in the Court of Appeals 6 October 1980.

Defendant was convicted of the felonious sale of bromodimethoxyamphetamine and possession with intent to sell in violation of G.S. 90-95(a)(1). An active sentence of five to seven years was imposed.

Attorney General Edmisten, by Assistant Attorney General Francis W. Crawley, for the State.

John H. Harmon, for defendant appellant.

VAUGHN, Judge.

The sole issue is whether it was error to permit cross-examination of defendant's character witness concerning calls he made to an agent about his suspicion that defendant was dealing in drugs. We conclude that cross-examination on this matter was a proper means of impeachment of a character witness.

A character witness for the defense, Craig Finley, a police officer in defendant's community, was cross-examined in the following manner:

Q. Do you know Mr. McLeod here?

A. Yes, sir.

Q. Malcolm McLeod with the S.B.I.?

A. Yes sir.

Q. You have had dealings with him in your capacity or as an officer of the Winterville Police Department?

A. Yes sir. I have called him several times.

Q. In fact, haven't there been occasions that you called Mr. McLeod about this defendant right here, reporting to him that you suspected him of dealing in narcotic drugs?

MR. SHOFFNER: Objection.

COURT: Overruled.

A. Yes sir.

Q. What was your answer?

A. Yes, sir. I believe so.

MR. SHOFFNER: Move to strike his answer.

COURT: Overruled.

COURT: Members of the jury, the testimony of this witness concerning any call he has made to Mr. McLeod with reference to the defendant is not substantive evidence and it is admitted for the purpose of impeaching the testimony of this witness in the event you find it does impeach his testimony and for no other purpose.

A legitimate purpose of cross-examination is impeachment of a witness's credibility, and any circumstance tending to show a defect in the witness's veracity is relevant for that purpose. 1 Stansbury, N.C. Evidence § 38 (Brandis rev. 1973). Defendant placed his character in issue by calling character witnesses to testify in his behalf. A character witness may be impeached by cross-examination about contradictory statements he has made. *State v. Fisher*, 149 N.C. 557, 63 S.E. 153 (1908); 1 Stansbury, *supra*, § 46. Defense witness Finley testified upon cross-examination that he had called a S.B.I. agent several times to report his suspicion that defendant was dealing in drugs. Obviously, these prior declarations were inconsistent with Fin-

ley's trial testimony that defendant had a good reputation in the community and were, therefore, admissible impeachment evidence.

Nevertheless, defendant contends that this cross-examination was an improper exploration of the witness's personal knowledge of specific acts of misconduct by defendant. To support this argument, defendant cites the case of *State v. Hunt*, 287 N.C. 360, 215 S.E. 2d 40 (1975). In *Hunt*, the solicitor asked the defense witness whether he knew that defendant had a police record and had served time for possession of marijuana and assault. After negative responses, the solicitor then asked "[a]nd if you know this, you wouldn't have given him the good character and reputation you did, would you?" That type of cross-examination was clearly improper; however, *Hunt* is inapposite here. *Hunt* applied the well established rule that a character witness may not be asked *whether he has heard* of particular acts of misconduct by defendant. In the instant case, the witness was asked whether he had, in his official capacity, called a narcotics officer reporting his suspicions concerning defendant. Finley was not asked about the basis for his suspicion or about his personal knowledge of defendant's specific drug dealings. This evidence was properly elicited on cross-examination because "it consisted of declarations from the witness himself, having a direct tendency to contradict the testimony he had given in [defendant's] favor, and was clearly admissible . . . ." *State v. Dove*, 156 N.C. 653, 659, 72 S.E. 792, 795 (1911). In addition, the judge properly instructed the jury, without a request from defendant, that Finley's testimony about the calls to the agent was admissible only for impeachment purposes and not as substantive evidence.

No error.

Chief Judge MORRIS and Judge WELLS concur.

MATTIE J. LEACH v. JOHN N. ROBERTSON, JR.

No. 8012SC360

(Filed 4 November 1980)

Torts § 7– complete release given by defendant – personal injury action – counterclaim for property damages – reliance on release to defeat counterclaim improper

G.S. 1-540.2, which provides that the settlement of a property damage claim does not constitute the admission of liability as to personal injury claims from an automobile accident, that it may not be used as evidence to that effect, and that, of itself, the settlement shall not act as a bar to any claim other than the property damage claim unless, by the terms of the settlement, all claims arising from the accident are covered, does not affect the rule that a plaintiff may not maintain an action for personal injuries while relying on a complete release given by defendant to defeat defendant's counterclaim for property damages.

APPEAL by plaintiff from *Martin (John C.), Judge.* Judgment entered 4 February 1980 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 9 October 1980.

The plaintiff in this action seeks damages from the defendant, alleging his negligence was the proximate cause of personal injuries to her in a two-automobile accident. Defendant counterclaimed for damages he alleged were proximately caused to his vehicle as the result of the plaintiff's negligence. In her reply, plaintiff attached a release signed by the defendant and alleged that any claim of defendant had been "settled, compromised and barred" by accord and satisfaction.

The court granted defendant's motion for judgment on the pleadings. Plaintiff appealed.

Cooper, Davis and Eaglin, by Paul B. Eaglin, for plaintiff appellant.

Johnson, Patterson, Dilthey and Clay, by Dan M. Hartzog, for defendant appellee.

WEBB, Judge.

The question posed by this appeal is whether plaintiff may maintain an action for personal injuries while relying on a complete release given by the defendant to defeat the defendant's counterclaim for property damages. We hold that she

may not. By pleading the release in her reply, the plaintiff ratified the compromise settlement and her claim is barred. *Bongardt v. Frink*, 265 N.C. 130, 143 S.E. 2d 286 (1965); *Keith v. Glenn*, 262 N.C. 284, 136 S.E. 2d 665 (1964); *Bradford v. Kelly*, 260 N.C. 382, 132 S.E. 2d 886 (1963); *Snyder v. Oil Co.*, 235 N.C. 119, 68 S.E. 2d 805 (1952); *Lyon v. Younger*, 35 N.C. App. 408, 241 S.E. 2d 407 (1978); *Fowler v. McLean*, 30 N.C. App. 393, 226 S.E. 2d 867 (1976); *McKinney v. Morrow*, 18 N.C. App. 282, 196 S.E. 2d 585 (1973).

Plaintiff contends the above cases have been overruled by G.S. 1-540.2 which became effective 1 July 1967. That statute provides in pertinent part:

> In any claim, civil action, or potential civil action which arises out of a motor vehicle collision or accident, settlement of any property damage claim arising from such collision or accident, whether such settlement be made by an individual, a self-insurer, or by an insurance carrier under a policy of insurance, shall not constitute an admission of liability on the part of the person, self-insurer or insurance carrier making such settlement, which arises out of the same motor vehicle collision or accident. It shall be incompetent for any claimant or party plaintiff in the said civil action to offer into evidence, either by oral testimony or paper writing, the fact that a settlement of the property damage claim arising from such collision or accident has been made; provided further, that settlement made of such property damage claim arising out of a motor vehicle collision or accident shall not in and of itself act as a bar, release, accord and satisfaction, or discharge of any claims other than the property damage claim, unless by the written terms of a properly executed settlement agreement it is specifically stated that the acceptance of said settlement constitutes full settlement of all claims and causes of action arising out of the said motor vehicle collision or accident.

The plaintiff contends she pled the release as a bar only to the defendant's claim for property damages and that G.S. 1-540.2 overrules the case law to the extent that a settlement of a property damage claim does not affect the litigation of a personal injury claim. Although the defendant in the case *sub judice* counterclaimed only for property damages, the release which

was pled by the plaintiff was a release for all claims. If the plaintiff by pleading this release ratified it, she is barred from pursuing all claims covered by the release. As we read G.S. 1-540.2, it provides that the settlement of a property damage claim does not constitute the admission of liability as to personal injury claims from the accident; that it may not be used as evidence to that effect; and that, of itself, the settlement shall not act as a bar to any claim other than the property damage claim unless, by the terms of the settlement, all claims arising from the accident are covered. The statute does not deal directly with the pleading of a settlement as a bar to a counterclaim. Several cases have been decided since the statute became effective without mentioning it. We would have to overrule these cases to adopt the plaintiff's argument. We do not believe we should do this. We hold that G.S. 1-540.2 does not affect the rule that by pleading the release in defense of the defendant's counterclaim, the plaintiff ratified the settlement and her action is barred.

Affirmed.

Judges CLARK and WHICHARD concur.

MARTHA A. SHAW, D/B/A SHAWS FURNITURE STORE v. VERNELL HUDSON

No. 8021DC305

(Filed 4 November 1980)

Appeal and Error § 14– service of notice of appeal

Notice of appeal must be served on the opposing party either before the notice is filed or on the same day the notice is filed. Rules of Appellate Procedure 3(a)(2), 3(e), 26(b) and 26(d).

APPEAL by plaintiff from *Tash, Judge.* Order entered 14 December 1979 in District Court, FORSYTH County. Heard in the Court of Appeals 18 September 1980.

In an action for the recovery of possession of defendant's washer and dryer based on defendant's alleged breach of a security agreement between the parties, the district court in an amended judgment filed on 19 October 1979 disallowed plain-

tiff's claim and allowed defendant's counterclaims. Plaintiff's motion to set aside the amended judgment under Rule 60(b), filed on 24 October 1979 was denied on 26 October 1979. Plaintiff then filed written notice of appeal also on 26 October. Plaintiff did not serve notice of the appeal upon defendant until 5 November 1979. On 27 November 1979 defendant moved to dismiss the appeal for failure to comply with Rules 3 and 26 of the N.C. Rules of Appellate Procedure. From the order of the district court granting defendant's motion, plaintiff appeals.

Kennedy, Kennedy, Kennedy and Kennedy, by Harold L. Kennedy III, for plaintiff appellant.

Legal Aid Society of Northwest North Carolina, Inc., by Margot Roten and Benjamin Erlitz, for defendant appellee.

WELLS, Judge.

The clear issue before us in this case is whether the Rules of Appellate Procedure require service of notice of appeal either before filing or on the same day notice is filed. Plaintiff contends that so long as the notice of appeal is served within ten days of filing, it is timely served. We reject this argument.

Rules 3 and 26 of the Rules of Appellate Procedure control. Rule 3(a), applicable in this case, is as follows:

> (a) From Judgments and Orders Rendered in Session. Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding during a session of court may take appeal by
>
> . . . .
>
> (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

Rule 3(e) provides:

> (e) Service of Notice of Appeal. Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

Rule 26(b), applicable in this case, provides:

(b) Service of All Papers Required. Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

Rule 26(d) provides:

(d) Proof of Service. Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. *Proof of service shall appear on or be affixed to the papers filed.* [Emphasis ours.]

We hold that the clear import of these Rules requires proof of service to show on the notice of appeal when filed. Such provisions carry the clear implication that the drafters of the Rules meant for the notice to be served no later than the filing day. *See Smith v. Smith,* 43 N.C. App. 338, 258 S.E. 2d 833 (1979), *disc. rev. denied,* 299 N.C. 122, 262 S.E. 2d 6 (1980).

Our decision makes it unnecessary to reach plaintiff's second argument as to whether the time of *filing* of notice was extended by his motion to set aside the amended judgment.

We hold that plaintiff's service of notice of appeal was not timely made and that the district court properly dismissed the appeal.

The order of the trial court is

Affirmed.

Judges ARNOLD and ERWIN concur.

STATE OF NORTH CAROLINA v. JODY McLENDON

No. 8020SC520

(Filed 4 November 1980)

1. Criminal Law § 86.3– prior conviction of prosecuting witness – cross-examination properly limited

The trial court in a rape prosecution did not err in disallowing questions

to the prosecuting witness on cross-examination relating to specific convictions of crime, since defendant was given sufficient opportunity to "sift the witness."

2. **Rape § 4.3– reputation of prosecutrix – cross-examination of investigating officer properly limited**

The trial court in a rape prosecution did not err in refusing to allow the investigating officer to answer on cross-examination a question relating to the character and reputation of the prosecuting witness, since the officer had already testified that he did not have any knowledge as to the prosecuting witness's reputation.

APPEAL by defendant from *Wood, Judge.* Judgment entered 15 November 1979 in Superior Court, STANLY County. Heard in the Court of Appeals on 14 October 1980.

Defendant was charged under proper indictment with second degree rape. The jury returned a verdict of guilty of assault with intent to commit rape, and the court sentenced defendant to a prison term of not less than 14 nor more than 15 years. Defendant appealed.

Attorney General Edmisten, by Associate Attorney Richard H. Carlton, for the State.

Gerald E. Rush, for the defendant appellant.

HEDRICK, Judge.

[1] Defendant first contends, based on his second assignment of error, that the court erred in disallowing questions to the prosecuting witness on cross-examination relating to specific convictions of crime. Defendant argues that the prosecuting witness, in her prior testimony, had contradicted herself on whether she had any previous convictions, and that defendant should have been allowed to "delve further" into those convictions. We disagree. The rule is well-settled that a witness, for purposes of impeachment, may be cross-examined concerning prior convictions. *State v. Ross*, 295 N.C. 488, 246 S.E. 2d 780 (1978); *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971).

If the witness on cross-examination denies being convicted of a prior criminal offense, the cross-examiner is bound by the denial and cannot offer evidence in contradiction, but the cross-examiner can pursue further on cross-examination concerning prior convictions so as to "sift the witness." *State v. Currie*, 293

N.C. 523, 238 S.E. 2d 477 (1977); *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970).

Whether such cross-examination goes too far however, is a matter largely in the discretion of the trial judge. *State v. Herbin*, 298 N.C. 441, 259 S.E. 2d 263 (1979); *State v. Garrison*, 294 N.C. 270, 240 S.E. 2d 377 (1978); *State v. Gaiten, supra.*

In the instant case, the record indicates that the prosecuting witness testified "[t]hat she hasn't been tried and convicted of anything; that she was convicted of driving drunk on two occasions." Thereafter, counsel for defendant twice sought responses as to other convictions, but the prosecuting witness both times denied having been convicted of anything else, and then the court sustained the State's objection to further questions on that point. It is obvious that defendant was given sufficient opportunity to "sift the witness" and that the trial judge did not abuse its discretion in stopping the questions at that point.

[2] Defendant next contends, based on his fourth assignment of error, that the court erred in sustaining the State's objection to a question directed to the investigating officer on cross-examination relating to the character and reputation of the prosecuting witness. Defendant argues that the court "effectively cut off" defendant's opportunity to offer evidence of the reputation of the prosecuting witness. We cannot agree. Generally, defendants in rape prosecutions are entitled to offer evidence of the bad character of the prosecuting witness by showing her general reputation in the community or neighborhood in which she resides. *State v. McEachern*, 283 N.C. 57, 194 S.E. 2d 787 (1973). In order for a witness to testify as to general reputation, the witness must first qualify himself by indicating that he knows the general reputation of the party about whom he proposes to testify, and if he does not know the general reputation, he cannot testify to it. *State v. Bush*, 289 N.C. 159, 221 S.E. 2d 333, *vacated in part*, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 46 (1976); *State v. Stegmann*, 286 N.C. 638, 213 S.E. 2d 262 (1975), *vacated in part*, 428 U.S. 902, 49 L.Ed. 2d 1205, 96 S.Ct. 3203 (1976).

In the present case, the record does not indicate that the investigating officer had any knowledge of the prosecuting wit-

ness' reputation. When asked by counsel for the defendant whether he had formed an opinion as to the reputation of the prosecuting witness, the officer replied, "I couldn't tell you about her reputation." Defense counsel thereafter asked whether the prosecuting witness had a reputation for being "rather promiscuous," to which the State objected, giving rise to the exception upon which this assignment of error is based. The court, in our view, properly sustained the State's objection, and this assignment of error is meritless.

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

No error.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

KENNETH H. JOHNSON v. WANDA B. GARWOOD AND HUSBAND, JOHN GARWOOD; PEGGY B. NEWSOM AND HUSBAND, CHARLES NEWSOM; KAYE B. MANN AND HUSBAND, ROBERT LEWIS MANN

No. 8025SC387

(Filed 4 November 1980)

Appeal and Error § 6.2– partial new trial on damages issue – no appeal

Defendant may not appeal from an order directing a new trial solely on the issue of damages.

APPEAL by defendants from *Collier, Judge.* Order entered 19 November 1979 in Superior Court, CATAWBA County. Heard in the Court of Appeals 15 October 1980.

This is a civil action in which plaintiff seeks actual and punitive damages for defendants' alleged wrongful conveyance of property to a third party. Plaintiff's evidence tended to show his deed to defendants was in reality a mortgage while defendants' evidence suggested a deed absolute from plaintiff coupled with an option to repurchase. Defendants' motion for a directed verdict on the issue of punitive damages was allowed. A directed verdict was also granted dismissing the case as against defendants John Garwood, Charles Newsom, and Robert Lewis Mann. The jury returned a verdict in favor of

plaintiff as to the remaining defendants, awarding $313.00 in damages. The judge set aside the damage award as being against the greater weight of the evidence and ordered a new trial as to the amount of damages only. Defendants appeal from the judge's refusal to grant a new trial as to all the issues.

No counsel for plaintiff appellee.

Patrick, Harper & Dixon, by Stephen M. Thomas, for defendant appellants.

ARNOLD, Judge.

By this purported appeal we are again presented with an attempt to appeal from an order granting a new trial solely as to the issue of damages. Such an order is interlocutory and there is no immediate right of appeal. *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979).

While G.S. 1-277(a) provides that "[a]n appeal may be taken from every judicial order or determination . . . which grants or refuses a new trial," this Court has observed that an order granting only a partial new trial is not subject to immediate appellate review. *Insurance Co. v. Dickens*, 41 N.C. App. 184, 254 S.E. 2d 197 (1979). Defendant may not appeal from the order directing a new trial solely on the issue of damages.

Appeal dismissed.

Judges HEDRICK and HILL concur.

HENRY M. BRITT, JR. v. SHIRLEY B. BRITT

No. 807DC399

(Filed 18 November 1980)

1. **Divorce and Alimony § 19.5– alimony provided in separation agreement – agreement adopted by court – enforcement by contempt – modification**

A separation agreement which has been adopted by incorporation into a decree of the court is subject to the contempt power of the court and alimony payments so ordered can be modified.

2. **Divorce and Alimony § 19.3– modification of alimony order – change of circumstances – consideration of income only improper**

In a hearing to determine whether there has been a substantial change

of circumstances to warrant a reduction in alimony payments, a conclusion of law that there has been a substantial change of circumstances based only on income is inadequate and in error; rather, the present overall circumstances of the parties must be compared with the circumstances existing at the time of the original award in order to determine if there has been a substantial change.

3. **Divorce and Alimony § 19.4– modification of alimony order – improper comparison of incomes**

In determining whether there had been a substantial change of circumstances to warrant a reduction in alimony payments, the trial court erred in comparing plaintiff s adjusted gross income, as reported on his federal tax return, with defendant's gross cash income.

APPEAL by plaintiff and defendant from *Matthews, Judge.* Judgment filed 1 December 1979 in District Court, EDGECOMBE County. Heard in the Court of Appeals 15 October 1980.

This appeal is taken from an order reducing plaintiff's alimony payments to defendant and adjudging plaintiff to be in contempt of court for arrearages in alimony.

On 19 December 1972 plaintiff-husband initiated this action, filing a complaint seeking a divorce from bed and board from defendant-wife and a judgment that defendant not be entitled to alimony. Defendant denied the material allegations of the complaint and counterclaimed for, *inter alia*, a divorce from bed and board and an award of alimony.

A consent judgment was filed on 1 March 1973, which provided in part that the parties had entered into a separation agreement "settling all the matters and things pending herein . . . and that the parties have agreed that the Court may enforce this Agreement by finding any party who wilfully defaults in contempt of this Court . . . ." The court found as a fact that the provisions of the separation agreement "are just and fair to both parties, that the sum to be paid by the plaintiff to the defendant as alimony . . . is appropriate and commensurate with the plaintiff's earnings and the defendant's needs." The court retained jurisdiction of the cause.

The separation agreement was divided into two sections, entitled "Property Settlement" and "Alimony and Support of Wife." Plaintiff agreed to pay defendant $367.50 per month as alimony. The separation agreement further stated:

> The provisions for support, maintenance and alimony of wife shall not be modified or changed except by further agreement between the parties expressed in writing.
>
> The provisions for the support, maintenance and alimony of wife are independent of any division or agreement for division of property between the parties and shall not for any purpose be deemed to be a part of or merged in or integrated with a property settlement of the parties.

On 31 December 1973 judgment was entered granting plaintiff absolute divorce on the ground of one year's separation. The judge ordered that the earlier consent judgment "remain in effect according to their respective terms and conditions and applicable law."

On 10 November 1976 plaintiff filed a motion seeking a reduction in the alimony payments, alleging a substantial change in circumstances, in that plaintiff's income had decreased and defendant's income had increased, to warrant such reduction. Upon hearing, the trial court denied the motion, concluding that the intentions of the parties as expressed by their contract could not be modified by the court without consent of both parties, that the provisions of the instrument were reciprocal considerations which, if modified, would destroy the entire agreement, and that the change of circumstances on the part of the wife did not justify modification of the alimony award as a matter of law.

The Court of Appeals reversed that decision in *Britt v. Britt*, 36 N.C. App. 705, 245 S.E. 2d 381 (1978). Judge Britt held that the decree in the consent judgment superseded the parties' agreement and that the alimony award was therefore subject to modification upon a change of conditions. The Court further held that the support provisions and property division portions of the separation agreement were not reciprocal considerations which would prevent modification. The trial court's order was vacated and the cause was remanded to determine whether a substantial change of circumstances existed to justify reduction of alimony.

On 21 September 1978 defendant filed a motion alleging that plaintiff was in arrears in alimony payments and praying that plaintiff be held in contempt. This motion and the original

motion for modification of alimony payments were heard together by Judge Matthews at the 19 November 1979 session of the District Court of Edgecombe County. The hearing had originally been held on 23 October 1978, in which plaintiff was found to be in contempt and allowed to purge himself of the arrearage, and in which the alimony payments were reduced to $210 per month beginning 10 November 1978. Because the attorneys were unable to agree upon a draft judgment, according to the normal custom of the area, the rehearing of November 1979 was called to determine facts for the record on appeal. Judge Matthews accepted twenty-five stipulations of fact and incorporated them into the court's findings. From these facts the court made additional findings, including:

> 26. There has been a substantial change of circumstances affecting the parties hereto in that the plaintiff's income has decreased from approximately $22,400.00 to $9,100.00 and that the defendant's income has increased from $1,600.00 to $10,746.00 annually.

On the basis of the findings of fact Judge Matthews concluded that "[t]here has been a substantial change of circumstances and the court concludes as a matter of law that a reduction in the amount of alimony is proper and should be ordered." He reduced the alimony payments to $210 per month. He also adjudged plaintiff in contempt of court for arrearages as of 23 October 1978 and allowed plaintiff to purge himself of contempt by payment of such arrearages. Additional facts necessary to this opinion are set out below.

Both plaintiff and defendant appeal.

Moore, Diedrick, Whitaker & Carlisle, by J. Edgar Moore, for plaintiff.

Hopkins & Allen, by Grover Prevatte Hopkins, for defendant.

MARTIN (Harry C.), Judge.

[1] This case was before the Court of Appeals more than two years ago on the issue of whether the trial court had the authority to modify the alimony awarded in the consent judgment contrary to the express language of the separation agreement. At that time we held that "the judgment in question is actually

an adjudication by the court which is enforceable by contempt and subject to modification upon a change of conditions rather than a contract approved by the court which cannot be modified absent consent of the parties." *Britt v. Britt, supra* at 710, 245 S.E. 2d at 384. Now, in oral argument, counsel for defendant urges us to reconsider that holding in light of recent decisions by the Supreme Court of North Carolina and by this Court. Although the issue is not properly before us at this time, we will distinguish those later cases to reconfirm our earlier decision that the alimony decreed by the consent judgment was, and remains, indeed subject to the modification power of the trial court.

The law governing when consent judgments retain their contractual nature and when they are superseded by adoption of the parties' agreement as an order of the court is fully discussed in *Britt, supra.* It is unnecessary to recapitulate those principles at the present time. Defendant contends that the law has been modified by the decisions in *Moore v. Moore,* 297 N.C. 14, 252 S.E. 2d 735 (1979); *Cox v. Cox,* 43 N.C. App. 518, 259 S.E. 2d 400 (1979), *disc. rev. denied,* 299 N.C. 329 (1980); and *Haynes v. Haynes,* 45 N.C. App. 376, 263 S.E. 2d 783 (1980). We do not agree.

The *Moore* case in no way reverses the well established rule that a separation agreement that has been adopted by incorporation into a decree of the court is subject to the contempt power of the court and alimony payments so ordered can be modified. *Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240 (1964). *See also Levitch v. Levitch,* 294 N.C. 437, 241 S.E. 2d 506 (1978); *Mitchell v. Mitchell,* 270 N.C. 253, 154 S.E. 2d 71 (1967). Rather, *Moore* expands the law regarding separation agreements which *have not* been incorporated into a decree, but have been merely approved by the court, in allowing specific performance to be invoked, at least in extreme circumstances, as a method of enforcing the contractual rights of the parties. The issue in *Moore* was succinctly stated: "The question we are called upon to decide is whether an action for specific performance will lie to enforce the alimony provisions of a separation agreement, which has not been made part of a divorce decree." *Id.* at 14, 252 S.E. 2d at 736. The Court allowed the specific performance action, which is different from a contempt proceeding, because the husband had deliberately and blatantly diverted his assets

and income to his second wife in an effort to avoid making alimony payments to his former wife under the terms of their extra-judicial separation agreement. We find *Moore* has no application to the present situation.

Neither is *Cox, supra,* helpful to defendant's position. In *Cox* the husband sought to amend a consent judgment for the purpose of tax deductions. In determining that the judgment could not be so amended the Court stated:

> [W]e believe the rule is that a consent judgment is not only a judgment of the court but is also a contract between the parties. It cannot be amended without showing fraud or mutual mistake, which showing must be by a separate action, or by showing the judgment as signed was not consented to by a party, which showing may be by motion in the cause.

Id. at 519, 259 S.E. 2d at 401-02. This holding is consistent with decisions that separation agreements incorporated into court decrees are construed and interpreted in the same manner as other contracts. *Lane v. Scarborough,* 284 N.C. 407, 200 S.E. 2d 622 (1973); *Bowles v. Bowles,* 237 N.C. 462, 75 S.E. 2d 413 (1953); *Pope v. Pope,* 38 N.C. App. 328, 248 S.E. 2d 260 (1978). It is the method of *enforcement,* rather than construction, that is transformed when a court adopts the parties' contract as its own decree.

Likewise, *Haynes, supra,* does not apply to the case at bar. The defendant-husband in *Haynes* filed a motion in the cause seeking a determination that he was no longer responsible for alimony payments ordered under a pre-divorce consent judgment on the ground that the subsequent divorce judgment terminated his marital obligation of support. Judge Parker, speaking for this Court, held that although absolute divorce does terminate a dependant spouse's right to support under N.C.G.S. 50-11(a), the earlier consent judgment awarding alimony arose from the separation agreement, which was a contract, not from the marital relationship itself. "Insofar as the consent judgment in the present case imposed a duty of support on the defendant-husband beyond that imposed by the common law or by statute, plaintiff-wife's rights did not arise out of the marriage, but out of contract . . . ." *Id.* at 383, 263 S.E. 2d at 787.

The Court further noted the distinction between consent judgments that merely approve or sanction the contract and those in which the court adjudicates the issue of alimony, and stated:

> However, we do not consider that distinction determinative of the question whether defendant-husband's duty to make support payments to plaintiff-wife ... arises out of marriage or out of contract *for the purposes of determining the effect of the divorce* obtained by the plaintiff-wife. ... Similarly, the fact that a consent judgment incorporating an agreement of the husband to provide support may be enforceable by contempt proceedings renders it no less a contract. Thus, plaintiff-wife's right to receive monthly payments ... in the present case does not become a right "arising out of the marriage" within the meaning of G.S. 50-11 merely because that right is provided in a judgment of court which may be enforceable by contempt.

Id. at 383-84, 263 S.E. 2d at 787 (emphasis added). The *Haynes* decision is addressed to the issue of survival of support rights upon divorce. We find that *Haynes* has no applicability to situations, such as the present, in which the method of enforcement or modification of the alimony provision of a consent judgment is at issue. We thus reject defendant's renewed contention that the separation agreement incorporated into the 1973 consent judgment should be treated as a contract rather than a court decree.

We now address the primary questions of this appeal. Defendant-wife appeals on the issue of whether the findings of fact support the trial court's conclusion of law that a substantial change of circumstances had been shown to warrant a reduction in alimony payments. On the assumption that the conclusion of changed circumstances was proper, plaintiff-husband assigns as error the award of alimony without a finding that defendant was in need of support. Plaintiff urges that a further reduction or elimination of alimony be ordered. The outcome of the first issue determines the second.

[2] In this case, the evidence has not been made part of the record. Where evidence is not made part of the record, findings of fact are deemed to be supported by competent evidence. *In re Housing Authority*, 233 N.C. 649, 65 S.E. 2d 761 (1951); *Utilities*

Comm. v. Electric Membership Corp., 276 N.C. 108, 171 S.E. 2d 406 (1970); *Bethea v. Bethea;* 43 N.C. App. 372, 258 S.E. 2d 796 (1979), *disc. rev. denied*, 299 N.C. 119 (1980). The issue remaining is whether the facts found support the conclusions of law. *Brown v. Board of Education*, 269 N.C. 667, 153 S.E. 2d 335 (1967); *Durland v. Peters, Comr. of Motor Vehicles*, 42 N.C. App. 25, 255 S.E. 2d 650 (1979); *In re Vinson*, 42 N.C. App. 28, 255 S.E. 2d 644 (1979). Judge Matthews's conclusion of law of the existence of substantial change of circumstances does not derive from all the findings of fact but was based solely on the incomes of the parties. Finding 26 states:

> There has been a substantial change of circumstances affecting the parties hereto *in that* the plaintiff's income has decreased from approximately $22,400.00 to $9,100.00 and that the defendant's income has increased from $1,600.00 to $10,746.00. (Emphasis added.)

Although designated as a finding of fact, the character of this statement is essentially a conclusion of law and will be treated as such on appeal. *Wachacha v. Wachacha*, 38 N.C. App. 504, 248 S.E. 2d 375 (1978). We hold that a conclusion of law that there has been a substantial change of circumstances based only on income is inadequate and in error.

N.C.G.S. 50-16.9 provides:

> (a) An order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.

From cases interpreting this statute it is apparent that not *any* change of circumstances will be sufficient to order modification of an alimony award; rather, the phrase is used as a term of art to mean a *substantial* change in conditions, upon which the moving party bears the burden of proving that the present award is either inadequate or unduly burdensome. *Roberts v. Roberts*, 38 N.C. App. 295, 248 S.E. 2d 85 (1978); *Gill v. Gill*, 29 N.C. App. 20, 222 S.E. 2d 754 (1976). In *Stallings v. Stallings*, 36 N.C. App. 643, 645, 244 S.E. 2d 494, 495, *disc. rev. denied*, 295 N.C. 648 (1978), we held "that the 'changed circumstances' must bear upon the financial needs of the dependent spouse or the ability

of the supporting spouse to pay," rather than post-marital conduct of either party. Financial needs and ability to pay depend on factors in addition to the annual incomes of the parties.

Here the stipulated facts show that plaintiff is self-employed in his own farming operation. He purchased land in 1978 at a cost of $80,000, financed 100% by the Federal Land Bank. Plaintiff has maintained farm equipment with a cost basis of about $95,000 for the years 1976 to 1978. He has remarried and has two stepchildren who attend a private school with tuition of $1,300 a year. Plaintiff's second wife has no earnings or income and receives no child support payments. Plaintiff raises some meat and vegetable products for family consumption. In 1975 plaintiff built a new home costing approximately $55,000, 100% financed. In 1978 he purchased a 1978 Oldsmobile station wagon, for which he paid $6,900 after trade of a 1973 Oldsmobile. An invoice for $2,088 for a dining room suite was made out to plaintiff, whose second wife paid for the furniture from funds she received from the sale of her former marital home. Plaintiff and his second wife have made trips to Las Vegas, the state of California, and the beach; some of the expenses of these trips were paid by other parties. These facts reveal that plaintiff has both money and property, and, taken as a whole, do not support the conclusion that the alimony payments should be reduced.

[3] The only fact remotely supporting the ruling is the change in the incomes of the parties. The trial judge compared plaintiff's adjusted gross income, as reported on his federal tax return, with defendant's gross cash income. These are not comparable amounts, as actual income and taxable income are often different. Because plaintiff's business expenses, including depreciation on his equipment, as well as his alimony payments, are deductible from his total income in determining his adjusted gross income, I.R.C. § 62, that figure is not appropriate for determining his actual ability to meet his alimony payments.

In *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979), a former wife sought an increase in alimony payments. Defendant-husband argued that a showing of an increase in his income alone was insufficient to demonstrate changed circumstances. The Court found that the wife had also alleged that the

current alimony payments were "totally inadequate under the circumstances" and held that "[c]hanged circumstances do not have to be pled with specificity" to withstand a motion to dismiss. *Id.* at 670, 252 S.E. 2d at 703. Although not precisely articulated as such, this case would imply that fluctuations in income alone do not comprise changed circumstances capable of requiring modification of an alimony award. This is the generally accepted view.

> It is said that a court should proceed with caution in determining whether to modify a decree for alimony on the ground of a change in the financial circumstances of the parties.
>
> Where the change in the circumstances is one that the trial court expected and probably made allowances for when entering the original decree, the change is not a ground for a modification of the decree. In accord with the view it is said that minor fluctuations in income are a common occurrence and the likelihood that they would occur must have been considered by the court when it entered a decree for alimony.

Annot., 18 A.L.R. 2d 10, 13 (1951).

> The fact that the husband's salary or income has been reduced substantially does not automatically entitle him to a reduction in alimony or maintenance. If the husband is able to make the payments as originally ordered notwithstanding the reduction in his income, and the other facts of the case make it proper to continue the payments, the court may refuse to modify the decree.

Id. at 43.

One commentator suggests that the provisions of a separation agreement be given deference even when adopted in a court order, to "increase 'self-help' among the parties and prevent protracted litigation of spousal rights." Note, *Modification of Spousal Support: A Survey of a Confusing Area of the Law*, 17 J. Fam. L. 711, 717 (1978-79). The author notes that the Uniform Marriage and Divorce Act (not enacted in this state) urges that courts apply the same high standard for modification as they generally do in adopting an original separation agreement,

that unless the terms are unconscionable or fraudulent they should be accepted by the court. This would have the desirable effect of discouraging modification except in special circumstances. The author further suggests that an implied requirement of proving "changed circumstances" should be that the change was not contemplated at the time of the decree. Increase in cost of living or the wife's obtaining employment are events that are foreseeable at the time of the original judgment. A good faith requirement would also be implicit; a voluntary undertaking by the petitioner could not qualify as a legally recognizable change in condition. Because every set of circumstances is different and subject to change at any time, previous decisions should serve only as general guidelines.

The decisions of courts of this state seem to reflect the above principles. In *Bunn v. Bunn*, 262 N.C. 67, 70, 136 S.E. 2d 240, 243 (1964), the Court said: "If a man in prosperous days consents that a judgment be entered against him for generous alimony and thereafter is *unable to pay it* because of financial reverses, the order should be altered to conform to his *ability to pay.*" (Emphasis added.) In *Sayland v. Sayland*, 267 N.C. 378, 148 S.E. 2d 218 (1966), the Supreme Court stated:

> Payment of alimony may not be avoided merely because it has become burdensome, or because the husband has remarried and voluntarily assumed additional obligations. [Citations omitted.] However, any *considerable* change in the health or financial condition of the parties will warrant an application for a change or modification of an alimony decree ... ." The fact that the wife has acquired a substantial amount of property, or that her property has increased in value, after entry of a decree for alimony or maintenance is an important consideration in determining whether and to what extent the decree should be modified." [Citations omitted.] A decrease in the wife's needs is a change in condition which may also be properly considered .... By the same token, an increase in the wife's needs, or a decrease in her separate estate, may warrant an increase in alimony.

Id. at 383, 148 S.E. 2d at 222 (emphasis added). In *Sayland*, the alimony payment was held to be unreasonable, and therefore modifiable, because the wife was institutionalized in a state

hospital and the alimony payment was three times the amount of her actual subsistence.

Thus it is apparent that a conclusion as a matter of law that changed circumstances exist, based only on the parties' incomes, is erroneous and must be reversed. The present overall circumstances of the parties must be compared with the circumstances existing at the time of the original award in order to determine if there has been a substantial change. *Gill, supra.* We note that defendant, in her pleadings, alleged that plaintiff had transferred some of his assets and interests therein to his second wife. If a court finds that a party who has been ordered to pay alimony has diverted his assets or voluntarily reduced his income to deliberately avoid payment of alimony, earning capacity rather than actual earnings should be considered. *Robinson v. Robinson,* 10 N.C. App. 463, 179 S.E. 2d 144 (1971). The party alleging such misconduct carries the burden of proof on this issue, however. *Bowes v. Bowes,* 287 N.C. 163, 214 S.E. 2d 40 (1975). Perhaps the overriding principle in determining whether changed circumstances exist, as well as redetermining the correct amount of alimony, is that which the Supreme Court recognized in *Beall v. Beall,* 290 N.C. 669, 679, 228 S.E. 2d 407, 413 (1976), that "the question of the correct amount of alimony ... is a question of fairness to all parties."

Plaintiff's final argument concerns the issue of from what date the reduced amount of alimony should be paid, if a substantial change of circumstance is found and a modification order is entered. As this problem may not arise upon rehearing, we refrain from discussing it.

The portion of the judgment holding plaintiff in contempt of court is affirmed. The portion dealing with modification of the alimony award is reversed.

Affirmed in part, reversed in part.

Judges VAUGHN and WELLS concur.

State v. Wallace

STATE OF NORTH CAROLINA v. JAMES E. WALLACE

No. 8015SC518

(Filed 18 November 1980)

Hunting § 3– hunting deer with dogs – insufficiency of citation to charge crime

A citation alleging that defendant "did unlawfully and wilfully operate a (motor) vehicle on a (street or highway) . . . By hunting deer with dogs in violation of Senate Bill #391" was insufficient to charge defendant with a violation of the criminal laws and was fatally defective.

Judge MARTIN (Robert M.) concurs in the result.

Judge HEDRICK concurring in result only.

APPEAL by defendant from *Clark, Judge.* Order entered 6 March 1980 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 14 October 1980.

Defendant was accused of violating Senate Bill #391 which prohibits pursuing, hunting, taking or killing deer or foxes with dogs. At trial, defendant moved for a dismissal pursuant to N.C.G.S. 15A-954, alleging the law was unconstitutional on its face and that the court had no jurisdiction of the offense charged. The district court granted defendant's motion, and the state appealed.

In the case of *State v. Keck*, the same district court judge had previously held the pertinent statute unconstitutional.

On appeal in the superior court, the court heard testimony and entered an order holding the statute to be constitutional. The case was thereupon remanded to the district court for further proceedings as provided by N.C.G.S. 15A-1432(d). From this order, defendant appeals.

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

Vernon, Vernon, Wooten, Brown & Andrews, by Wiley P. Wooten, for defendant appellant.

MARTIN (Harry C.), Judge.

This is a case about dogs. As dogs do not often appear in the courts, it is perhaps not inappropriate to write a few words about them. The dog, a carnivorous mammal, has been kept in a

domesticated state by man since prehistoric time. "The memory of man runneth not to the contrary."

Diana, the Roman counterpart to Artemis, was the goddess of hunting. She was the twin sister of Apollo and was usually pictured with her hunting dogs, given to her by the wind-god, Pan. Cerberus, the three-headed dog, served as the watchdog at the gates of Hades. In the sky we find Sirius, the brilliant dog star, the brightest star in the entire heavens. Sirius floats through time at the hand of his master, Orion.

Edmund Burke in *The Sublime and Beautiful* (1756) said: "Dogs are indeed the most social, affectionate, and amiable animals of the whole brute creation." Herodotus reports in *An Account of Egypt* (5th Century) that dogs were regarded as sacred by the ancient Egyptians. When a dog died, the people of the house shaved their whole bodies and heads and the dog was buried in sacred tombs within the city. In Sir Francis Bacon's essay *Of Atheism* (1612), we find "for take an example of a dog, and mark what a generosity and courage he will put on when he finds himself maintained by a man."

Byron wrote:

> But the poor dog, in life the foremost friend,
> The first to welcome, the foremost to defend.

The Talisman tells that Richard I said:

> The Almighty, who gave the dog to be companion of our pleasures and our toils, hath invested him with a nature noble and incapable of deceit. He forgets neither friend nor foe — remembers both benefits and injury. He hath a share of man's intelligence, but no share of his falsehood. You may bribe a soldier to slay a man, or a witness to take life by false accusation, but you cannot make a hound tear his benefactor. He is ever a friend of man, save when man incurs his enmity.

The shape of history was changed by a spaniel who saved William of Orange from death by the Spaniards when they made a surprise attack upon his army at night. William and his sentinels were fast asleep but a small spaniel on the prince's bed barked furiously at the approaching footsteps. It sprang forward, scratched his master's face with a paw, and enabled him

to mount a horse and escape. To his dying day the prince kept a spaniel in his bedchamber.

Throughout history we find the fate of man and dog intertwined. Dogs have rescued kings and knaves, princes and paupers. Who will ever forget the heroic deeds of the great St. Bernards of the Alps? As one gazes through the window of time, the vision of a barefoot boy and his dog, walking down a dusty summer road, brings a tear to the eye. A boy without a dog! Life would be unbearable.

The dog is of a noble, free nature, yet is domesticated and dedicated to the well-being of people of all races. We find the dog's story told throughout our reports. One of the earliest cases, *Dodson v. Mock*, 20 N.C. 282 (1838), was an action for *trespass vi et armis* for killing plaintiff's dog by poison. Justice Gaston, for the Court, held that dogs belong to that class of domiciled animals which the law recognizes as objects of property. As such, the dog is entitled to protection of the law even though it may on occasion have stolen an egg, nipped at the heel of a man chasing it, or worried a sheep. Those offenses by a dog are not of a very heinous character. "If such deflections as these from strict propriety be sufficient to give a dog a bad name and kill him, the entire race of these faithful and useful animals might be rightfully extirpated." *Id.* at 285.

Justice Walker speaks of the dog in *State v. Smith*, 156 N.C. 628, 629-31, 72 S.E. 321, 321-22 (1911):

> A dog is like a man in one respect, at least — that is, he will do wrong sometimes; but if the wrong is slight or trival, he does not thereby forfeit his life.
>
> . . . .
>
> . . . [W]e will say that the dog is not an animal of such base nature or low degree, whatever his pedigree may be, as not to be entitled to the consideration and full protection of the law, or as to subject him to outlawry if he has a bad reputation, or at least a habit of killing fowls, so that if he lurks near where they are to be found, although they are protected by a sufficient fence or other barrier against his predatory and ferocious disposition, he may be killed, even if he is not engaged in the actual attempt to slay and devour

his supposed prey, or the danger of his doing so is not so imminent or immediately threatening that a prudent and reasonable man would be led to believe that his property is in jeopardy. We cannot give our assent to this principle. Admit such a right, and the peace and good order of society would be seriously endangered and could not well be preserved, for the exercise of such a right would excite the most angry passions and resentment of the dog's owner and eventually result in personal violence, thus disrupting the peace and quiet of the community . . . . He [the dog] has the goodwill of mankind because of his friendship and loyalty, which are such marked traits of his character that they have been touchingly portrayed both in song and story.

In *Moore v. Electric Co.*, 136 N.C. 554, 557-58, 48 S.E. 822, 823, 67 L.R.A. 470, 471-72 (1904), we find:

It is not hazarding too much to say that it is a matter of common knowledge that in the classification of animal life (not including man) the dog occupies a position in point of intelligence, fidelity and affection superior probably to all of the others. He is known to have been for ages not only an animal of prey but wonderfully acquainted with the habits and ways of both man and beast and birds, keenly sensitive as to sight, hearing and smell, and remarkably agile in all of his movements. He can, by training and association with man, become adept in many useful employments and can be taught to do almost anything except to speak. They are known ordinarily to be able to take care of themselves amidst the dangers incident to their surroundings. Where a horse or a cow or a hog or any of the lower animals would be killed or injured by dangerous agencies the dog would extricate himself with safety.

. . . .

We think, therefore, that the dog, on account of his superior intelligence and possession of the other traits which we have mentioned in respect to the diligence and care which locomotive engineers owe to their owners and to them, must be placed on the same footing with that of a man walking upon or near a railroad track apparently in possession of all his faculties, ...

The Commonwealth of Kentucky recognized the virtues of the dog in *Shadoan v. Barnett*, 217 Ky. 205, 210-11, 289 S.W. 204, 206, 49 A.L.R. 843, 847 (1926):

> [H]istory may be searched in vain to find a living creature exhibiting as much fidelity and affection as does the dog to and for his master. Neither cold, heat, danger, nor starvation deters him from manifesting those most excellent qualities in his love for his master, and those with whom he constantly associates. History is filled with instances where all others have fled, but the faithful dog stood guard, either as a mourner at his master's grave or with a determined purpose to administer to the latter if occasion presented itself. The press dispatches constantly record his unparalleled deeds of heroism for the protection and benefit of mankind, even at the sacrifice of his own life. Because of those qualities, his virtues have been touchingly described by poets and celebrated in song, and rightfully the dog as a companion is most affectionately regarded by all persons who truly estimate loyalty and friendship as factors in smoothing the path of this world's existence.

In 1897 the Supreme Court of the United States had this to say about dogs:

> They are not considered as being upon the same plane with horses, cattle, sheep, and other domesticated animals, but rather in the category of cats, monkeys, parrots, singing birds, and similar animals kept for pleasure, curiosity, or caprice. They have no intrinsic value, by which we understand a value common to all dogs as such, and independent of the particular breed or individual. Unlike other domestic animals, they are useful neither as beasts of burden, for draft (except to a limited extent), nor for food. They are peculiar in the fact that they differ among themselves more widely than any other class of animals, and can hardly be said to have a characteristic common to the entire race. While the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection, and above all, for their natural companionship with man, others are afflicted with such serious infirmities

> of temper as to be little better than a public nuisance. All are more or less subject to attacks of hydrophobic madness.

Sentell v. New Orleans & c. Railroad Co., 166 U.S. 698, 701, 41 L.Ed. 1169, 1170 (1897).

An opinion by then superior court judge Lumpkin (later supreme court justice) of Georgia states the history of the dog in inimitable fashion:

> "The dog has figured very extensively in the past and present. In mythology, as Cerberus, he was intrusted with watching the gates of hell; and he seems to have performed his duties so well that there were but few escapes. In the history of the past he has been used extensively for hunting purposes, as the guardian of persons and property, and as a pet and companion. He is the much valued possession of hunters the world over, and in England especially is the pack o'hounds highly prized. In literature he has appeared more often than any other animal, except perhaps the horse. Sometimes he is greatly praised, and at others greatly abused. Sometimes he is made the type of what is mean, low, and contemptible; while at others he is described in terms of eulogy. Few men will forget the song of their childhood, which runs:
>
> 'Old dog Tray's ever faithful;
> Grief cannot drive him away;
> He is gentle, he is kind;
> I'll never, never find
> A better friend than old dog Tray.'
>
> "Nor can any of us fail to remember the intelligent animal on whose behalf 'Old Mother Hubbard went to the cupboard.'
>
> "Few men have deserved and few have won higher praise in an epitaph than the following, which was written by Lord Byron in regard to his dead Newfoundland: 'Near this spot are deposited the remains of one who possessed beauty without vanity, strength without insolence, courage without ferocity, and all the virtues of man without his vices. This praise, which would be unmeaning flattery if inscribed over human ashes, is but a just tribute to the

memory of Boatswain, a dog who was born at Newfoundland, May 3, 1803, and died at Newstead Abbey, November 18, 1808.

"The dog has even invaded the domain of art. All who have seen Sir Edwin Landseer's great pictures will know how much human intelligence can be expressed in the face of a dog. His picture entitled 'Laying Down the Law' will not be forgotten in considering the dog as a litigant.

"Thus the dog has figured in mythology, history, poetry, fiction, and art, from the earliest times down to the present, and now in these closing days of the nineteenth century we are called upon to decide whether a dog is a wild animal (ferae naturae) in such sense as not to be leviable property; or, if he is a domestic animal (domitae naturae), whether he is not subject to levy on the ancient theory that he had no intrinsic value if he was not good to eat.

"Originally all the animals which are now used by man were wild. One after another they have become domesticated, and subject to his control, ownership, and use. As time progressed they gradually lost their character of wildness, and became more and more subject to mankind, and more and more regarded as ordinary property. At this day no one would contend that the horse was not the subject of absolute property because his ancestors were originally wild; and the same may be said of other animals now thoroughly recognized as domestic. Even in the days of Blackstone, while it was declared that the property in a dog was 'base property,' it was nevertheless asserted that such property was sufficient to maintain a civil action for its loss. (4 Bl. Com. 236.) Since that day, in the evolution of civilization, the dog has not been left behind. He is now not only prized for hunting purposes, as a watchdog, and as a pet, but it is common knowledge that many dogs have an actual commercial and market value. When annually there is held in New York a bench show, at which dogs take prizes amounting to thousands of dollars, and where they are bought and sold at prices which are frequently far larger than are paid for ordinary horses, it is rather late in the day to assert that they are not valuable property.

"Dogs are also trained for purposes of exhibition, being sometimes the sole means of support of their masters. It would be an interesting survival of archaic law to say that a showman could put up his tent, give nightly exhibitions of his valuable dogs, making large sums of money from them, get in debt to any given extent, laugh at his creditors, and proceed with his daily exhibitions, on the ground that his stock in trade is not subject to levy. If it be contended that the horse, mule, and other animals are used for more practical purposes (some of them as beasts of burden), it need only be asked what animals draw the sleds of the Eskimos and others in the northern latitudes? Nor is this confined alone to the Arctic regions. Any traveler on the continent of Europe, and especially through Belgium, who has kept his eyes open, has seen these animals drawing heavy loads, and often taking the place of other draft animals. . . . The ancient idea that 'animals which do not serve for food, and which therefore the law holds to have no intrinsic value,' were not the subject of larceny (4 Bl. Com. 236), has passed away. Now the stomach is not the only criterion of value. . . .

"The dog has been very often before the courts of the different States and of different countries, and has been the subject of a good deal of judicial humor and of judicial learning; but it bears a tinge of the ridiculous to contend that, however many and however valuable dogs a man may own, he can not be made to pay his debts if he will only invest his money in dogs, — a contention which reminds one of the very solemn discussions in a certain court, at a time not very long past as to whether the oyster was a wild animal. Before the courts, the dog has received a treatment as varied as that given him by authors . . . .' . . . From the time of the pyramids to the present day; from the frozen pole to the torrid zone, wherever man has been, there has been his dog. Cuvier has asserted that the dog was, perhaps, necessary for the establishment of civilized society, and that a little reflection will convince us that barbarous nations owe much of their civilization above the brute to the possession of the dog. He is the friend and companion of his master — accompanying him in his walks, his servant

> aiding him in his hunting, the playmate of his children, an inmate of his house, protecting it against all assailants.' "

Strong v. Georgia Railway & Electric Co., 118 Ga. 515, 516-19, 45 S.E. 366, 367-68 (1903).

At common law it was not larceny to steal a live dog, but it was to steal a dead dog's hide. *Mullaly v. The People*, 86 N.Y. 365 (1881).

> A French justice was once troubled by the following case, and his decision is unknown: A cattle drover and a butcher while dining together undertook to adjust their accounts. The drover's dog was lying by the table. The butcher took a note for 100 francs and handed it toward the drover, and it fell in the gravy dish. The butcher snatched the note from the dish, and while waving it to and fro to dry it, the drover's dog, evidently supposing that the note was a morsel of food, snapped it from the butcher's hand and swallowed it. The butcher demanded that the dog be killed and dissected. The drover refused, and the butcher then claimed that the dog had collected his master's account and that he owed the drover nothing. The drover insisted that the dog was not acting within the scope of his duties and authority, and sued the butcher to recover the account.

J. Seawell, *Law Tales for Laymen* 127 (1925).

No tribute to the noble dog is more eloquent than the following of Senator Vest in the Missouri case of *Burden v. Hornsby:*

> "The best friend a man has in the world may turn against him and become his enemy. His son or daughter that he has reared with loving care may prove ungrateful. Those who are nearest and dearest to us, those whom we trust with our happiness and our good name, may become traitors to our faith. The money that a man has he may lose. It flies away from him perhaps when he needs it most. A man's reputation may be sacrificed in a moment of ill-considered action. The people who are prone to fall on their knees to do us honor when success is with us may be the first to throw the stone of malice when failure settles its cloud upon our heads. The one absolutely unselfish friend

that man can have in this selfish world, the one that never deserts him, the one that never proves ungrateful or treacherous, is his dog. A man's dog stands by him in prosperity and poverty, in health and in sickness. He will sleep on the cold ground, where the winter winds blow and the snow drives fiercely, if he may be only near his master's side. He will kiss the hand that has no food to offer; he will lick the wounds and sores that come in encountering the roughness of the world. He guards the sleep of his pauper master as if he were a prince.

"When all other friends desert, he remains. When riches take wings and reputation falls to pieces, he is as constant in his love as the sun in its journey through the heavens. If misfortune drives the master an outcast in the world, friendless and homeless, the faithful dog asks no higher privilege than that of accompanying him to guard against danger, to fight against his enemies. And when the last scene comes and death takes the master in its embrace, and his body is laid in the ground, no matter if all other friends pursue their way, there by the graveside will be found the noble dog, his head between his paws, his eyes sad, but open in alert watchfulness, faithful and true in death."

J. Seawell, *supra* at 127-28.

With this background on the legal perspective of dogs as it has evolved throughout our history, we now turn to the issue argued on appeal. Defendant insists the statute is unconstitutional on its face. He contends that, among other things, due process is denied when "any person, adult or child, who while in the company of a dog, which in response to its natural instincts, suddenly and without warning, catches the scent of a deer or a fox and gives chase" is subject to a violation of the criminal law and may be fined. While defendant's argument is intriguing and unique, on the record before us we are not required to reach any constitutional question. A constitutional question will not be passed upon if there is also present some other ground upon which the case may be decided. If the case can be decided on one of two grounds, one involving a constitutional question, the other a question of lesser importance, the latter alone will be determined. The Court will not decide questions of a constitutional nature unless absolutely necessary to a decision of the

case. *State v. Blackwell*, 246 N.C. 642, 99 S.E. 2d 867 (1957); *State v. Lueders*, 214 N.C. 558, 200 S.E. 22 (1938).

Here, we are faced at the threshold with the question of the validity of the process. Although counsel do not address this question, it arises on the face of the record.

The process in this case is a uniform traffic citation. Its pertinent parts are as follows:

> State of North Carolina vs.
>
> James E. Wallace
>
> The undersigned officer has probable cause to believe that on or about 10:20 a.m., the 20th day of Nov. 1979 in the named county, the named defendant did unlawfully and wilfully operate a (motor) vehicle on a (street or highway) . . .
>
> By hunting deer with dogs in violation of Senate Bill #391 which prohibits same . . . .
>
> C.W. Swinney
>
> Officer

It is obvious on the face of the citation that it fails to allege a violation of the criminal laws, and is fatally defective. It is the function of a warrant, or citation, to make clear and definite the offense charged so that the investigation may be limited to that offense in order that the proper procedure be followed and the applicable law invoked, and to put the defendant on notice as to what he is charged with and to enable him to make his defense. *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954). A warrant must express the charge against defendant in a plain, intelligible and explicit manner and contain sufficient matter to enable the court to proceed to judgment and thus bar another prosecution for the same offense. *Id.; State v. Brown*, 13 N.C. App. 280, 185 S.E. 2d 486 (1971). A cursory examination of the citation in question discloses that it fails to comply with this standard. Likewise, the citation fails to comply with the requirements of N.C.G.S. 15A-302. We hold the citation is fatally defective and the same should be quashed.

As the case is being disposed of on this ground, we do not reach or discuss the alleged constitutional infirmity. It is interesting to note, nevertheless, that the statute in question evidently had its origin in the ancient dog-draw of old forest law. Dog-draw was the manifest deprehension of an offender against venison in a forest, when he was found drawing after a deer by the scent of a hound led in his hand; or where a person had wounded a deer and was caught with a dog drawing after him to receive the same. Manwood, *Forest Law*, 2, c. 8. One way used to prevent dogs from running after deer was the "lawing of dogs," or cutting several claws of the forefeet of dogs. Black's Law Dictionary 1033 (4th ed. rev. 1968).

Finally:

> It is a matter of common knowledge that there are many breeds of dogs endowed with special traits and gifts peculiar to their respective kind — the pointer and setter take instinctively to hunting birds; the hound to foxes, deer and rabbits, but we know of no breed which instinctively hunts mankind. Yet we know that dogs are capable of running the tracks of human beings, as is frequently evidenced by the lost dog trailing his master's track long distances and through crowded streets, and finally overtaking him, which demonstrates the further fact that some distinctive peculiarity exists between different persons which can be recognized and known by a dog. And it is a well known fact that the bloodhound can be trained to run the tracks of strangers; and in this the "training" consists only in being taught to *pursue* the *human* track; the gifts or powers or instincts being already inherent in the animal, he is induced to exercise them under the persuasive influence and protection of his trainer or master. Once trained in this pursuit, we must assume that his accuracy depends not upon his training, but upon the degree of capacity bestowed upon him by nature. Experience and common observation show that among dogs of the full blood and full brothers and sisters, one or more may be highly proficient, while others will be inefficient, unreliable and sometimes worthless; some may be acute to scent, while others will be dull to scent and incapable of running a "cold" track. Then again we may find the most reliable and favorite hound taking

> the "fresher" track which crosses his trail, or quitting the "cold" trail of a fox and following the "hot" track of a deer which he may strike. Likewise, the pointer or setter may abandon a "cold" trail of a covey of birds and follow a "warmer" one upon which he may happen to run. Or the squirrel dog may leave the tree at which he has taken his stand and barked, and go to another, or quit entirely. So it does no violence to common experience to assume that dogs are liable to be deficient in their instincts. Therefore, we frequently hear huntsmen speak of some dogs as "true" and "staunch," while others will be denounced as unreliable or "liars." It sometimes happens that the best trained foxhounds will lead their master into a rabbit chase, or a pointer will hold his master with trembling excitement while he "points" a terrapin.

State v. Moore, 129 N.C. 494, 498-99, 39 S.E. 626, 627-28, 55 L.R.A. 96, 98 (1901).

The case is remanded to the Superior Court of Alamance County with direction that it be remanded to the district court of that county for the entry of an order dismissing the action.

Judge HEDRICK concurs in the result only.

Judge MARTIN (Robert M.) concurs in the result.

Judge HEDRICK concurring in result only:

I concur completely in the decision that the citation in question does not charge an offense. I am compelled to register, however, my opposition to using the North Carolina Court of Appeals Reports to publish my colleague's totally irrelevant, however learned, dissertation on dogs.

R.L. HOWELL, LAMAR SIMMONS, AND WIFE, DORIS G. SIMMONS, BRUCE B. BLACKMON AND WIFE, LELIA L. BLACKMON, BRUCE B. BLACKMON, JR., KATYE BLACKMON, OSCAR RIVENBARK, J.K. WILLIFORD, AND WIFE, EILEEN WILLIFORD, NORA RIVENBARK v. C. PAGE FISHER and SOIL TESTING SERVICES OF CAROLINA, INC. (IDENTICAL BY CHANGE OF NAME WITH GEOTECHNICAL ENGINEERING COMPANY, INC.)

No. 8011SC340

(Filed 18 November 1980)

Negligence § 2; Corporations § 6; Rules of Civil Procedure § 19– negligent misrepresentations in soil report – action by stockholders – corporation not necessary party

A corporation is not a necessary party when stockholders seek damages in their own right for negligent misrepresentations made to them before they were stockholders for the purpose of inducing their investment, and a sufficient legal basis existed to support plaintiffs' allegations of an individual loss, separate and distinct from any damage suffered by the corporation, where plaintiffs alleged that defendants were to prepare a soil testing report to determine the feasibility of mining certain tracts of land leased by the corporation; defendants had express knowledge of the corporation's purpose in obtaining the report; defendants knew the specific persons to whom the report would be shown; defendants knew that the report was intended to induce plaintiffs' investment in the corporation; and plaintiffs did buy capital stock in the corporation for $184,000 and did lend it $204,000.

APPEAL by plaintiffs from *Hobgood, (Robert H.), Judge.* Judgment entered 19 February 1980 in Superior Court, HARNETT County. Heard in the Court of Appeals 8 October 1980.

Plaintiffs sued defendants for the negligent preparation of a soil testing report which induced them to invest in a corporation that is now insolvent. Defendants moved for dismissal of the action pursuant to G.S. 1A-1, Rule 12(b)(6) and 12(b)(7). In its order of 19 February 1980, the court denied the 12(b)(6) motion but granted the 12(b)(7) motion and dismissed the claim for failure to join a necessary party, the corporation.

Plaintiffs made the following allegations in their complaint to support a claim for relief. The individual defendant, C. Page Fisher, is a geologist and professional engineer. He is president of the defendant corporation, a geological engineering firm, which performs soil tests to determine the quality, quantity and value of minerals in land tracts and their mining potential. Defendants prepare written reports and evaluations for per-

sons interested in mining the soil and prospective investors and lenders of mining businesses.

In 1976, Howell Industries, Inc. [hereinafter Howell] was a corporation existing under the laws of this State engaged in mineral exploration with its principal place of business in Harnett County. At that time, Howell was the lessee of four tracts of land in Jones, Pender and Bertie counties. Howell wanted to mine these tracts and therefore requested defendants to prepare a geological feasibility study. On 4 May 1976, Howell and defendants entered into a contract for this purpose. The terms of the contract were incorporated in a letter sent to Howell by Arthur W. Hayes, an agent and principal geologist of defendant corporation. In pertinent part, Hayes stated in the letter: "It is our understanding that you require our services to assist Howell Industries obtain a loan for the mill(s), through a professional statement regarding the feasibility of mining on these tracts. In addition, we understand that you require our assistance in obtaining the four mining permits . . . ."

A soil study of the tracts leased by Howell was conducted, and Hayes sent the following report to Howell 10 June 1976:

> It is our opinion that these varied deposits will provide excellent products for different needs in the State and perhaps, neighboring states. The various strata can produce high-calcium livestock feed supplement, agricultural lime for soil neutralization, road surfacing, and stabilization material, and crushed limestone aggregate for construction. Simple processing, such as crushing, washing, screening, and perhaps some blending is all that would be required to prepare a high-quality product . . . . A conservative estimate of total mass available for extraction is 6.63 million tons. Based upon current prices, the potential gross sales of these materials, f.o.b. plant, is conservatively estimated to be $81.20 million.

Defendants later repudiated this report but agreed to do another study of the four tracts as well as one additional tract that had been acquired by Howell in the interim. In the 27 September 1976 letter disavowing the earlier evaluation, defendant Fisher stated:

> As of this time, I will be the principal of Geotechnical Engineering Company who is responsible for the Howell project . . . .
>
> Dr. Hayes will no longer be associated with the project and I am making contact with those individuals at Branch Banking & Trust Company, North Carolina National Bank, Peat, Marwick, Mitchell & Company, and with various state agencies with whom he had contact in your behalf, to so inform them.

On 12 October 1976, defendants submitted a final study from the soil testing of the five tracts. The report was identical with the previous one except that it estimated the total mass available for extraction at ten million tons with a potential gross sales value of $65.35 million.

Subsequently, between 12 October and 3 December 1976, Dr. C.E. Howard, an agent and employee of defendants, showed the report to plaintiffs. A material allegation in plaintiffs' complaint is that Dr. Howard

> gave copies thereof to the plaintiffs for the purpose of inducing the plaintiffs to invest in the stock of Howell; that Dr. C.E. Howard is a geologist and as such represented to the plaintiffs that, based on said report, an investment in the capital stock of Howell would be a good investment and would return a substantial profit to the investor.

Thereafter, plaintiffs bought capital stock in Howell for $184,000.00 and lent it $204,000.00. Plaintiffs allege that this total investment of $388,000.00 was made in reliance upon defendants' evaluation report of 12 October 1976 and the representations made by defendants' agent, Dr. Howard.

After plaintiffs became stockholders, Howell began mining the Harriet tract. In the course of its operations, it soon discovered that the quality, quantity and value of minerals therein did not conform to defendants' representations in the mining feasibility study. Apparently, defendants had grossly exaggerated and overstated the mineral content in the tracts. Because there were insufficient minerals for mining, Howell became insolvent. Howell is now "defunct, inoperative and is no longer

engaged in the mining business." Plaintiffs' capital investments and loans to Howell are, therefore, totally worthless.

Plaintiffs brought suit against defendants alleging that they were negligent in conducting the soil tests and in providing incomplete and misleading information about the feasibility of and the potential value to be derived from mining the properties. Plaintiffs sought damages equivalent to their original total investment in Howell ($388,000.00) and punitive damages of $250,000.00. Upon defendants' motion, the court dismissed the action for failure to join the necessary party of Howell. From that dismissal, plaintiffs now appeal.

Bryan, Jones and Johnson, by James M. Johnson, for plaintiff appellants.

Ragsdale and Liggett, by Peter M. Foley, and Manning, Fulton and Skinner, by Howard E. Manning, Jr., for defendant appellees.

VAUGHN, Judge.

The issue is whether plaintiff-stockholders' suit was properly dismissed under Rule 12(b)(7) for failure to join the corporation as a necessary party. Plaintiffs contend that the court committed error on two alternative bases: (1) that even if the corporation were a necessary party, the action should have been continued to permit joinder; (2) the corporation was not, however, a necessary party because the complaint was an individual claim for personal wrongs done to them by defendants. At the outset, we note that dismissal under Rule 12(b)(7) is proper only when the defect cannot be cured, and the court ordinarily should order a continuance for the absent party to be brought into the action and plead. *Booker v. Everhart*, 294 N.C. 146, 240 S.E. 2d 360 (1978); *Carding Developments v. Gunter & Cooke*, 12 N.C. App. 448, 183 S.E. 2d 834 (1971); Shuford, N.C. Civil Practice and Procedure § 19-3 (1975); 3A Moore's Federal Practice ¶ 19.07-1[3] (2d ed. 1979); 5 Wright & Miller, Federal Practice and Procedure: Civil § 1359 (1969). The record does not indicate that plaintiffs were given an opportunity to join the corporation before dismissal. It is unnecessary, however, to formulate a holding on this question since we agree with plaintiffs' second contention and reverse the dismissal because the corporation, in these circumstances, was not a necessary party.

If shareholders bring an action to enforce a primary right belonging to the corporation, their claim is derivative, and the corporation is a necessary party. *Underwood v. Stafford*, 270 N.C. 700, 155 S.E. 2d 211 (1967); *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279, *appeal dismissed*, 296 N.C. 740, 254 S.E. 2d 181 (1979). The well established rule is that shareholders cannot maintain an individual action against third persons for wrongs or injuries to the corporation which result in depreciation or destruction of the value of their stock. *Jordan v. Hartness*, 230 N.C. 718, 55 S.E. 2d 484 (1949); *Hoyle v. Carter*, 215 N.C. 90, 1 S.E. 2d 93 (1939); Annot., 167 A.L.R. 279 (1947). There is, however, a notable exception to the general rule

> which permits a stockholder to maintain an action in his own right for an injury directly affecting him, although the corporation also may have a cause of action growing out of the same wrong, where it appears that the injury to the stockholder resulted from the violation of some special duty owed the stockholder by the wrongdoer and having its origin in circumstances independent of the plaintiff's status as a stockholder.

167 A.L.R. at 285.

Our courts recognize this exception and permit a shareholder to bring an individual cause of action "[i]f he can, in addition, 'allege a loss peculiar to himself,' by reason of some special circumstances or special relationship to the wrongdoers . . . ." Robinson, N.C. Corporation Law § 14-2, at 287 (2d ed. 1974). When the injuries complained of are "peculiar or personal" to the shareholders, the corporation is not a necessary party to the suit since any damages recovered do not pass to the corporation or indirectly to its creditors. *Snyder v. Freeman*, 300 N.C. 204, 266 S.E. 2d 593 (1980); *Underwood v. Stafford*, 270 N.C. 700, 155 S.E. 2d 211 (1967).

In light of the foregoing principles, the question at bar is reduced to whether a legal basis exists to support plaintiffs' allegations of an individual loss, separate and distinct from any damage suffered by the corporation. There are only two possible avenues of recovery: in contract or in tort.

Since this case arises in a contractual setting, we must determine whether plaintiffs may maintain an individual claim

based upon the contract between the corporation and defendants. "It is well settled in North Carolina that where a contract between two parties is intended for the benefit of a third party, the latter may maintain an action in contract for its breach . . . ." *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 265, 257 S.E. 2d 50, 55, *discretionary review denied*, 298 N.C. 296, 259 S.E. 2d 301 (1979). An intended beneficiary, despite a lack of privity, may sue on the contract, either for its performance or damages. In addition, the corporation is not a necessary party when a shareholder claims a personal loss for a breach of contract as an intended beneficiary thereof. *Snyder v. Freeman*, 300 N.C. 204, 266 S.E. 2d 593 (1980). Plaintiffs, however, have failed to meet the test for bringing a claim for defendants' breach of contract in these circumstances. "The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts." *Vogel v. Supply Co.*, 277 N.C. 119, 128, 177 S.E. 2d 273, 279 (1970); Restatement (Second) of Contracts § 133 (1973). The allegations in plaintiffs' complaint do not establish a claim as intended beneficiaries of the corporation's contract for there is no recital that the contract was entered into for their direct benefit. *Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E. 2d 313, *review denied*, 300 N.C. 374, 267 S.E. 2d 685 (1980). Indeed, the record plainly indicates that the contract for soil testing services was entered into for the corporation's sole benefit to enable it to obtain the necessary loans and permits for its mining operations.

Plaintiffs' complaint does, nonetheless, allege a cause of action based on defendants' negligence. Defendants assert that privity is a threshold obstacle to plaintiffs' claim for individual losses in negligence. We do not agree for two reasons.

First, as a general matter, sound reason dictates that negligence liability be imposed, in appropriate circumstances, to protect the foreseeable interests of third parties not in privity of contract.

> [B]y entering into a contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that B will not be injured. The incidental fact of the existence of

> the contract with A does not negative the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person.

Prosser, Handbook of the Law of Torts § 93, at 622 (4th ed. 1971). In several recent cases, this Court has held that a third party, not in privity of contract with a professional person, may recover for negligence which proximately causes a foreseeable economic injury to him. *Condominium Assoc. v. Scholz Co.*, 47 N.C. App. 518, 268 S.E. 2d 12 (1980) (condominium owners may recover for an architect's negligent design of a water pipe system); *Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E. 2d 313, *review denied*, 300 N.C. 374, 267 S.E. 2d 685 (1980) (equipment lessor may recover for a lawyer's negligent failure to discover the existence of a lien on property used as collateral in a leasing agreement); *Browning v. Levien & Co.*, 44 N.C. App. 701, 262 S.E. 2d 355, *review denied*, 300 N.C. 371, 267 S.E. 2d 673 (1980) (builders may recover from an architectural firm for negligent overcertification to the construction lender of the amount of work performed by a contractor) [*see also Kornitz v. Earling & Hiller, Inc.*, 49 Wis. 2d 97, 181 N.W. 2d 403 (1970)]; *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 257 S.E. 2d 50, *review denied*, 298 N.C. 296, 259 S.E. 2d 301 (1979) (a contractor may recover for an architect's negligence in approving defective materials and workmanship).

Second, and more particularly, plaintiffs' claim is an action for negligent misrepresentation which may be brought, absent privity of contract, to recover pecuniary loss. *See* Prosser, Handbook of the Law of Torts § 107 (4th ed. 1971); 57 Am. Jur. 2d, Negligence §§ 49, 51 (1971). In essence, plaintiffs allege a twofold basis for defendants' liability: (1) negligence in the misrepresentations of the soil content in the test reports which defendants knew would be used to induce plaintiffs to become stockholders in the corporation; and (2) negligence in the affirmative misrepresentations of Dr. Howard, defendants' agent, to plaintiffs that "based on said report, an investment in the capital stock of Howell would be a good investment and would return a substantial profit to the investor."

An action for negligent misrepresentation by third persons lacking privity to recover economic loss has only recently

gained acceptance, but it now appears to be the prevailing American law. Prosser, *Misrepresentation and Third Persons*, 19 Vand. L. Rev. 231 (1966). The action was long resisted on grounds similar to Chief Judge Cardozo's oft-quoted fears in *Ultramares Corp. v. Touche*, 255 N.Y. 170, 179-80, 174 N.E. 441, 444 (1931):

> If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.

In *Ultramares*, the Court refused to impose negligence liability upon an accountant to a third party for negligent preparation of a balance sheet. The defendant was aware that his client would use the financial statement to obtain extensive credit. The defendant was, however, unaware of the names or numbers of possible lenders to whom the sheet would be shown. Accountant liability has since been imposed for negligent misrepresentations in an audit where the plaintiff was identified and the defendant had special reason to expect his reliance or action. *See American Indemnity Co. v. Ernst & Ernst*, 106 S.W. 2d 763 (Tex. Civ. App. 1937); Annot., 46 A.L.R. 3d 979 (1972). The rationale of *Ultramares* is not, therefore, controlling where the damages to an identified third party are reasonably foreseeable by the defendant. *Tartera v. Palumbo*, 224 Tenn. 262, 453 S.W. 2d 780 (1970) (surveyor hired by purchaser of property may be liable for negligent misrepresentation to plaintiff-owners for losses due to a mistaken description in the warranty deed executed in reliance upon his negligent survey).

In the instant case, there can be little doubt that plaintiffs sufficiently alleged that defendants should have reasonably foreseen the damages they would suffer if the soil reports were incorrect. In the contract, defendants specifically acknowledged that the corporation needed the reports to obtain a loan and stated that they would assist it in this regard. Moreover, the degree of defendants' assistance in the corporation's finan-

cial activities is indicated in defendant Fisher's letter of 27 September 1976. He stated that he would be "making contact" with the banks the corporation had been dealing with to inform them that his company would be preparing another soil evaluation of the tracts. This fact alone indicates that defendants knew the soil reports were being relied on by the corporation's lenders and investors. Finally, plaintiffs stated that Dr. Howard, defendants' agent, personally delivered and exhibited copies of the report to them for the purpose of inducing them to invest in the corporation. In sum, the complaint alleges that defendants had express knowledge of the corporation's purpose in obtaining the report, the specific persons to whom the report would be shown, and the transaction which it was intended to induce: plaintiffs' investment in the corporation.

In these circumstances, *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922), provides the applicable rationale for imposition of liability. In *Glanzer*, a public weigher was negligent in weighing beans for the seller which were subsequently purchased by plaintiff at a loss. The Court held the weigher liable to the purchaser for the negligence because:

> [t]he plaintiffs' use of the certificates was not an indirect or collateral consequence of the action of the weighers. It was a consequence which, to the weighers' knowledge, was the end and aim of the transaction. Bech, Van Siclen & Co. [seller] ordered, but Glanzer Brothers [plaintiff] were to use. The defendants held themselves out to the public as skilled and careful in their calling. They knew that the beans had been sold, and that on the faith of their certificate payment would be made. They sent a copy to the plaintiffs for the very purpose of inducing action. All this they admit. In such circumstances, assumption of the task of weighing was the assumption of a duty to weigh carefully for the benefit of all whose conduct was to be governed.

233 N.Y. at 238-39, 135 N.E. at 275-76. Liability for negligent misrepresentations has been found in many similar cases. For example,

> [t]he defendant is liable where, without proper care, he provides B with a title or weight certificate, an ab-

> stract of title, an appraisal, an audit, or a report of a boiler inspection, knowing that B intends to pass it on to C and that C is contemplating action in reliance upon it. The report may even be sent by the defendant to C at the request of B, or the defendant may be informed that B and C expect to act in concert.

Prosser, *Misrepresentation and Third Persons*, 19 Vand. L. Rev. 231, 242 (1966).

The Restatement (Second) of Torts § 552 (1977) is in accord with the *Glanzer* approach. It provides that:

> [o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

In deference to legitimate fears of "indeterminate" liability to third persons, the Restatement narrows the scope of an action for negligent misrepresentations. The action must be brought by the person or a limited group of persons, to whom defendant intended the information to be supplied, who have suffered a loss in reliance upon the information in a transaction which defendant intended the information to influence. Restatement, *supra*, § 552(2)(a)-(b). Plaintiffs' claim unquestionably comes within the permissible range of negligent misrepresentation actions where it is alleged that defendants prepared the soil test reports with express knowledge that they would be used to induce plaintiffs to invest in the corporation and defendants' agent so advised plaintiffs upon the reliability of the soil reports.

This Court endorsed the Restatement position in *Davidson & Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 255 S.E. 2d 580, *review denied*, 298 N.C. 295, 259 S.E. 2d 911 (1979). The Court held that a firm of soil testing engineers could be liable for damages to third party contractors who relied on the reports, which negligently misrepresented the subsurface soil conditions, in submitting their bids.

> In performing its contractual duties, Soil and Material Engineering, Inc. was under a common law duty to use due care. To the extent that plaintiff and third-party defendants have alleged a breach of that duty of due care and that the breach was a proximate cause of their injury, they have stated a cause of action.

41 N.C. App. at 669, 255 S.E. 2d at 585. In an analogous case, the California Court reversed summary judgment for defendant where plaintiff alleged that it had contracted with a sanitary district to build a sewer system and suffered loss as a result of defendant's negligent preparation of soil tests for the district. *M. Miller Co. v. Dames & Moore*, 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (1961); *see* Restatement (Second) of Torts § 552, Illustration 9 (1977).

We conclude that plaintiffs have stated an individual claim in negligence for injuries "peculiar or personal" to themselves, which are distinct from any damages suffered by the corporation. In such circumstances, the corporation is not a necessary party to the action. *Snyder v. Freeman*, 300 N.C. 204, 266 S.E. 2d 593 (1980); *Underwood v. Stafford*, 270 N.C. 700, 155 S.E. 2d 211 (1967); Robinson, N.C. Corporation Law § 14-2 (2d ed. 1974). Two further observations are appropriate: (1) plaintiffs' claim is based on a theory of negligence whereas any possible claim by the corporation would probably be on its contract; (2) plaintiffs' claim cannot be a derivative one, on behalf of the corporation, when the alleged negligence occurred before they were even stockholders. *See Sutter v. General Petroleum Corp.*, 28 Cal. 2d 525, 170 P. 2d 898 (1964) (plaintiff-stockholder allowed to individually recover for fraudulent misrepresentations which induced him to form and invest in a corporation).

We hold that a corporation is not a necessary party when stockholders seek damages in their own right for negligent misrepresentations made to them before they were stockholders for the purpose of inducing their investment. Thus, it was error to grant defendants' motion to dismiss under G.S. 1A-1, Rule 12(b)(7).

The judgment appealed from is reversed.

Reversed.

Chief Judge MORRIS and Judge WELLS concur.

State v. King

STATE OF NORTH CAROLINA v. HOWARD FRANKLIN KING

No. 8019SC514

(Filed 18 November 1980)

1. **Criminal Law § 75.9– in-custody statement – admissibility – failure to make specific findings of fact**

The trial court did not err in admitting into evidence a statement made by defendant on the way to the police station, although the court failed to make specific findings of fact to support its conclusions, where the evidence on *voir dire* was not conflicting and supported the court's conclusions that the statement was not the result of any custodial interrogation; that defendant made the statement freely and voluntarily without duress, coercion or inducement; that the officer did not question defendant or in any way induce his confession; and that the *Miranda* rule was not applicable to the statement in question.

2. **Homicide § 28– self-defense – instruction – murderous assault – great bodily harm**

The trial court's instruction that defendant could use reasonable force to defend himself if he reasonably believed that a "murderous assault" was being made upon him was not erroneous where the charge as a whole clearly explained the principle that defendant must have reasonably believed that he needed to save himself from death "or great bodily harm" to establish self-defense.

3. **Homicide § 28.4– defense of habitation – when applicable**

The defense of habitation is available only to prevent a forcible entry into the habitation and does not apply where one remains in a home after being directed by the owner to leave.

4. **Homicide § 26– second-degree murder – instructions – specific intent – intoxication**

The trial court's instructions that "the law does not require any specific intent for the defendant to be guilty of the crime of second degree murder or of voluntary manslaughter" and, therefore, "the defendant's intoxication can have no bearing upon your determination of his guilt or innocence of these crimes" constituted a correct statement of the law.

5. **Homicide § 27.1– instructions – absence of malice**

The trial court's instructions on voluntary manslaughter did not limit the jury to a finding of an absence of malice only if the State failed to prove that defendant acted in the heat of passion or that defendant acted in self-defense.

APPEAL by defendant from *Albright, Judge*. Judgment entered 10 January 1980 in Superior Court, ROWAN County. Heard in the Court of Appeals 10 October 1980.

State v. King

Defendant appeals from a judgment of imprisonment after a verdict of guilty on the charge of murder in the second degree was returned by the jury. The offense occurred on 22 September 1979; defendant was indicted on 19 November 1979. Defendant pleaded not guilty.

The decedent, George Lee Comer, was thirty-five years old, 5 feet 8 inches tall, and weighed 154 pounds. Defendant, Howard Franklin King, was fifty-nine years old, was 5 feet 4 inches tall, and weighed about 122 pounds. Comer died as a result of a close-range gunshot wound.

The evidence for the state tends to show that during the evening of 21 September and early morning of 22 September 1979, King, Comer, and others were in King's home. A young girl named Beth Santas was in a back room; everyone else had been drinking for some time. No arguments or fights took place while the others were in the house, but King told Comer not to go in the room where Beth was. Some of the guests started to leave. One guest, Linda Morris, saw King with a shotgun pointed in the direction of Comer. She told King not to shoot him; King told her to leave. When Morris got to the car she heard a shot, returned to the house, and saw Comer on the floor. King called the police and an ambulance.

When the police arrived King invited them in and told them he had shot and killed a man. His statement was not in response to any question. A shotgun was in the kitchen. On the way to the station house King made a statement, not in response to any question, that he had shot Comer, who deserved to die. He later made a further statement that Comer had been bothering Beth and that King had told Comer several times to leave her alone. Comer had grabbed King and thrown him across the bed. King told Comer he would have to leave; Comer did not leave, and King got a shotgun. As Comer advanced towards him, King shot him. He meant to kill Comer.

At the close of the state's evidence, defendant moved for dismissal. The motion was denied.

King testified in his own behalf. His testimony tended to show that George Comer had lived at King's house for about a month. Comer did not pay rent. On 21 September 1979 a girl named Beth came to King's place with no place to stay. King

offered to let her stay at his house in exchange for her doing housework. King told Comer several times not to "mess" with Beth, to leave her alone, but Comer persisted in going to the room she was in and bothering her. Just before the shooting Comer had gone to Beth's room. When King asked Comer to come out, Comer knocked him across a bed. King told Comer to leave the house. King got a shotgun and again told Comer to leave, but Comer did not, and circled around the room. With his hands about his hips, Comer came within four feet of King, who told him to stop. It was rather dark and King couldn't see if Comer had anything in his hands. King was afraid because Comer was bigger and stronger than he, and he had seen Comer carry a knife on other occasions. King had heard Comer threaten to kill his wife on the telephone and make a statement about killing "younguns" at an earlier time. After he shot, King told someone to call the police, then he blacked out and didn't remember much after that.

At the close of all the evidence, defendant made a motion to dismiss, which was denied.

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

Robert M. Davis for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant's first assignment of error is that the trial court erred in admitting into evidence a statement made by King on the way to the station house. He argues that the court committed prejudicial error by failing to find specific facts that support the conclusions of law which allowed King's confession into evidence.

The record reveals that a *voir dire* hearing was conducted, upon defendant's objection to testimony, to determine the admissibility of the statement. Officer Rollins, who had transported King to the station, testified as to the circumstances surrounding King's statement. Defendant offered no evidence at the *voir dire*. The court found the facts "to be as all the evidence tends to show." The court concluded as a matter of law that the statement was not the result of any custodial interrogation; rather, defendant made the statement freely and volun-

tarily without duress, coercion, or inducement; that the officer did not question defendant nor in any way induce his confession; and that the *Miranda* rule was not applicable to the statement in question.

It is correct that the general rule is that a trial court judge should make findings of fact to show the basis of his rulings concerning the admissibility of a confession. *State v. Silver*, 286 N.C. 709, 213 S.E. 2d 247 (1975); *State v. Moore*, 275 N.C. 141, 166 S.E. 2d 53 (1969). In *State v. Lynch*, 279 N.C. 1, 15, 181 S.E. 2d 561, 570 (1971), the Supreme Court noted that it is "always the better practice for the court to find the facts upon which it concludes any confession is admissible." But where "no conflicting testimony is offered on *voir dire*, it is not error for the judge to admit the confession without making specific findings of fact." *State v. Simmons*, 286 N.C. 681, 692, 213 S.E. 2d 280, 288 (1975), *death pen. vac.*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976). *Accord, State v. Lynch, supra; State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511 (1968); *State v. Keith*, 266 N.C. 263, 145 S.E. 2d 841 (1966). Although defendant King later testified that he did not remember what he said going to the police station, that he blacked out, there is no evidence that the confession was involuntary or in any way unconstitutional. Despite the fact that the trial judge's findings are non-specific, there is ample evidence to support his conclusions and ruling which admitted the statement into evidence. This assignment of error is overruled.

[2] Defendant's second assignment of error deals with Judge Albright's charge to the jury. Defendant objects to the portion of the instruction regarding self-defense:

> Now, Members of the Jury, the Court further charges you that if the defendant reasonably believed that a murderous assault was being made upon him in his own home, he was not required to retreat, but to stand his ground and use whatever force he reasonably believed to be necessary to save himself from death or great bodily harm. It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time.

Defendant argues that it was error to instruct the jury that defendant could use reasonable force to defend himself if he

reasonably believed that a "murderous assault" was being made upon him because the defense applies to felonious assaults as well as those in which it appears that the assailant had the intent to kill. Defendant relies on the decision in *State v. Mosley*, 213 N.C. 304, 195 S.E. 830 (1938), in which the trial judge charged the jury that "[a] man must in good faith believe he is going to be killed," in order to have the right to use such force as he believes necessary to protect himself. The Supreme Court held it was erroneous to have omitted any reference to "the apprehension of great bodily harm," and ordered a new trial. In the disputed charge in the present case, however, the judge referred to the applicability of the defense with regard to "great bodily harm" in the same sentence, as well as in other portions of the charge. It is a well-familiar rule that "[t]he charge of the court will be construed contextually and segregated portions will not be held prejudicial error when the charge as a whole is free from objection." 4 Strong's N.C. Index 3d Criminal Law § 168 (1976). *Accord, State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683, *cert. denied*, 409 U.S. 948, 34 L. Ed. 2d 218 (1972); *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971). The trial judge clearly set out and explained the principle that defendant must have reasonably believed that he needed to save himself from death or great bodily harm to establish self-defense. Defendant's testimony regarding the circumstances at the time of the shooting were summarized. The instruction on self-defense, taken in context and as a whole, was not erroneous.

[3] Defendant contends that Comer became a trespasser when he was told to leave and refused to do so, and that defense of habitation became available to defendant at that time, and implies that the court erred in failing to so instruct the jury. Defendant relies on *State v. Kelly*, 24 N.C. App. 670, 211 S.E. 2d 854 (1975), in which Judge Clark held: "One who remains in a home after being directed to leave is guilty of a wrongful entry and becomes a trespasser, even though the original entry was peaceful and authorized, and a householder may use such force as reasonably necessary to eject him." *Id.* at 672, 211 S.E. 2d at 856. The defendant in *Kelly* was granted a new trial because of the trial court's failure to instruct on defense of habitation, despite a proper charge on self-defense, where the evidence tended to show that defendant had requested deceased to leave several times before shooting him.

The *Kelly* decision has been effectively overruled, however. In *State v. McCombs*, 297 N.C. 151, 253 S.E. 2d 906 (1979), the Supreme Court limited right to an instruction on the defense of habitation to those rare occurrences in which a defendant acts to *prevent* a forcible entry into his home. Justice Branch (now Chief Justice) reviewed the applicable rules of law regarding this defense to distinguish between the defense of habitation and ordinary self-defense, which "has become somewhat blurred due to the varied factual situations in which these defenses arise." *Id.* at 154, 253 S.E. 2d at 909. He concluded that defense of habitation is available only "to *prevent* a forcible entry into the habitation under such circumstances . . . that the occupant reasonably apprehends death or great bodily harm to himself or other occupants at the hands of the assailant or believes that the assailant intends to commit a felony." *Id.* at 156-57, 253 S.E. 2d at 910.

> Once the assailant has gained entry, however, the usual rules of self-defense replace the rules governing defense of habitation, with the exception that there is no duty to retreat. . . .
>
> . . . [I]t is well settled that a person is entitled to defend his property by the use of reasonable force, subject to the qualification that, in the absence of a felonious use of force on the part of the aggressor, human life must not be endangered or great bodily harm inflicted. [Citations omitted.] Likewise, when a trespasser invades the premises of another, the latter has the right to remove him, and the law requires that he should first request him to leave, and if he does not do so, he should lay his hands gently upon him, and if he resists, he may use sufficient force to remove him, taking care, however, to use no more force than is necessary to accomplish that object. [Citation omitted.] Should we extend the availability of the defense of habitation to cover *any* invasion of the home, every occupant who kills a person present in his home without authorization would be entitled to an instruction on defense of habitation. Such extension is both unwarranted and unnecessary.

Id. at 157-58, 253 S.E. 2d at 910-11.

Under the rule of *McCombs*, it is clear that defendant King was not entitled to an instruction on the defense of habitation. That assignment of error is overruled.

[4] Defendant also excepts to the charge as it pertains to specific intent, as related to defendant's evidence of his intoxication at the time of the shooting:

> Now, Members of the Jury, the Court further charges you that there is evidence which tends to show that the defendant was intoxicated at the time of the crime alleged in this case. Now, the law does not require any specific intent for the defendant to be guilty of the crime of second degree murder or of voluntary manslaughter. Thus, the defendant's intoxication can have no bearing upon your determination of his guilt or innocence of these crimes.

The disputed charge is a correct statement of the law. While intoxication may negate the specific intents of premeditation and deliberation necessary to prove first degree murder, it is not a defense to second degree murder. *State v. Couch*, 35 N.C. App. 202, 241 S.E. 2d 105 (1978). *See also State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975), *death pen. vac.*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976). Defendant's argument that the charge implied that the jury need not find any intent to shoot the victim is entirely without merit. That portion of the charge clearly relates only to specific intent, not to the general intent required of second degree murder. The trial judge previously had set out the elements necessary to prove second degree murder, and summarized those elements again immediately following the excepted-to portion of the charge. The exception is overruled.

[5] Defendant's final argument concerns the instruction on voluntary manslaughter:

> If you do not find the defendant guilty of second degree murder, you must consider whether he is guilty of voluntary manslaughter. If you find from the evidence and beyond a reasonable doubt that on or about September twenty-second, 1979 Howard Franklin King, intentionally and without justification or excuse shot George Lee Comer with a four/ten gauge shotgun, thereby proximately causing George Lee Comer's death, but that the state has failed

to satisfy you beyond a reasonable doubt that the defendant acted with malice because it has failed to satisfy you beyond a reasonable doubt that Howard Franklin King did not act in the heat of passion upon adequate provocation or because it has failed to satisfy you beyond a reasonable doubt that Howard Franklin King did not act in self-defense, but the state has proved beyond a reasonable doubt that Howard Franklin King used excessive force in his self-defense or was the aggressor, although without murderous intent about bringing on the dispute with George Lee Comer, it would be your duty to return a verdict of guilty of voluntary manslaughter. However, if you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Defendant contends that the jury was limited in its determination of whether the state had proved malice to two situations: failure to prove defendant did not act in the heat of passion, and failure to prove defendant did not act in self-defense.

Earlier in the charge the judge had properly defined voluntary manslaughter as "the unlawful killing of a human being without malice and without premeditation." *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979); *State v. Benge*, 272 N.C. 261, 158 S.E. 2d 70 (1967). He then fully and correctly explained malice. N.C.P.I. — Crim. 206.10. The burden of proving malice was placed upon the state. In the objected-to portion of the charge, the jury's responsibility for determining whether the state had proved each element of the offenses was correctly stated. It does not appear the jury would have been confused or misled. The assignment of error is overruled.

Defendant received a fair trial free of prejudicial error.

No error.

Judges ARNOLD and HILL concur.

State v. Bradsher

STATE OF NORTH CAROLINA v. ROBERT BRADSHER

No. 8015SC547

(Filed 18 November 1980)

1. **Robbery § 2– armed robbery – location where acts occurred – sufficiency of indictment**

An indictment which charged defendant with armed robbery sufficiently designated the address or location of premises where the alleged acts occurred and was otherwise sufficient to charge defendant with the named crime.

2. **Criminal Law § 91– speedy trial – method of computing delay**

There was no merit to defendant's contention that the trial court erred in denying his motion to dismiss on the ground that a speedy trial was not afforded him as required by the Speedy Trial Act, since the trial court properly excluded the period from 1 October 1979 through 5 November 1979, as defendant requested a continuance during that period, and the trial court properly excluded from the 120 day time limit eight days during which the withdrawal of counsel and appointment of new counsel took place.

3. **Robbery § 3.2; Assault and Battery § 13– rifle – proper identification – chain of custody – admissibility**

In a prosecution of defendant for common law robbery and assault with a deadly weapon inflicting serious injury, the trial court did not err in admitting into evidence a rifle purportedly taken during the crimes by defendant, since the rifle was properly identified by police officers, and a sufficient chain of custody between the time of the crime and the trial was shown.

4. **Robbery § 3.2– documents found in vehicle – admissibility**

The trial court in a common law robbery case did not err in admitting into evidence documents purportedly taken from the victim's residence and found 33 days later in an automobile used by defendant and his companions on the night of the incident in question, since the documents were properly identified by the victim as having been in his home on the night in question, and the owner of the automobile testified that he lent his car to one of defendant's companions in crime and that he put no papers in the car between the time it was returned to him and police officers discovered the documents.

5. **Robbery § 4.2– common law robbery – sufficiency of evidence**

Evidence tending to show that defendant struck his victim repeatedly in the head with a shotgun, causing the victim to be hospitalized, was enough to raise the inference, sufficient to withstand a motion to dismiss, that defendant took personal property belonging to the victim by force or putting in fear, and his conviction for common law robbery was therefore proper.

6. **Assault and Battery § 14.3– assault with deadly weapon with intent to kill inflicting serious injury – sufficiency of evidence**

Evidence tending to show that defendant struck his victim repeatedly in

the head with a shotgun causing bleeding and hospitalization was enough to raise the inference, defeating a motion to dismiss, that defendant assaulted his victim with a deadly weapon with intent to kill inflicting serious injury.

7. **Criminal Law § 63– mental condition of assault victim – lay opinion testimony admissible**

The trial court did not err in permitting a police officer to testify concerning changes in the mental condition of the robbery and assault victim, since lay opinion is generally permitted as to the mental capacity of a witness as long as the testimony is based on observations during a period not too remote from the time during which mental capacity is in question.

8. **Criminal Law § 102.6– jury argument – district attorney's remark no grounds for mistrial**

The trial court did not err in refusing to allow a motion for mistrial after the district attorney, in his closing argument to the jury, "stated in substance that as a result of this assault [the victim] has 'scrambled eggs for brains,' " since the record did not indicate the context in which the district attorney's statement arose; it did not give any of the arguments of counsel other than the mere reference to the substance of the challenged statement; and the argument is therefore presumed to be proper.

9. **Criminal Law § 119– request for instructions – instructions given in substance**

There was no merit to defendant's contention that the trial judge erred by refusing to give instructions requested by defendant on accomplice testimony and common law robbery, since the charge did incorporate the substance of the tendered instructions.

APPEAL by defendant from *Clark, Judge.* Judgment entered 16 January 1980 in Superior Court, ALAMANCE County. Heard in the Court of Appeals on 16 October 1980.

Defendant was charged under an indictment dated 4 June 1979 with first degree burglary and armed robbery. An indictment, also dated 4 June 1979, for assault with intent to kill inflicting serious bodily injury, was captioned with defendant's name but erroneously referred to another person. This defect was cured in an indictment dated 2 July 1979.

Counsel was appointed for defendant, but on 28 August 1979 counsel moved to withdraw from the proceedings, and the court allowed the withdrawal. On 30 August 1979 new counsel was appointed for defendant. On 31 August 1979, defendant moved to continue the proceedings from the scheduled date of trial, 4 September 1979, to "the October 1, 1979 Session" on the grounds that the "attorney as appointed August 30, 1979 cannot reasonably become acquainted with the charges herein and

prepare for trial in time for September 1979 Session." The court granted the continuance. The case was not called during the 1 October 1979 session of Alamance County Superior Court, and thereafter, on 17 October 1979, defendant made a second motion for continuance, "from the October 1, 1979 Session to the December 10, 1979 Session." On 25 October 1979, the court granted the continuance.

On 10 December 1979, defendant filed motions to dismiss on the grounds that the indictment did not comply with G.S. § 15A-924(a), and the State made a motion to continue the proceedings until 14 January 1980. That same day the court denied defendant's motion and granted the State's motion, but the court held that the period covered by the State's continuance request would not be an "exclusion of time under the Speedy Trial Act. . . ."

Defendant moved to dismiss the proceedings for failure to comply with the time limits required by G.S. § 15A-701(al) on 10 January 1980. After a hearing, the court made findings of fact and conclusions of law that after providing for the exclusions under G.S. § 15A-701(b), the time remaining between the date of the original indictments and the trial was not greater than the statutory limit of 120 days, and denied defendant's motions. Defendant made similar motions on 14 January 1980, but these also were denied.

At trial, the State's evidence tended to show as follows: Sometime around 1:00 a.m. on 21 February 1979, defendant and two companions, Gordon Devon Moore and Thomas Latta, drove up to the residence of T.K. Wilkinson in Mebane, North Carolina. Defendant walked up to the back door and knocked, and after being admitted into the house by Wilkinson, defendant struck Wilkinson several times on the head with a shotgun. Defendant then took several guns belonging to Wilkinson from a gun cabinet and left the premises. As a result of the blows from the shotgun Wilkinson "couldn't get up" and he lay on a couch until his son-in-law, Thomas Paul Williams, came to the house around 8:30 or 9:00 a.m. that morning. When discovered by Williams, Wilkinson "couldn't see out of but one eye" and he "was just black with blood down to his pocket." Blood was all over the couch, with a "big puddle" on the floor nearby. Wilkinson was hospitalized for several days.

At the close of the State's evidence, the court granted defendant's motion to dismiss the charge of first degree burglary. Defendant offered no evidence.

The jury found defendant guilty of common law robbery and assault with a deadly weapon inflicting serious injury, and the court sentenced defendant to a prison term of "ten (10) years minimum and maximum" on the assault conviction, and to a prison term of "ten (10) years maximum and minimum" on the robbery conviction, the latter sentence to begin at the expiration of the former. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Henry T. Rosser, for the State.

Paul H. Ridge, for the defendant appellant.

HEDRICK, Judge.

[1] Defendant first assigns error to the court's denial of defendant's motion to dismiss based upon the failure of the bill of indictment properly to charge the offense of armed robbery. Specifically, defendant argues that the indictment did not sufficiently "designate the address or location of premises where alleged acts referred to occurred." We do not agree. The indictment plainly states that personal property "of the said T.K. Wilkinson" was taken "from the presence, and residence of T.K. Wilkinson, 308 North Third Street, Mebane, N.C." Furthermore, we have carefully examined the bill of indictment and find it to be in sufficient compliance with the requirements of G.S. §§ 15A-644, 15A-924(a). This assignment of error is without merit.

[2] Defendant contends by his second assignment of error that the court erred in denying defendant's motion to dismiss on the grounds that a speedy trial was not afforded to defendant as required by the Speedy Trial Act, G.S. § 15A-701 *et seq.* Defendant argues that the court committed prejudicial error in excluding the period from 1 October 1979 through 5 November 1979, despite the motion for continuance made on 17 October 1979, on the grounds that the request to continue from "the October 1, 1979 Session" was "an inadvertant mistake by Counsel as evidenced by the fact that Assistant District Attorney did not correspond with Defendant's attorney concerning setting

the cases for trial until October 16, 1979 . . . ." Defendant has cited no authority for this argument, and we see no reason why he should not be bound by his own request for a continuance. The 17 October 1979 request for continuance was in clear, unmistakable language, the trial judge properly followed the dictates of the Speedy Trial Act in granting the continuance, and defendant was given exactly what he requested.

Alternatively, defendant contends the court erred in excluding from the 120 day time limit the period from 28 August 1979 to 4 September 1979. This contention has no merit since the court specifically found, based on G.S. § 15A-701(b)(1), that this period was "a period of delay resulting from other proceedings concerning the defendant, to wit: the withdrawal of counsel and the appointment of new counsel." G.S. § 15A-701(b)(1) in pertinent part provides:

> (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 . . .
>
> d. Hearings on pre-trial motions or the granting or denial of such motions; . . .

Clearly, the finding by the trial judge is supported by the record in this case, which shows that the first counsel appointed for defendant withdrew on 28 August 1979, that the court appointed new counsel on 30 August 1979, and that the first action by new counsel was to move for a continuance in order to get familiar with the case. Moreover, the finding seems to us proper under the statute. *Compare, State v. Rogers,* 49 N.C. App. 337, 271 S.E. 2d 535 (1980). This assignment of error is without merit.

[3] Defendant next contends, based upon his fourth assignment of error, that the court erred in admitting into evidence over defendant's objection State's Exhibit #1, a rifle that was purportedly taken from the Wilkinson residence by defendant. Objects such as the rifle marked as State's Exhibit #1 that are offered at trial as being the particular item that was involved in

the incident at issue are "real evidence," and such an object must be identified as the same object involved in the incident at issue, and it must be shown that the object has not undergone any material change in condition, before the object can be admitted into evidence. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979); *State v. Harbison*, 293 N.C. 474, 238 S.E. 2d 449 (1977). Defendant argues that State's Exhibit #1 did not meet this test of admissibility because the exhibit was not sufficiently identified as being the rifle described in the bill of indictment, and because of the lack of an "appropriate and reliable chain of custody" between the time of the incident at issue and the trial. We disagree. The indictment for armed robbery charged that defendant "did then and there unlawfully, wilfully, forcibly, violently, and feloniously take, steal, and carry away a .35 Remington Lever Action Rifle; ..." State's Exhibit #1 was described by Officer H.S. Lineberry as being a "Remington gun" and though Lineberry was not sure of the exact caliber, he believed it "to be a thirty-five caliber." Captain Thomas J. Long of the Alamance County Sheriff's Department testified that sometime around 19 March 1979, Lineberry had shown him "a lever action thirty-five Remington rifle with a serial number 27058047" that other officers suspected was taken by defendant from the Wilkinson residence, and further testified that:

> I recognize what's marked for identification as State's Exhibit 1 that you show me. I saw that in my office following the 18th or 19th of March. It does have a serial number on it. The serial number on the tag on the receiver of the rifle is 27058047.

With respect to the "chain of custody," the record tends to show that Thomas Latta, one of defendant's companions when defendant went to the Wilkinson residence, was given the rifle identified as State's Exhibit #1 by defendant just after the robbery took place; that Latta took the rifle home; that Latta's mother took the rifle from the home and gave it to Jerry Warren; that Warren then gave the rifle to Officer Ronald R. Porter, who kept it until it was given to Officer Lineberry; and that Lineberry stored the rifle at the City-County Vice Unit until delivery by Lineberry and Captain Long to Chief Tate, who kept the rifle in his custody until the trial.

Moreover, the record contains ample evidence that the exhibit was the rifle taken from the Wilkinson residence by defendant. T.K. Wilkinson testified that the exhibit "looks like" one of the guns taken from his home, and Thomas Paul Williams testified as to a "sticker" he knew to be on the rifle and which he pointed out on the exhibit. In addition, Thomas Latta testified: "The kind of rifle I say I got out of that night of going to Mr. Wilkinson's is the one I just seen a while ago." In our view, State's Exhibit #1 was properly admitted into evidence, and this assignment of error is meritless.

[4] Defendant raises a similar question with respect to his third assignment of error. Defendant contends that the court erred in admitting into evidence over defendant's objection documents purportedly taken from the Wilkinson residence and later found in an automobile used by defendant and his companions on the night of the incident in question. Defendant argues that the documents were not properly identified as being related to the incident in question and that because the documents were not discovered until 33 days after the night in question, the documents were found too remote in time to be relevant. We cannot agree. T.K. Wilkinson testified as to what the documents were, and that they were in his residence on the night in question. The owner of the automobile, Freddy McAdoo, testified that he lent his car to Gordon Devon Moore sometime before 1:00 a.m. on 21 February 1979, and Moore testified that the car was used to take defendant, Moore, and Thomas Latta to and from the Wilkinson residence that night. McAdoo further testified that he did not put any papers into the automobile between the time Moore returned it to him and the time the documents were discovered by the police. In reference to the length of time between the incident and the discovery of the documents by the police, we do not consider 33 days sufficient to render the discovery too remote in time under the circumstances. This assignment of error is without merit.

[5,6] By his fifth and sixth assignment of error, defendant contends the court erred in denying defendant's motion to dismiss the charges of armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury. Since defendant was convicted of common law robbery, a lesser included offense of armed robbery, we see no necessity to discuss

whether the evidence was sufficient to withstand a motion to dismiss on the armed robbery charge, but defendant also argues that "there was not sufficient evidence other than a surmise, suspicion or conjecture as to the element of a taking by force or putting in fear as to the lesser included offense of common law robbery." This contention is meritless. Obviously, the evidence tending to show that defendant struck Wilkinson repeatedly in the head with a shotgun, causing Wilkinson to be hospitalized, is enough to raise the inference, sufficient to withstand a motion to dismiss, that defendant took personal property belonging to Wilkinson "by force or putting in fear." Similarly, with respect to the assault charge, the evidence tending to show that defendant struck Wilkinson as heretofore described, causing bleeding and hospitalization, is enough to raise the inference, defeating a motion to dismiss, that defendant assaulted Wilkinson with a deadly weapon with intent to kill inflicting serious injury. These assignments of error are without merit.

[7] Based on his seventh assignment of error, defendant makes two arguments. First, he contends the court erred in allowing testimony over defendant's objection by Chief Tate as to changes in the mental condition of the victim T.K. Wilkinson. We disagree. Lay opinion is generally permitted as to the mental capacity of a witness, as long as the testimony is based on observations during a period not too remote from the time during which mental capacity is in question. *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977); *State v. Hedrick*, 289 N.C. 232, 221 S.E. 2d 350 (1976). In the present case, Chief Tate was merely testifying from his personal observations of Wilkinson's mental state over a considerable period of time. Tate testified that he had known Wilkinson for thirty years prior to 21 February 1979, that he had seen Wilkinson within a week or two of that date, and that he had talked with Wilkinson "on at least three or four, five occasions" since that date. Tate's observations were obviously within a period "not too remote" from the date of the incident, and his testimony as to Wilkinson's mental state was properly admitted.

[8] Second, defendant contends that the court erred in refusing to allow a motion for mistrial after the District Attorney, in his closing argument to the jury, "stated in substance that as a

result of this assault Mr. Wilkinson has 'scrambled eggs for brains.' " We do not agree. Generally, the attorneys on both sides are given wide latitude in their arguments to the jury, *State v. Hunter*, 297 N.C. 272, 254 S.E. 2d 521 (1979); *State v. McCall*, 289 N.C. 512, 223 S.E. 2d 303, *vacated in part*, 429 U.S. 912, 50 L.Ed. 2d 278, 97 S.Ct. 301 (1976) and the trial judge's rulings thereon will not be disturbed absent a gross abuse of discretion. *State v. Lang*, 46 N.C. App. 138, 264 S.E. 2d 821 (1980); *State v. Hoskins*, 36 N.C. App. 92, 242 S.E. 2d 900, *disc. review denied*, 295 N.C. 469, 246 S.E. 2d 11 (1978). Moreover, when a portion of the argument of either counsel is omitted from the record on appeal, the arguments must be presumed proper. *State v. Hunt*, 37 N.C. App. 315, 246 S.E. 2d 159, *disc. review denied*, 295 N.C. 736, 248 S.E. 2d 865 (1978); *State v. Hoskins*, *supra*. In the present case, although the statement of the District Attorney may not have been well-advised, the record gives no indication as to the context in which the District Attorney's statement arose, nor does it give any of the arguments of counsel other than the mere reference to the "substance" of the challenged statement. The argument of the District Attorney to the jury must, therefore, be presumed proper, as must the trial judge's ruling on defendant's motion for mistrial. Defendant's seventh assignment of error is without merit.

[9] Defendant's eighth and ninth assignments of error relate to the instructions to the jury. Defendant contends the trial judge committed prejudicial error by refusing to give instructions requested by defendant on accomplice testimony and common law robbery. We cannot agree. It is the duty of the trial judge in instructing the jury to declare and explain the law arising on the evidence in the case. G.S. § 15A-1232; *State v. Leslie*, 42 N.C. App. 81, 255 S.E. 2d 635 (1979). The court is not required to give a requested instruction in the exact language of the request, and when the request is correct in itself and supported by the evidence in the case, it suffices if the requested instruction is given in substance. *State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979); *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978).

In the present case, defendant excepted to certain portions of the trial judge's charge to the jury as not properly incorporating his requested instructions on accomplice testimony and

common law robbery. Other portions of the charge, however, when read together with the challenged portions, do incorporate the substance of the tendered instructions in our view, and since we must view the charge to the jury contextually as a whole, *State v. Rogers*, 299 N.C. 597, 264 S.E. 2d 89 (1980); *State v. Alston*, 38 N.C. App. 219, 247 S.E. 2d 726 (1978), *cert. denied*, 296 N.C. 586, 254 S.E. 2d 30 (1979), we find no error in the court's failure to give the exact wording of defendant's requests.

We hold defendant received a fair trial free from prejudicial error.

No error.

Chief Judge MORRIS and Judge MARTIN (Robert M.) concur.

GWENDOLYN S. TAN v. RICARDO M. TAN

No. 805DC375

(Filed 18 November 1980)

1. **Divorce and Alimony § 8– abandonment – sufficiency of evidence**

Plaintiff's evidence was sufficient to be submitted to the jury on the issue of defendant's abandonment of plaintiff where it tended to show that ten days before he moved out, defendant was staying out very late at night and did not come home at all on one occasion; several days later, defendant telephoned plaintiff from his office to tell her he was getting an apartment; defendant thereafter moved all of his belongings from the marital home; defendant had already contacted the telephone company and the electric company to change the billing address when he notified plaintiff of his intention to move out; plaintiff did not do anything to cause defendant to leave home; plaintiff never wrote defendant a note or told him to move out of the house; and the parties had not discussed separation in the week prior to the day defendant moved out.

2. **Divorce and Alimony § 8– abandonment – failure to give requested instructions**

The trial court did not err in refusing to give requested instructions on the issue of abandonment where the instructions given fully and fairly presented the issue of abandonment.

3. **Divorce and Alimony §§ 16.6, 25.11– dependent spouse – child custody – attorney fees**

The evidence supported the court's determination that plaintiff is the dependent spouse and defendant is the supporting spouse, its award of custody of the minor children jointly to the parties, and its award of attorney fees to plaintiff.

4. **Divorce and Alimony §§ 16.9, 24.9– amount of alimony, child support – insufficient findings**

Portion of the court's judgment awarding alimony to plaintiff wife and support for a minor child in her custody was not supported by sufficient findings where the court found that defendant husband's net income after taxes was $30,000 to $32,000, and the court ordered defendant to pay (1) $1,000 per month in alimony to plaintiff, (2) $150 per month for support of a child in plaintiff's custody, (3) an undetermined amount for mortgage payments, taxes and insurance on the home sequestered to plaintiff, and (4) medical expenses of plaintiff, but the court made no findings as to the financial needs of defendant or the two minor children in his custody and no findings as to the actual amount defendant will have to pay from his net income for plaintiff's support.

APPEAL by defendant from *Rice, Judge.* Judgment entered 14 January 1980 in District Court, NEW HANOVER County. Heard in the Court of Appeals 14 October 1980.

This is a civil action wherein plaintiff seeks the custody of the minor children by her marriage to defendant, support for the minor children, alimony *pendente lite* and permanent alimony, and attorney's fees. Following a trial on the issue of abandonment, a jury returned a verdict in favor of plaintiff, and after a non-jury evidentiary hearing, the court made the following pertinent findings and conclusions:

> *THIRD:* The plaintiff herein is a dependent spouse and the defendant is a supporting spouse.
>
> *FOURTH:* The plaintiff herein is not now and has not for several years been gainfully or regularly employed and the defendant herein is a practicing licensed physician and surgeon in the City of Wilmington, who is regularly and gainfully employed having a net annual income, after payment of taxes of approximately $30,000 to $32,000.
>
> *FIFTH:* The parties hereto own as tenants by the entirety a home at 2701 Newkirk Avenue, in Wilmington, North Carolina, in which they resided with the family until May 29, 1977, at which time the defendant moved out of said home and has not lived there since that date. The defendant has been and is now making the mortgage payment on said home and said home has been maintained as a home for the plaintiff and the three minor children of the parties until the two children mentioned above moved out and

went to live with their father in his apartment over his medical office.

SIXTH: The plaintiff herein has no funds, income or estate of her own and when this action was instituted the plaintiff originally employed Herbert Scott, Esq., who instituted this action and rendered valuable services to the plaintiff in attempting to negotiate a settlement between the plaintiff and the defendant herein and the plaintiff is presently indebted to the said Herbert Scott, Esq., in the amount of $630.00 dollars which the Court finds is a fair and reasonable fee for services heretofore rendered by the said Herbert Scott, Esq., to the plaintiff herein in this cause.

. . .

EIGHTH: The best interests of the minor children of the parties hereto require that their custody be awarded jointly to their mother and father, the plaintiff and the defendant respectfully herein, and in particular the best interests of the minor child, Colette Marie, will be served by her remaining a resident of the home on Newkirk Avenue with her mother and the best interests of Melinda Renee and Scott Anthony require or will be best served by their remaining a resident of the apartment with their father over his medical office. The reasonable support need for the minor child, Colette Marie, can be met by the defendant paying to the plaintiff for the support of said minor child, Colette Marie, the sum of $150.00 per month.

NINTH: The economic needs of the plaintiff herein will require that she have a home in which to live, or other dwelling place, that her medical expenses be paid, and that she have the sum of $827.00 per month in cash after payment of income taxes, both Federal and State, and that she have the use of an automobile for her own necessary transportation and the necessary transportation of the minor child, Colette Marie. The defendant is well able to provide the economic requirements of the plaintiff as herein-above mentioned in detail.

TENTH: The plaintiff herein had no funds with which to employ or pay W.G. Smith, Esq., her present counsel of record, when he undertook to represent her, . . . Since said

employment, the said W.G. Smith, Esq., has spent six days in Court in this matter, including the partial hearing of a Motion for temporary support and for temporary subsistence, and custody the trial of the issue between the plaintiff and the defendant and the hearing upon the question of custody, alimony and support. His services are reasonably worth the sum of $5,000.00, which sum the defendant is well able to pay within 90 days from the date of this Order.

Now, therefore, based upon the foregoing findings of fact, the Court concludes as a matter of law:

FIRST: The plaintiff is a dependant spouse and the defendant is a supporting spouse.

SECOND: The defendant owes a duty of support to the plaintiff herein.

THIRD: The defendant owes a duty of support to the minor children of the parties hereto.

. . .

The trial court entered a judgment awarding custody of the minor children jointly to the parties; ordering defendant to pay to plaintiff $1,000 per month in alimony and to pay the mortgage payments, taxes, and insurance on the marital home, sequestered to plaintiff; ordering defendant to pay reasonable past and future medical expenses of plaintiff and to allow plaintiff to continue using the automobile she is now using; ordering defendant to pay plaintiff's attorney's fees; and ordering defendant to support the minor children in his custody and to pay $150 per month for the support of the minor child in plaintiff's custody. Defendant appealed.

W.G. Smith and Bruce Holt Jackson, Jr., for the plaintiff appellee.

James L. Nelson and James D. Smith, for the defendant appellant.

HEDRICK, Judge.

[1] By his second, sixth, and eighteenth assignments of error, defendant contends the court erred in denying his motions for a directed verdict pursuant to G.S. § 1A-1, Rule 50 and in thereaf-

ter submitting the issue of abandonment to the jury. We disagree. We first note that we need not consider defendant's motion for a directed verdict at the close of plaintiff's evidence, as defendant chose thereafter to present evidence in his favor. *See Hodges v. Hodges*, 37 N.C. App. 459, 246 S.E. 2d 812 (1978). In considering defendant's other motions for a directed verdict, the evidence is to be considered in the light most favorable to plaintiff, and plaintiff is entitled to all reasonable inferences that can be drawn from that evidence. *Snow v. Duke Power Co.*, 297 N.C. 591, 256 S.E. 2d 227 (1979); *Murray v. Murray*, 296 N.C. 405, 250 S.E. 2d 276 (1979). G.S. § 50-16.2(4) provides as follows: "A dependent spouse is entitled to an order for alimony when: . . . (4) The supporting spouse abandons the dependent spouse." One spouse abandons the other within the meaning of G.S. § 50-16.2(4) where he or she brings their cohabitation to an end without justification, without consent of the other spouse and without intent of renewing cohabitation. *Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E. 2d 387 (1971); *Powell v. Powell*, 25 N.C. App. 695, 214 S.E. 2d 808 (1975). We are of the view that the evidence in this case, when considered in the light most favorable to plaintiff, was sufficient to raise a factual question as to the issue of abandonment, and thus the court properly submitted that issue to the jury. Plaintiff's testimony tended to show that ten days before he moved out, defendant was staying out very late at night, and on one occasion did not come home at all. Several days later, defendant phoned plaintiff from his office to tell her that he was getting an apartment. Defendant thereafter moved all of his belongings out of the marital home. Plaintiff testified further that she did not do anything to cause him to leave home and that she never wrote him a note or told him to move out of the house. In addition, defendant and plaintiff had not discussed separation in the week prior to the day defendant moved out.

Despite this, defendant contends that evidence that the spouse was spending little time with his family, that the spouse would come home late at night and leave when he got up in the morning, and that the spouse finally told the other that she "made him sick" and left the family home with all his personal belongings, was not sufficient to support a finding and conclusion of abandonment in *Holt v. Holt*, 29 N.C. App. 124, 223 S.E. 2d 542 (1976), and thus similar evidence in the present case should

preclude submission of the issue of abandonment to the jury. Defendant, however, has misinterpreted the court's holding in *Holt v. Holt, supra.* The court in *Holt* did indeed find that the record did not support a finding of abandonment, but the facts in that case indicated that the parties resumed cohabitation sometime after the defendant moved out, and thus one of the essential elements of abandonment set forth in *Panhorst v. Panhorst, supra,* that of no intention of resuming cohabitation, was not present. Clearly, on the facts of the present case, defendant had no intention to resume living with plaintiff; defendant had already contacted the telephone company and the electric company to change the billing address when he notified plaintiff of his intention to move out. We also believe that the court in *Holt v. Holt, supra,* was influenced by the fact that plaintiff there did not controvert defendant's contention as to the insufficiency of evidence of abandonment. Moreover, since there is no all-inclusive definition as to what will justify abandonment, each case must be determined in large measure upon its own circumstances. *Heilman v. Heilman,* 24 N.C. App. 11, 210 S.E. 2d 69 (1974). These assignments of error have no merit.

[2] Defendant's fourth, fifth, seventeenth, and eighteenth assignments of error relate to the court's instructions to the jury. First, defendant argues that the court did not correctly explain the "law of abandonment." This assignment of error is based upon a broadside exception to the charge, and such an exception does not comply with the dictates of Rule 10(b)(2) of the Rules of Appellate Procedure. *State v. Freeman,* 295 N.C. 210, 244 S.E. 2d 680 (1978). As such, this exception will not be considered. Rule 10(a), Rules of Appellate Procedure; *State v. Graham,* 35 N.C. App. 700, 242 S.E. 2d 512 (1978). Second, defendant argues that the court erred in not instructing the jury as requested with respect to the issue of abandonment. The court's refusal to submit requested instructions is not error when the instructions given fully and fairly present the issues in controversy. *Clemons v. Lewis,* 23 N.C. App. 488, 209 S.E. 2d 291 (1974). We have reviewed the instructions given on abandonment in light of defendant's requested instructions, and find that the court fully and fairly instructed the jury on the issue of abandonment. Assignments of Error Nos. 17 and 18 are based on exceptions to the entry of the judgment and to the denial of defendant's post-trial motions for judgment notwithstanding

the verdict, new trial, and relief from the judgment. These assignments of error raise no questions not heretofore discussed, and are without merit.

We have reviewed defendant's other assignments of error addressed to the trial on the issue of abandonment and find them to be without merit. In the trial on the issue of abandonment, we find no error.

[3] Based on his ninth, thirteenth, seventeenth, and eighteenth assignments of error, defendant argues that the order requiring defendant to pay plaintiff's attorney's fees in this action was "fatally defective" because the complaint did not allege "that the plaintiff did not have 'sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof.'" The question argued in defendant's brief, however, is not raised by the exceptions upon which these assignments of error are based. Assignment of Error No. 17 is based on exceptions to the judgment awarding custody of the minor children jointly to the parties, awarding plaintiff alimony and attorney's fees, and requiring that defendant provide for the support of the minor children, while Assignment of Error No. 18 is based on an exception to the court's denial of defendant's motions for judgment notwithstanding the verdict, new trial, and relief from judgment. Such exceptions raise the sole question of whether the facts found by the court support the judgment. Clearly, the facts found do support the conclusions made, and the conclusions in turn do support the court's judgment. Assignments of Error Nos. 9 and 13 are based on exceptions to Findings of Fact Nos. 6 and 10. These exceptions raise questions as to the sufficiency of the evidence to support those findings. We have carefully reviewed the record in this case, and find ample evidence to support each of the findings challenged by these exceptions. These assignments of error have no merit.

[4] Defendant contends by his seventh, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth assignments of error that the trial judge failed to make sufficient findings with respect to the "reasonable needs of the defendant and the minor children in his custody," that the findings made by the trial judge do not support the conclusions drawn therefrom, and that the conclu-

sions are not sufficient to support the judgment entered. The trial judge found as a fact that defendant's net annual income after taxes was "approximately $30,000 to $32,000." From this net income, defendant has been ordered to pay the following: (1) $1,000 each month in alimony to plaintiff; (2) $150 each month for the support of Colette Marie Tan, in plaintiff's custody; (3) an undetermined amount for mortgage payments, taxes, and insurance on the home sequestered to plaintiff; and (4) medical expenses of plaintiff in an amount not fixed or known, and both past and future. While we realize there is evidence in the record as to the amount of mortgage payments to be paid on the home, the trial judge made no finding with respect to that amount. Furthermore, the trial judge made no finding as to the financial needs of defendant or the minor children in his custody, nor did he make a finding as to the actual amount defendant will have to pay from his net income as a result of this action. Without more definite findings on these matters, we are unable to determine whether the judgment is fair to all parties concerned. Moreover, the trial judge made a finding that plaintiff's monthly economic needs consisted of a home to live in, use of an automobile, medical expenses and $847 in cash, yet the trial judge provided plaintiff with the home and car, and ordered defendant to pay plaintiff's medical expenses and $1,000 each month in cash. It seems obvious to us that the findings made by the trial judge are too meager to enable the reviewing court to determine whether the trial judge exercised proper discretion in deciding what defendant was to pay plaintiff, and that the findings which were made do not support the judgment. For these reasons, the portion of the judgment awarding alimony to plaintiff and support for Colette Marie Tan in her custody, must be vacated.

The result is: In that portion of the proceedings pertaining to the trial on the issue of abandonment, we find no error; those portions of the judgment declaring plaintiff to be a dependent spouse and defendant to be a supporting spouse, ordering defendant to pay attorney's fees, and awarding custody of the minor children are affirmed; that portion of the judgment fixing the amount of alimony for plaintiff and support for the minor child, Colette Marie Tan, in her custody is vacated, and the proceeding is remanded to the District Court for a further hearing with respect to the amount of alimony for plaintiff and

support for Colette Marie Tan and to the ability of defendant to pay those amounts, more definitive findings with respect thereto, and a proper order based thereon.

No error in part; affirmed in part; vacated and remanded in part.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. FRED SEUFERT

No. 809SC490

(Filed 18 November 1980)

Embezzlement § 6– money deducted from pay checks for insurance – insufficiency of evidence of embezzlement by corporation president

In a prosecution of defendant president of a corporation for embezzlement from employees of the corporation, evidence was insufficient to be submitted to the jury where it tended to show that the corporation had a group life and medical and accidental death insurance policy for the benefit of its employees; the premiums for the group policy were to be paid by deductions from the wages of the employees; the money was not paid to the insurance company and the group policy was terminated; deductions from employees' pay checks were made by computer and all information which went into the computer was the responsibility of the comptroller; and there was not substantial evidence that defendant, as president of the corporation, personally and actually received the money deducted for the group insurance and converted or misapplied it with fraudulent intent. G.S. 14-90.

APPEAL by defendant from *Brannon (A.M.), Judge.* Judgment entered 20 December 1979 in Superior Court, PERSON County. Heard in the Court of Appeals 16 October 1980.

Defendant was found guilty on twelve charges of embezzling (G.S. 14-90) money belonging to various named employees of the Steinthal Corporation and one charge of embezzling $11,294.10 from "employees of The Steinthal Corp." The counts were consolidated for judgment, and defendant appeals from the judgment imposing a prison term of four years.

A summary of the evidence offered by the State is made in the body of the opinion on the question of whether the evidence was sufficient to withstand defendant's motion to dismiss. The defendant offered no evidence.

Attorney General Edmisten by Assistant Attorney General Daniel F. McLawhorn for the State.

Tharrington, Smith & Hargrove by Wade M. Smith for defendant appellant.

CLARK, Judge.

We first consider defendant's assignment of error that the trial court erred in denying defendant's motion to dismiss for insufficiency of the evidence. G.S. 15A-1227.

Seven of the indictments (including the one relating to "employees of the Steinthal Corporation") charge that the embezzlement occurred on 15 October 1978 and 31 January 1979, and six indictments charge that the embezzlement occurred on 18 October 1978 and 31 January 1979. All indictments charge in substance that the defendant was President of Steinthal Corporation, was the agent of the corporation, as such agent was entrusted to and did receive money for the corporation's employees, and willfully and fraudulently embezzled the money.

To withstand a motion to dismiss for insufficiency of the evidence (G.S. 15A-1227) there must be substantial evidence of all material elements of the offense charged. Whether the State offered such substantial evidence is a question of law for the trial court. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975); *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979).

In the case before us, to withstand the defendant's motion to dismiss, the burden was on the State to offer substantial evidence of the material elements of embezzlement (G.S. 14-90) as follows:

1. Defendant, President of Steinthal Corp., was the agent of the employees of the corporation with the duty of receiving in his fiduciary capacity money of the employees deducted from their wages for payment over to Provident Mutual Life Insurance Company on a group life, medical, and accidental death policy;

2. he did in fact receive such money;

3. he received this money as such agent by virtue of his fiduciary relationship; and

4. he, knowing this money was not his own, with fraudulent intent embezzled or misapplied the money so entrusted to him. See *State v. Helsabeck*, 258 N.C. 107, 128 S.E. 2d 205 (1962); *State v. Block*, 245 N.C. 661, 97 S.E. 2d 243 (1957); *State v. Seay*, 44 N.C. App. 301, 260 S.E. 2d 786 (1979), *disc. rev. denied*, 299 N.C. 333, 265 S.E. 2d 401 (1980); *State v. Pate*, 40 N.C. App. 580, 253 S.E. 2d 266 *cert. denied*, 297 N.C. 616, 257 S.E. 2d 222 (1979); 5 Strong's N.C. Index *Embezzlement* § 1.

The evidence offered by the State has been carefully considered in determining whether the State has carried its burden by offering substantial evidence of the foregoing elements of the offenses charged and by offering substantial evidence that the defendant personally and actually committed acts constituting embezzlement.

Steinthal Corporation operated a textile manufacturing business in Person County for many years employing three to four hundred workers. During 1978 the corporation for the benefit of its employees had a group life and medical and accidental death policy with the Provident Mutual Life Insurance Company. The premiums for the group policy were to be paid by deductions from the wages of the employees. The corporation encountered financial difficulties in the fall of 1978. The group policy was terminated on 17 October 1978 when the corporation owed $16,300. Provident received a check from the corporation on 20 November 1978 in the amount of about $20,000, but it was returned by the bank for insufficient funds. At the time of termination Provident held reserves, money over and above claims, in the amount of $36,000. On 14 December 1978, defendant mailed a letter to employees, and posted a copy on the bulletin board, informing them that the group policy was terminated.

The employees' wages were paid by check accompanied by stubs showing deductions for premiums on the group policy until the end of January 1979.

Defendant was President of Steinthal Corporation. Dennis Smolinski was Comptroller. Employee deductions were made by computer, and all information that went into the computer was the responsibility of Mr. Smolinski, who was in charge of the financial affairs of the corporation.

Defendant told Provident he would do what he could about the late payment of premiums due on the group policy. He tried to catch up on the premiums with a $20,000 check, but the check was returned marked "insufficient funds."

On 19 January 1979 defendant told an employee that he need not worry about the medical expenses incurred for the treatment of his daughter because Provident would make it good. William E. Bradfield, Assistant Vice President of Provident, testified that his company had paid some of the claims for medical expenses made by Steinthal employees after the grace period of the group policy "and I have authorized our company to begin paying the remainder of them because I believe these people should not be denied their benefits." At the time of the trial some of the claims still had not been paid by Provident.

It was general knowledge among the employees of Steinthal by October 1978 that the company was in financial trouble. Defendant said that sums deducted from employee paychecks were used to pay employee salaries.

In December 1978 Steinthal was unable to meet its payroll for a few days. In March, 1979, Steinthal went into bankruptcy, and the trustee in bankruptcy received cash assets of the company in the sum of $53,690.77.

Having concluded the summary of the evidence offered by the State, we find that there was insufficient evidence of a violation of G.S. 14-90 by the defendant and that the trial court erred in denying defendant's motion to dismiss.

The State's case appears to be based primarily on the evidence that accompanying the checks in October 1978 and January 1979 to the employees for wages, the Steinthal Corporation attached a paper writing, referred to in the evidence as a "stub," showing a deduction from wages for employees group insurance and that the corporation did not pay the premium for the insurance to the insurer, which resulted in the denial of some claims under the policy for medical expense. While this evidence is sufficient to show a breach of trust by the corporation in failing to pay the insurance premium, it falls far short, however, of constituting substantial evidence that the defendant, as President of the corporation, personally and actually received the money deducted for group insurance and con-

verted or misapplied it with fraudulent intent. Conversely, other evidence tended to negate fraudulent intent on the part of the corporation and the defendant. The evidence of the corporation's financial difficulty, the attempted payment of premiums which was aborted by insufficient funds, the statement of the defendant to an employee that all corporate money was being used for employee wages, tends to show a business faced with a financial crisis struggling to continue operations and paying all available funds to its workers in order to do so. The subsequent cessation of operations by the corporation and its bankruptcy with the loss of jobs by several hundred workers are tragic circumstances, but not circumstances that raise a presumption or an inference of embezzlement by the corporation or the defendant.

Officers, directors and agents of a corporation may be held criminally liable individually for participating in a violation of the criminal law while conducting the corporate business. But they are not criminally liable for corporate acts performed by other officers or agents. Where the crime charged involves guilty knowledge or criminal intent, as does embezzlement, it is essential to criminal liability on the part of the officer or agent that he actually and personally did the acts which constitute the offense or that they be done by his direction or permission. *State v. Franks*, 262 N.C. 94, 136 S.E. 2d 623 (1964); *State v. Agey*, 171 N.C. 831, 88 S.E. 726 (1916). [*See State v. Salisbury Ice & Fuel Co.*, 166 N.C. 366, 81 S.E. 737 (1914), holding that a corporation can be convicted of a crime which requires a criminal intent and the responsible officers or agents of the corporation may be indicted and convicted jointly with the corporation as a co-principal or accessory.]

The case *sub judice*, is clearly distinguishable from *State v. Louchheim*, 296 N.C. 314, 250 S.E. 2d 630, *cert. denied*, 444 U.S. 836, 62 L. Ed. 2d 47, 100 S. Ct. 71 (1979), where there was substantial evidence that the corporation was the *alter ego* of the defendant, who was president and managing officer of the corporation and personally gave the orders to commit the crime charged. Under such circumstances the corporate officer may not use the corporation to shield his criminal activity and the corporate entity will be disregarded.

In the case before us there is no evidence that defendant was the sole shareholder or that he personally gave an order to others in the corporation to convert or misapply moneys belonging to the employees of the corporation.

Since insufficiency of the evidence requires dismissal, it is not necessary to discuss other errors assigned.

The judgment is vacated and the cause remanded for entry of judgment dismissing the charges.

Vacated and Remanded for dismissal.

Judges WEBB and WHICHARD concur.

IN THE MATTER OF: THE APPEAL OF LAND AND MINERAL COMPANY FROM THE VALUATION OF CERTAIN OF ITS PROPERTY, TO WIT: 10,000 ACRES OF MINERAL RIGHTS BY THE MITCHELL COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1978

No. 8024SC416

(Filed 18 November 1980)

Taxation § 25.4– ad valorem taxes – valuation of mineral rights

Even if respondent county violated statutory requirements in the reappraisal of petitioner's mineral rights from $3.00 to $50.00 per acre, the evidence supported a determination by the State Board of Equalization and Review that the assessed valuation did not exceed the true value of the mineral rights where petitioner's president testified that he told the county Board of Equalization and Review that petitioner was asking $150.00 per acre for the mineral rights.

APPEAL by respondent from *Allen (C. Walter), Judge.* Judgment entered 15 January 1980 in Superior Court, MITCHELL County. Heard in the Court of Appeals 16 October 1980.

This is an appeal by respondent Mitchell County from a judgment of the Superior Court of Mitchell County reversing a decision of the Property Tax Commission sitting as the State Board of Equalization and Review. The State Board of Equalization and Review had affirmed a decision of the Mitchell County Board of Equalization and Review. The petitioner appellee owns mineral rights in 10,000 acres of land in Mitchell

County. In 1977, the petitioner's mineral rights were reappraised from $3.00 to $50.00 per acre. Petitioner contested this reappraisal. The Mitchell County Board of Equalization and Review upheld the appraisal, and Land and Mineral Company petitioned the Property Tax Commission, sitting as the State Board of Equalization and Review, for review.

The State Board of Equalization and Review conducted a full hearing. Frances E. Fields, president of petitioner, testified that "[i]n the last 10 years no one has asked to lease any of the mineral rights or to prospect for minerals on the land." On cross-examination, he testified that he had stated to the Mitchell County Board of Equalization and Review that the company was asking $150.00 per acre for the mineral rights. Arthur Buchanan testified for the petitioner as to the location of the mineral rights and stated that in his opinion $10.00 per acre would be "top price" for the mineral rights. Petitioner also introduced into evidence an affidavit from S.J. Crow as to comparable sales in the mountain counties of Tennessee.

Two witnesses testified for Mitchell County. Bruce Stamey testified he is the Tax Supervisor of Mitchell County. He stated that the mineral rights were appraised at $50.00 per acre regardless of where they were located. Luther Ford testified that he appraised the mineral rights in Mitchell County. He stated that he based the valuation of $50.00 per acre on sales of mineral rights in Yancey County which he considered comparable, although the sales in Yancey County were not for mining purposes but were purchases by the owners of the surface lands in order to hold the complete title to their lands. He also discussed his appraisal with agents of two mining companies in Mitchell County. He testified he did not enter the petitioner's land in Mitchell County; does not know where it is located; does not know what is the access to the property; and does not know whether water is available.

The State Board of Equalization and Review made findings of fact and concluded that the county's valuation of the mineral rights was not in excess of their true value in money. The State Board ordered that the valuation be sustained.

The petitioner appealed to the superior court. The superior court held that the "[c]onclusions, [d]ecision, and [o]rder of the

Board in sustaining the reappraisal and revaluation of the Petitioner's mineral rights in the general reappraisal in Mitchell County in 1977 were unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record" and "[t]hat Mitchell County did not comply with the requirements of G.S. 105-283 *Uniform Appraisal Standards* and G.S. 105-317 *Appraisal of Real Property, adoption of schedules, standards and rules* in the 1977 reappraisal of the Petitioner's mineral rights and that the previously existing valuation must, therefore, be deemed to continue in effect." The court ordered the appraisal of petitioner's mineral rights to remain as it had been prior to 1977.

Respondent Mitchell County appealed.

Adams, Hendon, Carson and Crow, by Philip C. Carson, for petitioner appellee.

Watson and Dobbin, by Charlie A. Hunt, Jr., for respondent appellant.

WEBB, Judge.

This case brings to the Court the question of whether the superior court was correct in reversing the State Board of Equalization and Review after finding that the State Board did not comply with the statutory requirements in reappraising the petitioner's property and that the findings of the State Board were unsupported by substantial evidence in view of the entire record. *See Thompson v. Board of Education,* 292 N.C. 406, 233 S.E. 2d 538 (1977).

The official acts of a public agency, in this case the Mitchell County Board of Equalization and Review, are presumed to be made in good faith and in accordance with law. The burden is on a party asserting otherwise to overcome such presumptions by competent evidence to the contrary. The petitioner in the case *sub judice* must show that the appraisal method used was not in accordance with statutory requirements or that the findings of fact of the State Board were not based on competent evidence. The petitioner must also show it was substantially injured by an excessive valuation. The petitioner may overcome the presumed correctness of Mitchell County's assessment only by showing by competent evidence that the assessment exceeds

the true value of the property. *Electric Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E. 2d 811 (1972).

The appellee contends that it has proved Mitchell County did not comply with the statutory requirements in the reappraisal and that the State Board failed to consider the lack of evidence as to value submitted by Mitchell County. Mitchell County put on two witnesses at the hearing before the State Board. Mr. Stamey testified that no differential was made as to the value of mineral rights notwithstanding where they may be. Appellee says this violates the requirements of G.S. 105-317(a)(1). Mr. Ford testified that in appraising the mineral rights, he used four sales in Yancey County which he considered to be comparable. On cross-examination, he testified that the Yancey County sales were not for mining purposes. Appellee argues this shows the Yancey County sales were not comparable. Mr. Ford also testified he did not consider location, access, or availability of water in making the appraisal. The petitioner contends this violated the requirements of G.S. 105-317(a)(1). The petitioner also contends Mitchell County's evidence was so weak it was not substantial evidence within the meaning of G.S. 150A-29(a).

Assuming the appellee is correct in its argument that the county violated the statutory requirements in the reappraisal and that there was not substantial evidence to support the value of the property as assessed by the county, we do not believe the appellee can prevail. The president of Land and Mineral Company testified he told the Mitchell County Board of Equalization and Review the company was asking $150.00 per acre for the mineral rights. We hold that considering the entire record, this is substantial evidence from which the State Board could conclude the assessment did not exceed the true value of the mineral rights. The evidence supports this finding and the conclusion of the State Board.

For the reasons stated in this opinion, we reverse and remand to the superior court for a judgment consistent with this opinion.

Reversed and remanded.

Judges CLARK and WHICHARD concur.

Page v. Hospital

RUTH D. PAGE, ADMINISTRATRIX OF THE ESTATE OF LUCY PAGE HOGG v. WILSON MEMORIAL HOSPITAL, INC., AND CAROLYN COATES AND JACQUELINE SIMMS WARD

No. 807SC336

(Filed 18 November 1980)

Evidence § 50; Physicians, Surgeons and Allied Professions § 15.2– patient's use of bedpan – nurse's expert testimony improperly excluded

In an action to recover for injuries received by plaintiff's intestate when she fell and broke her hip while a patient at defendant hospital, the trial court erred in excluding expert testimony by a nurse regarding the standard of care in situations involving a patient's use of a bedpan, since the witness was a registered nurse licensed to practice in N.C., Kansas and Missouri; she had been an assistant professor at East Carolina School of Nursing where she supervised student nurses in caring for patients at hospitals in Nash, Pitt, Martin and Beaufort Counties; she was familiar with the practices, procedures and standards of nursing care in those hospitals where she supervised student nurses; her lecture responsibilities covered the nurses' role in meeting the physical and psychological needs of the patient through various nursing procedures; she had more than 14 years' experience as a nurse and nursing instructor; and the nursing practices in connection with patients' use of a bedpan are so routine and uncomplicated that the standard of care should not differ appreciably between counties such as the one the injury occurred in and neighboring counties in which the witness had worked. G.S. 90-21.12.

APPEAL by plaintiff from *Peel, Judge.* Judgment entered 17 September 1979 in Superior Court, WILSON County. Heard in the Court of Appeals 8 October 1980.

This is a civil action by the duly appointed administratrix of the estate of Lucy Page Hogg for damages due to personal injuries received by plaintiff's intestate when she fell and broke her hip while a patient at defendant Hospital. The evidence showed that Mrs. Hogg was admitted to the hospital suffering from congestive heart failure and shortness of breath, that she was 69 years old and suffered from marked kyphosis, a condition which caused her to be seriously slumped over, that she had experienced periods of confusion and mental dullness due to her illness and medications she was receiving, and that she was in a semi-private room with two beds and a chair.

On 17 January 1975 defendant Ward, a nurses' aide, assisted Mrs. Hogg from her bed to a bedpan placed in the armchair in the room. The chair was not within reach of a call buzzer.

Defendant Ward left the room three times for approximately four minutes each time to afford Mrs. Hogg privacy while using the bedpan in the chair. Each time defendant Ward departed from the room she instructed Mrs. Hogg that she would be back in a few minutes and for her not to get up until she returned to assist her. When she returned to assist Mrs. Hogg from the bedpan, defendant Ward found the patient lying on the floor. Mrs. Hogg suffered a fractured hip from the fall, and died in February of 1975 from causes unrelated to the accident.

Plaintiff brought suit under the Medical Malpractice Statute alleging that the negligence of defendant Ward caused Mrs. Hogg's injury. Defendants answered denying negligence on their part and pleading affirmatively the contributory negligence of the patient as a bar to recovery.

At trial, plaintiff called Janet Sue Pennington as an expert witness on the subject of nursing care. The trial judge, after *voir dire,* refused to allow the witness to answer hypotheticals as to whether defendant Ward's activities constituted a deviation from the standard of nursing care applicable to such situations in hospitals similar to Wilson Memorial. At the end of plaintiff's evidence, defendants' motion for directed verdict was granted. Plaintiff appeals.

Biggs, Meadows, Batts, Etheridge & Winberry, by Auley M. Crouch III, for plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson and Jodee Sparkman King, for defendant appellees.

ARNOLD, Judge.

Plaintiff contends that it was error for the trial court to exclude testimony of the expert witness, Nurse Pennington, regarding the standard of care in situations involving a patient's use of a bedpan, and in directing a verdict for defendants.

Nurse Pennington would have testified that placing the patient on a bedpan in a chair and leaving her unattended for periods of three to four minutes was a violation of the standard of nursing care in Wilson County Hospital or hospitals located in similar communities. Her testimony would have constituted

sufficient evidence of actionable negligence to take the case to the jury.

Defendants argue that the court correctly sustained objection to Nurse Pennington testifying as an expert witness concerning the standard of practice in the field of nursing in Wilson County or a similar community. They contend that plaintiff failed to establish Nurse Pennington's familiarity with the standard of nursing care in hospitals and communities "similar" to Wilson County Hospital, as required by G.S. 90-21.12. The essence of defendants' position is that the plaintiff did not present any evidence that the communities with which Nurse Pennington was familiar were *similar* to the community wherein the treatment occurred.

Article 1B, Chapter 90 of our General Statutes entitled Medical Malpractice Actions, controls the standard of care for "health care providers" including the practice of nursing. The Supreme Court of North Carolina, in *Wiggins v. Piver*, 276 N.C. 134, 171 S.E. 2d 393 (1970), abandoned the strict "locality" rule in favor of the "similar community" rule. That rule was affirmed in *Dickens v. Everhart*, 284 N.C. 95, 199 S.E. 2d 440 (1973), and is now codified in G.S. 90-21.12.

We find that the testimony of Nurse Pennington was admissible. By adopting the "similar community" rule in G.S. 90-21.12 it was the intent of the General Assembly to avoid the adoption of a national or regional standard of care for health providers and not to exclude testimony such as that offered in this case where it was shown that the witness was familiar with the standards of hospitals in adjoining and nearby communities.

The record shows that Nurse Pennington was a registered nurse licensed to practice in North Carolina, Kansas and Missouri, formerly an assistant professor at East Carolina School of Nursing where she supervised student nurses in caring for patients at Nash County Hospital in Rocky Mount, Martin County Hospital in Williamston, Pitt County Hospital in Greenville, Beaufort County Hospital in Washington and a nursing home in Greenville; that she was familiar with the practices, procedures and standards of nursing care in those hospitals where she supervised student nurses; that her lecture respon-

sibilities covered the nurses' role in meeting the physical and psychological needs of the patient through various nursing procedures; that she received her B.S. in nursing from the University of Kansas and had more than 14 years experience as a nurse and nursing instructor in North Carolina, Kansas and Missouri. Based on the record before us, we find that it was error to exclude Nurse Pennington's testimony and consequently to direct a verdict in favor of defendants.

Moreover, we suggest that the nursing practices in connection with patients' use of a bedpan are so routine and uncomplicated that the standard of care should not differ appreciably between counties such as Wilson and the neighboring counties of Nash and Pitt, or nearby Martin County. *See, e.g. Williams v. Reynolds*, 45 N.C. App. 655, 263 S.E. 2d 853 (1980); *Rucker v. High Point Memorial Hospital*, 285 N.C. 519, 206 S.E. 2d 196 (1974). Though *Williams* did not involve a case under the Medical Malpractice Statute, but rather alleged negligence by a veterinarian, Judge Hedrick observed that "[w]e are not dealing in this case with a complicated, novel or rare medical procedure, but rather with an operation commonly and routinely performed on certain male animals." *Williams v. Reynolds, supra* at 660, 263 S.E. 2d at 856.

The Court in *Wiggins* at 138, 171 S.E. 2d at 395, 396, observed: "The operative procedures here involved would seem to be as simple and uncomplicated as any cutting operation one may imagine. Reason does not appear to the non-medically oriented mind why there should be any essential differences in the manner of closing an incision, whether performed in Jacksonville, Kinston, Goldsboro, ... or any other similar community in North Carolina." We see no reason why the procedures dealing with a patient's use of a bedpan should be more complicated than those associated with closure of an incision or treatment of a gunshot wound. Having taught nursing care in Nash and Pitt county hospitals, Nurse Pennington is eminently qualified to testify as an expert witness concerning the practices and standard of care appropriate when administering a bedpan in communities similar to Wilson County.

As an additional argument in favor of the directed verdict in their favor defendants assert that the evidence establishes contributory negligence as a matter of law. We reject this con-

tention. Based on the evidence presented in this case it is for the jury to say whether the patient was contributorily negligent.

Testifying as an adverse witness defendant Ward, a nurses' aide, testified on cross-examination regarding prior instances where plaintiff's intestate was placed on a bedpan in a chair, and that she would not have placed the patient in the chair if the patient had been confused or disoriented. Inasmuch as plaintiff's counsel "opened the door" to this testimony in his adverse examination we find that the testimony was not improperly admitted in violation of G.S. 8-51, if indeed that statute is applicable.

Also testifying as an adverse witness, defendant Coates, a nurse, testified concerning statements plaintiff's intestate made to her after the fall. Plaintiff argues that this testimony was prohibited by G.S. 8-51 and constituted hearsay. We again, however, agree with defendants that plaintiff had "opened the door," and the testimony was admissible under the hearsay exceptions of *res gestae* and declaration against interest.

Reversed and remanded.

Judges ERWIN and HILL concur.

STATE OF NORTH CAROLINA v. MAMIE RAKINA AND STATE OF NORTH CAROLINA v. MARIA ZOFIRA

No. 8015SC404

(Filed 18 November 1980)

1. Arrest and Bail § 11.4– remission of forfeited bond – elapse of more than 90 days after forfeiture

The trial court properly found that G.S. 15A-544(e) was not applicable to a petition for remission of forfeited appearance bonds because more than 90 days had elapsed since entry of the judgment of forfeiture where the petition was filed on 1 July 1979; the hearing on the petition was set for 30 July 1979, the date the 90 day period elapsed; the hearing was continued at the request of the State until 20 August 1979; the hearing was not held until 19 November 1979; and the record fails to disclose why the hearing was not held on 20 August or at whose request the hearing was continued.

2. **Arrest and Bail § 11.4– remission of forfeited bond – no extraordinary cause**

The trial court made sufficient findings of fact to support its conclusion that no extraordinary cause was shown to justify remission of forfeited appearance bonds in whole or in part under G.S. 15A-544(h).

APPEAL by petitioner surety-obligor from *Herring, Judge.* Order entered 21 November 1979 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 14 October 1980.

On 18 October 1978 appellant, a professional bondsman in Baltimore, Maryland, posted two appearance bonds in Alamance County Superior Court secured by full deposits of $25,000.00 each for criminal defendants, Rakina and Zofira. Both defendants failed to appear for trial on 7 November 1978 and orders of forfeiture were entered on the bonds in each case. In response to notice of the orders, appellant, through counsel, filed answer on 7 December 1978. Appellant was subsequently notified of a 30 April 1979 hearing at which he would be allowed to present evidence to show cause why judgment against him should be set aside. On 30 April 1979 judgment was entered against appellant in the amount of the bonds. On 14 May 1979 appellant surrendered defendants to the Sheriff of Alamance County and they were arrested.

On 1 July 1979 appellant, through counsel, filed a petition for remission of the forfeited bonds pursuant to N.C. Gen. Stat. § 15A-544 (e) and (h). The hearing on this petition was set for 30 July 1979. On 27 July 1979 the hearing was continued at the request of an assistant district attorney until 20 August 1979.

Hearing on the petition was finally held during the 19 November 1979 session of court. At the hearing Judge Herring made findings of fact and concluded:

(1) That N.C. Gen. Stat. § 15A-544 (e) was not applicable to the proceeding as more than ninety days had elapsed since entry of judgment of forfeiture; and

(2) That appellant had not shown "extraordinary cause" justifying remission.

Judge Herring therefore denied the petition. The petitioner appealed.

Attorney General Edmisten, by Senior Deputy Attorney General Andrew A. Vanore, Jr. and Special Deputy Attorney General Isaac T. Avery III, for the State.

Drum and Lefkowitz by Victor M. Lefkowitz, for petitioner-appellant.

MARTIN (Robert M.), Judge.

The purpose of N.C. Gen. Stat. § 15A-544, which regulates the forfeiture of bonds in criminal proceedings, is to establish "an orderly procedure for forfeiture." *Id.*, (Official Commentary). After entry of judgment of forfeiture, subsections (e) and (h) provide two situations in which the court is authorized to order remission. Subsection (e) provides:

> At any time within 90 days after entry of the judgment against a principal or his surety, or on the first day of the next session of court commencing more than 90 days after the entry of the judgment, the court may direct that the judgment be remitted in whole or in part, upon such conditions as the court may impose, if it appears that justice requires the remission of part or all of the judgment.

Under subsection (e) the court is guided in its discretion as "justice requires." Execution is mandatory under subsection (f) "[i]f a judgment has not been remitted within the period provided in subsection (e) above. . . ." Subsection (h) becomes applicable after execution of the judgment. Subsection (h) provides in pertinent part:

> For extraordinary cause shown, the court which has entered judgment upon a forfeiture of a bond may, after execution, remit the judgment in whole or in part and order the clerk to refund such amounts as the court considers appropriate.

Under subsection (h), the court in its discretion is authorized to remit the judgment "[f]or extraordinary cause shown."

[1] By his first argument appellant contends the trial court erred in concluding that N.C. Gen. Stat. § 15A-544(e) was inapplicable to the proceeding as more than ninety days had elapsed since entry of judgment of forfeiture. Appellant contends that when the petition for remission is timely filed and set for hear-

ing, a continuance granted at the State's request does not divest the trial court of jurisdiction to exercise its discretion pursuant to G.S. 15A-544(e). This issue has not been answered previously by the courts of our State and it is unnecessary to answer it in the case *sub judice.*

The record discloses that judgment of forfeiture was entered 30 April 1979. The ninety-day period under subsection (e) would have elapsed on 29 July 1979, a Sunday. Therefore the ninetieth day is deemed to have been Monday, July 30. Assuming, for purposes of argument only, that the ninety-day period can be extended by a continuance requested by the State, the statutory period was extended to 20 August 1979. The hearing was not held and the order was not entered until 19 November 1979, which was clearly outside even the "extended" ninety-day period. The record fails to disclose why the hearing was not held at the earlier 20 August 1979 date or at whose request the hearing was continued. Nor does the record disclose when the "first day of the next session of court commencing more than 90 days after the entry of the judgment ..." was. We therefore agree with Judge Herring that G.S. 15A-544(e) was not applicable to the proceeding.

[2] Appellant also argues that the trial court failed to make findings of fact with sufficient particularity to support its conclusion that no extraordinary cause was shown to justify remission of the bond in whole or part under subsection (h) of G.S. 15A-544. We disagree.

The court made three findings of fact pertinent to the existence of extraordinary cause: Finding #6 that appellant retained counsel and incurred other expenses in connection with the forfeiture, Finding #12 that there was no evidence that the State incurred any expense in returning the defendants to custody, and Finding #14 that appellant "has not satisfied the Court of the existence of extraordinary cause" justifying remission of the forfeiture in whole or in part. Appellant contends the court "failed to address in its findings of fact the personal efforts of surety, the absence of prejudice to the State, and the significance of appellant's lack of understanding of the proceedings."

Appellant argues for more specificity than is required. Under Rule 52(a), N.C. Rules Civ. Proc., the court need only

make brief, definite, pertinent findings and conclusions upon the contested matters. A finding of such essential facts as lay a basis for the decision is sufficient. *Trotter v. Hewitt*, 19 N.C. App. 253, 198 S.E. 2d 465, *cert. denied*, 284 N.C. 124, 199 S.E. 2d 633 (1973). The findings by the court in the case *sub judice* are sufficient and support the court's conclusion.

For the reasons stated above the order of the trial court is affirmed.

Affirmed.

Judges HEDRICK and MARTIN (Harry C.) concur.

GENERAL FOODS CORPORATION v. P.W. MORRIS, A/K/A PAUL WAYNE MORRIS, A/K/A WAYNE MORRIS, T/A METROLINA TOBACCO COMPANY

No. 8026SC426

(Filed 18 November 1980)

Judgments § 13; Rules of Civil Procedure § 55– default – default judgment – finding of no disability not required

G.S. 1A-1, Rule 55 and G.S. 1-75.11 do not require the clerk to make an affirmative finding that defendant is not a minor and is under no legal disability in order to enter a default or a default judgment.

APPEAL by defendant from *Burroughs, Judge*. Order entered 12 February 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 October 1980.

This is an action to vacate the entry of default and default judgment entered by the Clerk of Mecklenburg County against the defendant. Plaintiff's summons and verified complaint were served on the defendant personally on 13 October 1978. No appearance was made, and no answer was filed by the defendant. An entry of default and default judgment were applied for by the plaintiff's attorney and entered by an assistant clerk of superior court on 15 November 1978.

On 22 October 1979, defendant filed a motion, pursuant to G.S. 1A-1, Rule 60(b)(1), (4) and (6), along with a supporting affidavit and exhibits, asking that the default judgment be set aside. Judge Burroughs entered his order denying defendant's

motion on 12 February 1980. Defendant appealed, and the parties have stipulated that defendant's motion to vacate the default judgment also constitutes a motion pursuant to Rule 55(d) to vacate the entry of default.

Fairley, Hamrick, Monteith & Cobb, by John W. Fairley, for plaintiff appellee.

James, McElroy & Diehl, by Allen J. Peterson, for defendant appellant.

HILL, Judge.

The record does not contain findings that defendant was not an infant or incompetent at the time he was served with summons and complaint in this action or at the time of the entry of default or default judgment. Defendant contends that such findings are necessary and that, because they are missing, the trial court erred in refusing to vacate the entry of default and the default judgment. We find no error.

Rule 55 of the Rules of Civil Procedure reads in pertinent part:

. . . .

(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. — When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear *and if he is not an infant or incompetent person.* A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain. (Emphasis added.)

G.S. 1-75.11 states in pertinent part:

Where a defendant fails to appear in the action within apt time the court shall, before entering a judgment

against such defendant, require proof of service of the summons in the manner required by § 1-75.10 and, in addition, shall require further proof as follows:

(1) Where Personal Jurisdiction is Claimed Over the Defendant. — Where a personal claim is made against the defendant, the court *shall require proof by affidavit or other evidence* to be made and filed, *of the existence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction* over the defendant. The court may require such additional proof as the interests of justice require. (Emphasis added.)

Defendant appellant contends Rule 55 and the statute, when read together, require an affirmative finding by the clerk that the defendant is not a minor and is under no legal disability. We do not agree.

Defendant's contention is partially based on language in *Roland v. Motor Lines*, 32 N.C. App. 288, 231 S.E. 2d 685 (1977), and *Bailey v. Gooding*, 45 N.C. App. 335, 263 S.E. 2d 634 (1980). *Bailey* at p. 341, *citing* from *Roland*, states that the clerk can enter default judgment pursuant to G.S. 1A-1, Rule 55, "only when (1) plaintiff's claim is for a sum certain ... and (2) the defendant is defaulted for failure to appear *and is not an infant or incompetent person.*" (Emphasis added.)

We do not construe the language in *Bailey* to require a finding that defendant is not under a disability. The requirement is only that defendant in fact not be under a disability.

Defendant also relies on *Hill v. Hill*, 11 N.C. App. 1, 180 S.E. 2d 424, *cert. denied* 279 N.C. 348 (1971). Before a valid judgment by default can be entered, there must be "proof by affidavit or other evidence 'made and filed' in this case showing that there was a claim arising within or without this State against a natural person, not under disability ...." *Hill* at p. 10.

The verified complaint in this case alleges that defendant is a citizen and resident of North Carolina. This is sufficient for the court to obtain personal jurisdiction over defendant under G.S. 1A-1, Rule 55(b) and G.S. 1-75.11(1). In *Hill* the complaint

was unverified, and no affidavit was filed. Therefore, the requirements of G.S. 1-75.11(1) had not been met, and we so found. *Hill* is not to be interpreted as requiring a plaintiff to show that defendant is not an infant and not under disability. In the case *sub judice*, defendant admits that he is not an infant and not under disability.

Defendant has not pursued his contention that the judgment must be abandoned. Defendant has not alleged fraud, misrepresentation, or misconduct by the plaintiff, or excusable neglect by himself. When a party seeks to vacate a default judgment, the burden is on him to show facts which would make the refusal to vacate an abuse of discretion. *See Kershner v. Baker*, 82 N.C. 169 (1880). Defendant has not carried his burden.

The judgment of the trial court is

Affirmed.

Chief Judge MORRIS and Judge ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 NOVEMBER 1980

FABRICS v. KNITTING MILLS No. 8022SC403	Iredell (78CVS01006)	New Trial
GREENFIELD v. GREENFIELD No. 808DC396	Wayne (79CVD541)	Affirmed
HICKS v. CONSOLIDATED ALUMINUM and HICKS v. LOWE'S No. 8025SC382	Burke (78CVS502) (78CVS405)	Appeal Dismissed
IN RE McCLURE No. 8027DC472	Gaston (79J110) (79J366)	Affirmed
KIMEL v. CHAPPELL No. 8021SC395	Forsyth (78CVS2013)	Appeals Dismissed
NELMS v. MAGNAVOX No. 8010IC406	Ind. Comm. (G-1303)	Affirmed
STATE v. ADLER No. 8020SC541	Union (79CRS8308)	No Error Remanded for Judgment
STATE v. BANKS No. 8018SC552	Guilford (78CRS46456)	No Error
STATE v. BILLINGER No. 8012SC431	Hoke (79CRS2155)	No Error
STATE v. BROCK No. 804SC483	Onslow (79CRS21866) (79CRS24488) (79CRS24489)	No Error
STATE v. CANTRELL No. 8029SC484	Henderson (79CR01083) (79CR01091)	No Error
STATE v. CORNELL No. 8024SC553	Watauga (79CR2351)	Vacated and Remanded
STATE v. LEE No. 8010SC470	Wake (77CRS44242)	No Error

STATE v. LEISY No. 803SC528	Craven (79CRS12586)	No Error
STATE v. McDOWELL No. 804SC570	Sampson (79CRS13019)	No Error
STATE v. PARRISH No. 809SC568	Vance (79CRS3000)	New Trial
STATE v. SMITH No. 8018SC436	Guilford (79CRS17418)	No Error
STATE v. SPENCER No. 802SC604	Beaufort (80CRS1150)	No Error
STATE v. STRICKLAND No. 804SC559	Onslow (79CRS21664)	No Error
STATE v. TINNIN No. 8019SC606	Randolph (79CRS10979)	No Error
STATE v. WORRELL No. 8017SC525	Surry (79CRS5353)	No Error

FILED 18 NOVEMBER 1980

STATE v. COX No. 807SC762	Wilson (79CRS11534)	No Error
STATE v. DILLARD No. 8027SC647	Gaston (79CRS18943)	No Error
STATE v. FISHER No. 8012SC688	Cumberland (79CRS38727)	No Error
STATE v. McGEACHY No. 8016SC371	Robeson (79CR16598)	No Error
STATE v. MUNDINE No. 808SC388	Lenoir (79CRS8430)	No Error
STATE v. WHALEY No. 8025SC672	Burke (79CRS11633)	No Error

STATE OF NORTH CAROLINA v. DENNIS EDWIN EDWARDS AND STATE OF NORTH CAROLINA v. RICHARD KEITH NANCE

No. 8013SC595

(Filed 2 December 1980)

1. Criminal Law § 66.18— limp in assailant's walk — no identification — voir dire not necessary

The trial court did not err in failing to conduct a *voir dire* hearing before permitting a robbery and assault victim to testify over defendant's objection that she noticed that there was a limp in her assailant's walk since the witness was not identifying defendant but was merely describing in general the man who robbed and assaulted her; moreover, any error in failing to hold a *voir dire* hearing at that time was rendered harmless when such a hearing was later conducted and defendant had a full opportunity to challenge and discredit the victim's identification of him.

2. Criminal Law §§ 66.11, 66.17— pretrial confrontation at victim's home — in-court identification — independent origin — no unnecessary suggestiveness

A robbery and assault victim's in-court identification was of independent origin and not tainted by a pretrial identification, and the pretrial identification procedure was not impermissibly suggestive, where the victim had a sufficient opportunity to view her assailant in her house while he walked toward her, attempted to shoot her at close range, and then beat her about the head; when the victim returned home from the hospital a few hours after the crime, her yard was full of many people and the police; officers brought defendant into the victim's yard; the victim identified defendant as her assailant after observing him in the yard for ten minutes while he stood in a group of officers, neighbors and friends; and the victim's identification of defendant as he stood in her yard was based on the fact that defendant had similar physical characteristics, including the distinguishing feature of a limp, as her assailant.

3. Constitutional Law § 43; Criminal Law § 66.5— pretrial confrontation — defendant not under arrest — no right to counsel

Defendant did not have a right to counsel when a robbery and assault victim identified him while he was standing in her yard a few hours after the crimes since defendant had not been arrested at the time of the confrontation and adversary judicial proceedings thus had not been instituted against him.

4. Criminal Law § 86.3— cross-examination of defendant — details about prior convictions

In a prosecution in which defendant testified on direct examination that he had been convicted of breaking and entering, larceny and two simple assaults, the trial court did not abuse its discretion in permitting the prosecutor to ask defendant questions on cross-examination attempting to elicit further details about defendant's prior convictions where the record fails to show that the questions were not asked in good faith, and defendant testified about an addi-

tional conviction for assault with a firearm which he had failed to mention on direct examination.

5. Criminal Law § 138.7— sentencing hearing — Department of Justice criminal record

The trial court did not err in the admission of a copy of defendant's U.S. Department of Justice criminal record during the sentencing hearing.

6. Criminal Law § 51— qualifications to give expert testimony — effect of general objection

Defendant waived objection to the qualifications of a deputy sheriff to testify that he checked the brakes on defendant's car and they worked properly and had sufficient brake fluid where defendant interposed only a general objection and did not object on the ground that the witness had not been qualified as an expert.

7. Criminal Law § 26.5— convictions of armed robbery and felonious assault — no double jeopardy

Defendant was not placed in double jeopardy by his convictions of armed robbery and assault with a deadly weapon inflicting serious injury not resulting in death arising out of the same conduct since a conviction of armed robbery does not establish defendant's guilt of the felonious assault.

8. Robbery § 4.3— property taken from victim's presence by use of firearm —sufficiency of evidence

The State's evidence in an armed robbery case was sufficient to show that property was taken by force from the victim's presence with the use of a firearm where it tended to show that the victim entered her house at 11:30 a.m. and immediately noticed that cabinet drawers and doors were open; as she was talking on the telephone, a masked man carrying a pistol came out of a bedroom down the hall toward her and said he was going to kill her; the victim knocked the gun up as it fired, and the man began to beat her with it; she managed to escape from the house; and when she returned home from the hospital a few hours later, she went into the bedroom with police officers and discovered that a window had been broken and several items of personal property were missing, since it can be inferred from the evidence that the assailant had attempted to frighten the victim and that as soon as she left the house, he went back into the bedroom and took property which did not belong to him.

9. Criminal Law § 9.3; Robbery § 4.5— guilt as aider and abettor — sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of felonious breaking or entering, armed robbery and felonious assault as an aider and abettor where it tended to show that defendant was parked on a road near woods leading to the victim's house at the time of the crimes; defendant admitted to an officer that he knew about the "hit" at the victim's house and that he had lied when he told the officer he was parked on the road because he was having brake trouble; and a hatchet found in a bedroom of the victim's house, a ladder found outside the bedroom window and a hatchet holster and belt belonged to defendant, since the evidence supports the conclusion that defendant communicated to

the actual perpetrator his intent to aid him by driving the car and waiting for his return, by supplying the tools used to gain entry into the house, and by remaining close enough to the scene to render assistance if necessary.

APPEAL by defendants from *McLelland, Judge.* Judgments entered 18 February 1980 in Superior Court, BLADEN County. Heard in the Court of Appeals 5 November 1980.

Defendants were convicted of felonious breaking or entering, robbery with a firearm, and assault with a deadly weapon inflicting serious injury in violation of G.S. 14-54(a), 14-87, and 14-32. Both received active prison sentences.

The State's evidence tended to show the following. Jessie Singletary was a widow who lived alone on Highway 211 in Bladenboro, North Carolina. Her son, Bob, lived approximately 300 yards away through some woods. On Sunday, 21 October 1979, she left her house, with all the windows and doors closed and locked, at 9:55 a.m. to go to church. She was driving back home on a rural road, when she noticed a car parked across from her son's house near the woods. A power line right-of-way leads through the woods to her house. She recognized the man sitting in the car, on the driver's side, as Richard Keith Nance. She drove into her son's driveway, but as he was not home from church yet, she left and headed back to her own home. As she passed the parked car a second time, Nance turned his head away to keep her from identifying him. She met her son on the way and stopped to tell him that "[t]here is something peculiar about that car sitting up there."

She subsequently arrived home at 11:30 a.m. and entered the house by unlocking the side door by the carport. Upon her entry, she immediately noticed that the cabinet doors and drawers were open in the kitchen. She went to the phone to call her son, and as she was talking to her grandson, she heard a noise in the bedroom. The bedroom is located in the back of the house. A man then came out of the bedroom and walked down the hall toward her. The man limped as he walked and wore a striped mask covering his entire face from above his upper lip. The man pointed a pistol straight at her and when he was only one foot away from her, said "I'm going to kill you." She knocked his gun up with her pocketbook as it fired, and the bullet hit a window frame. The man then beat her on the head with the gun. Mrs. Singletary, however, fought off the attacker with her pocketbook and was able to escape from the house.

She caught a ride to the hospital where her head wounds were treated, one of which required nine stitches. She received some medication for pain. She returned home within two hours, but she was still dizzy, nervous and had a headache.

Mrs. Singletary went with the police into her bedroom to reenact the crime. During the actual incident, she had not gone any further in the house than the den. She noticed that the outside screen to one of the bedroom windows had been torn off, the storm window was broken, and the inside window was raised. She also discovered that several items of personal property were missing. The items were estimated to be worth approximately $1,000.00.

Her yard was full of police, friends and neighbors after the crime. Defendants Nance and Edwards were also present. On *voir dire* examination at trial, Mrs. Singletary testified that she identified defendant Nance as the man in the parked car but told officers that he was not the man that had been in the house. Sheriff Storms asked her if she could identify another man. Defendant Edwards was standing in a group of officers and neighbors. After observing him for ten minutes, she identified Edwards as the man that had attacked her in the house. She testified that he was the same height as her attacker, the lower part of his face was similar, and he also limped as he walked. She admitted that she probably knew everyone in the yard where defendant was standing but stated that she had seen him before in the house. She also admitted that she was sitting down under her carport at the time of the identification, felt dizzy and had taken some pain pills. She was unable to identify what clothes he had on and could not remember whether she had her glasses on at the time. The judge found that the pretrial identification procedures were not impermissibly suggestive and admitted the identification.

Deputy Garland Prevatte responded to the armed robbery call on 21 October 1979. As he drove to the Singletary residence, he passed a parked car on the rural road. He arrived at the house within four minutes of the call at approximately 11:50 a.m. Some people at the scene advised him that the parked car "had been there." Prevatte drove back to the parked car and requested identification of the occupant. Defendant Nance was alone in the car in the driver's seat. He told Prevatte that he had borrowed Edwards' car and was having brake trouble. Prevatte told him he might want to talk to him again later. Prevatte went back to the house, and when

he learned what had happened, he called an officer on the radio to go and restrain Nance for questioning. Prevatte later tested the brakes on the car by getting in it and mashing on the brakes. He said they worked properly.

Deputy Hester had seen a similar car parked on the same rural road two weeks before Mrs. Singletary was robbed. No one was in the car at the time, but Hester called Raleigh for identification of the vehicle. The car was registered in name of Dennis Edwin Edwards.

Deputy Little also arrived on the scene on 21 October 1979. He observed a broken storm window and raised window in the bedroom and tools lying on a chair. One of the tools was a hatchet. He also found a ladder propped up against the wall next to the open bedroom window. He testified that he saw Nance in the yard at that time and that he had a conversation with him. During a conversation six hours later at the jail, Nance made a statement. After a *voir dire* examination, the court allowed admission of the statement. Nance told Little that the hatchet found in the bedroom belonged to him and gave him permission to search the car. A belt and hatchet holster were found in the car, and Nance identified them as his own. Since Nance had told him earlier that he was stopped because of car trouble, Little tested the brakes and found them to be working properly. He also checked the brake fluid under the hood and found that the car had a sufficient amount. Later at the jail, Nance told him that he had lied about the brake problem and that he knew something was about to be "hit" and broken into. Nance said he was parked there waiting on another individual and that he had been at the same location a few weeks earlier. He said he drove by the Singletary residence on Highway 211 for some distance. The individual with him then said, "I have seen enough." They then went back to the intersection of the highway and the rural road and parked on the shoulder. Nance remained in the car, but the individual with him got out and walked toward the highway in the general direction of Mrs. Singletary's house. After this statement was given, Deputy Little went to Nance's home and looked in his bedroom. He observed bunk beds there which were made of the same type of wood as that in the ladder found outside Mrs. Singletary's bedroom window.

Defendant Edwards testified that he had lent his car to Ricky Nance, his father and a fellow named Joe on the morning of 21

October 1979 around 9:00 or 9:30 a.m. He said he had also lent the car to them two weeks earlier. When his car was not returned as expected, he went looking for it and eventually went back to the Nance home around 4:30 p.m. Officers were at the house and asked him to accompany them to Mrs. Singletary's residence. He denied any knowledge or participation in any of the charged offenses. On cross-examination, he stated that he had polio and had limped most of his life. He could not explain how or why the witness identified him as the perpetrator.

Defendant Nance's evidence was that he drove Edwards' car, for the first time, on 21 October 1979 with a friend of his father's named Joe. He was driving to visit his mother. The brakes failed so he pulled over and parked. He gave Joe $20.00 to purchase brake fluid, and Joe left. Joe did not return, and his whereabouts were unknown at the time of the trial. Nance saw Mrs. Singletary ride by on her way back home from church. He permitted officers to question him and search his car, but he denied that he ever made any incriminating statements to Deputy Little. He admitted that the hatchet holster was his, but denied that the hatchet and ladder found at Mrs. Singletary's were his or that his bedroom at home had bunk beds in it.

Defendants appeal from their convictions for felonious breaking or entering, armed robbery and assault with a deadly weapon inflicting serious bodily injury.

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

Hester, Johnson and Johnson, by W. Leslie Johnson, Jr., and Moore and Melvin, by David Garrett Wall, for defendant appellants.

VAUGHN, Judge.

Defendant Edwards raises many questions for review, but his basic contentions concern the admission of Jessie Singletary's identification testimony, the District Attorney's questioning about his prior criminal record and the admission of a copy of that record during sentencing. Defendant Nance questions the admissibility of lay testimony about the working condition of brakes in a car, the court's failure to summarize his evidence and contentions adequately and its denial of his motion to arrest judgment in the conviction for assault with a deadly weapon inflicting serious bod-

ily injury. Both defendants argue that their motions to dismiss should have been allowed and that the many alleged errors require reversal or a new trial. We disagree.

[1] Defendant Edwards contends that the court improperly overruled his objection to the following question of Jessie Singletary on direct examination.

> Q. Did you see him [the man in her house] walk at this time?
>
> A. Yes.
>
> Q. What did you observe about the way he walked?
>
> MR. JOHNSON: OBJECTION.
>
> COURT: OVERRULED.
>
> MR. JOHNSON: I would like to be heard.
>
> COURT: You would like to be heard on the way he walked?
>
> MR. JOHNSON: Yes, sir.
>
> COURT: DENIED. Proceed.
>
> Q. What did you notice about the way he walked?
>
> A. There was a limp in his walk.
>
> MR. JOHNSON: OBJECTION AND MOTION TO STRIKE.
>
> COURT: OVERRULED AND DENIED.

Defendant argues that the court should have conducted a *voir dire* hearing before this testimony was admitted. The trial court ordinarily should conduct a *voir dire* examination, even upon a general objection, to determine the admissibility of identification testimony. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Byrd*, 40 N.C. App. 172, 252 S.E. 2d 279, *cert. denied*, 298 N.C. 301, 259 S.E. 2d 915 (1979). Nevertheless, we fail to see how defendant was prejudiced by the court's initial failure to conduct a *voir dire*. The witness was not identifying defendant Edwards in particular but was merely describing in general the man who assaulted her in the house. Moreover, a *voir dire* hearing was later conducted in

which defendant had a full opportunity to challenge and discredit the witness's identification. In these circumstances, any error concerning the timing of the *voir dire* must be deemed harmless. *State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979); *State v. Martin*, 29 N.C. App. 17, 222 S.E. 2d 718, *review denied*, 290 N.C. 96, 225 S.E. 2d 325 (1976).

[2] Defendant Edwards next contends that Mrs. Singletary's identification should have been suppressed because it was tainted by an illegal and impermissibly suggestive pretrial identification procedure. The court, however, held to the contrary and found from the evidence

> that the witness, Mrs. Singletary, observed at close range and in adequate light in her home a man wearing a mask who limped, not noting his clothing but noting his size and the build. That she observed the man for some minutes, was assaulted by him. That the defendant Dennis Edwin Edwards was brought by officers before the witness in her back yard and among a crowd of people some three to four hours later. That she observed the defendant walk, observed his size and build, and responding to an officer's inquiry identified defendant as the man seen earlier in her house. The confrontation was not impermissibly suggestive. The witness' identification was based on her observation.

It is axiomatic that the findings entered on *voir dire* are conclusive and binding on appeal if they are supported by competent evidence in the record. *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966); *State v. Baker*, 34 N.C. App. 434, 238 S.E. 2d 648 (1977). In addition, there is a presumption that the judge disregards incompetent evidence in making such findings. 1 Stansbury's N.C. Evidence § 4a (Brandis rev. 1973).

We believe that the witness had a sufficient opportunity to view her attacker in the house while he walked toward her, attempted to shoot her at a very close range, and then beat her about the head. She returned home from the hospital a few hours after the crime. Her yard was full of many people and police. She recognized defendant Nance as the man in the parked car. She later identified defendant Edwards as the man that had attacked her in the house after observing him in the yard for ten minutes, while he stood in a

group of "law officers, neighbors and friends." She testified that Edwards had similar physical characteristics, including the distinguishing feature of a limp, as her attacker. In short, the witness made a positive pretrial and in-court identification of defendant Edwards based on her personal observations during the assault. On cross-examination of Mrs. Singletary, defendant tended to impeach the reliability of her identification. The jury could properly weigh this evidence in its deliberations, but the evidence did not require the judge to exclude Mrs. Singletary's identification testimony as a matter of law. The court's conclusion that the pretrial procedures were not impermissibly suggestive is supported by ample competent evidence; therefore, it is binding on appeal. *State v. Patton*, 45 N.C. App. 676, 263 S.E. 2d 796 (1980).

[3] Counsel seems to assert an additional error with regard to the pretrial identification procedure: "the defendant had a right to counsel at the time he was paraded before the prosecuting witness, alone and in custody. . . ." Any question about a violation of defendant's right to counsel should have been raised during trial, and we cannot find any mention of it in the record. It suffices to say, however, that a defendant has a constitutional right to presence of counsel during a pretrial identification only when adversary judicial criminal proceedings have been instituted against him prior to the confrontation. *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877 (1972); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death penalty vacated*, 428 U.S. 902, 96 S. Ct. 3202 (1976); *State v. Puckett*, 46 N.C. App. 719, 266 S.E. 2d 48, *appeal dismissed*, 300 N.C. 561 (1980). Edwards had not been arrested at the time of the confrontation. His right to counsel was not, therefore, violated when the prosecuting witness identified him in the yard because he had not yet been accused in a judicial sense.

[4] Defendant Edwards also claims that the District Attorney asked prejudicial and inflammatory questions in cross-examining him about his criminal record. On direct examination, defendant testified about his convictions for breaking and entering, larceny and two simple assaults. Defendant was then cross-examined as follows:

> Q. Let me ask you this: Now, you told Mr. Johnson you have only been convicted of breaking and entering, is that right?

A. and simple assault.

Q. All right, was that in the house of a lady "that you had earlier cased out"?

A. No, sir.

MR. JOHNSON: OBJECTION.

COURT: OVERRULED.

A. In 1977 I was convicted of assault with a firearm. In 1976 they locked me up but they broke it down because it was not true.

Q. Tell me whether or not you were convicted of using a firearm, trying to kill someone?

A. No, sir.

MR. JOHNSON: OBJECTION.

COURT: OVERRULED.

There is nothing in the record to show that these questions were not asked in good faith, and we must defer to the judge's discretion in permitting the questions since there is no clear showing of abuse. *State v. McLean*, 294 N.C. 623, 242 S.E. 2d 814 (1978). Moreover, it is noteworthy that defendant testified about an additional conviction for assault with a firearm in 1977 which he had failed to mention during his direct examination. Certainly, this was relevant impeachment evidence. Thus, it was not only proper, it was also prudent for the prosecutor to attempt to elicit further details about defendant's prior convictions. *See* 1 Stansbury, N.C. Evidence § 112 (Brandis rev. 1973.)

[5] Defendant Edwards has also failed to show prejudicial error in the admission of a copy of his U.S. Department of Justice criminal record during the sentencing hearing. Clearly, it was within the judge's discretion to permit the introduction of actual evidence of defendant's prior criminal record. *State v. Hester*, 37 N.C. App. 448, 246 S.E. 2d 83 (1978); *State v. Hegler*, 15 N.C. App. 51, 189 S.E. 2d 596, *cert. denied*, 281 N.C. 761, 191 S.E. 2d 358 (1972). Defendant will not now be permitted to complain on appeal, on the basis of a general objection, when he did not specifically challenge the authenticity or accuracy of the record during the sentencing hear-

ing and failed to present any evidence whatsoever that the copy was false or irregular.

We now turn our attention to the alleged errors asserted by defendant Nance. Nance told officers shortly after the perpetration of the crime that he was parked near the Singletary residence because of brake trouble and that he had sent Joe, a fellow riding with him, to get some brake fluid. Deputy Prevatte testified that he checked the brakes on the car later, and they worked properly. Though defendant objected to this testimony, he has not made any argument or cited any authorities in his brief pertaining to these objections. The exceptions are, therefore, deemed abandoned on appeal. App. R. 28(b) (3). Defendant does, however, present argument in his brief concerning objections to similar testimony by another deputy which he contends should have been sustained.

[6] Deputy Little testified that he checked the brakes after Nance was in custody. He stated that the brakes worked properly and that there was sufficient brake fluid in the car. Nance contends that this testimony should not have been admitted because Little was not an expert in automobile mechanics. Defendant only interposed a general objection and did not make a special request to have the deputy qualified as an expert. This was insufficient to preserve an exception for our review. "Objection to a witness' qualifications as an expert is waived if not made in apt time on this special ground, even though general objection is taken." *Paris v. Aggregates, Inc.*, 271 N.C. 471, 481, 157 S.E. 2d 131, 138 (1967); 1 Stansbury, N.C. Evidence § 133, at 431 (Brandis rev. 1973). The deputy was also permitted to testify on this same subject on redirect examination without objection. Thus, even if a general objection had been sufficient, its benefit was lost when substantially the same evidence was thereafter admitted without renewed objection. *Power Co. v. Winebarger*, 300 N.C. 57, 265 S.E. 2d 227 (1980); 1 Stansbury, N.C. Evidence § 30 (Brandis rev. 1973).

Defendant Nance also claims that the judge failed to summarize his evidence and contentions adequately in the charge to the jury. The trial judge is only required to summarize the evidence in a manner sufficient to explain the law arising therefrom. G.S. 15A-1232. We hold that the summary is fair and adequate. In addition, the judge is not required to state the contentions of the parties even when requested. Here, neither side's contentions were given in the instructions, and there is simply nothing to complain about.

Moreover, no exceptions were preserved for review by timely objections at trial affording the judge an opportunity to correct any possible errors. *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Robinson*, 40 N.C. App. 514, 253 S.E. 2d 311 (1979).

[7] Defendant Nance questions the propriety of his convictions for armed robbery in violation of G.S. 14-87 and assault with a deadly weapon inflicting serious injury not resulting in death in violation of G.S. 14-32. He contends that simultaneous convictions on these charges violate the constitutional prohibition against double jeopardy for the same offense because a violation of G.S. 14-32 is a lesser included offense of G.S. 14-87. We must disagree. An assault with a deadly weapon is a lesser included offense of armed robbery. This is obviously true because it would be impossible to commit a robbery with a firearm without assaulting someone with a deadly weapon. Nevertheless, it does not follow that felonious assault with a deadly weapon inflicting serious injury is also a lesser included offense of armed robbery. Certainly, it is possible to perpetrate a robbery with a firearm without ever actually shooting someone or, as in this case, using the gun to beat someone about the head. The protection against double jeopardy does not attach unless all of the essential elements of one of the offenses are also included in the elements of another offense for which the defendant has been convicted. The issue raised by defendant Nance was specifically addressed and decided in *State v. Richardson*, 279 N.C. 621, 628, 185 S.E. 2d 102, 107-08 (1971), where the Court stated:

> If a person is convicted simultaneously of armed robbery and of the lesser included offense of assault with a deadly weapon, and both offenses arise out of the same conduct, as in *State v. Parker*, 262 N.C. 679, 138 S.E. 2d 496 (1964), and *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970), and separate judgments are pronounced, the judgment on the separate verdict of guilty of assault with a deadly weapon must be arrested. In such case, the armed robbery is accomplished by the assault with a deadly weapon and *all* essentials of this assault charge are essentials of the armed robbery charge. However, if a defendant is convicted simultaneously of armed robbery and of *felonious* assault under G.S. 14-32(a), neither the infliction of serious injury nor an intent to kill is an essential of the armed robbery charge. A conviction of

armed robbery does not establish a defendant's guilt of felonious assault.

See also State v. Dammons, 293 N.C. 263, 237 S.E. 2d 834 (1977). Defendant Nance could be convicted of both charges without offending the notion of double jeopardy, and it was not error for the judge to deny his motion to arrest judgment on this ground.

[8] Both defendants contend that their motions to dismiss the armed robbery charge should have been granted. It is elementary that a motion to dismiss should only be granted when the State has failed to present sufficient evidence of the essential elements of the crime charged, considering all the evidence in the light most favorable to the State with the benefit of every reasonable inference of fact arising therefrom. *State v. Easterling*, 300 N.C. App. 594, 268 S.E. 2d 800 (1980); *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). Defendants argue that a violation of G.S. 14-87 could not be proven because the State could not show that anything was taken by force from the presence of Mrs. Singletary with the use of a firearm. We disagree.

The State's evidence tended to show that Mrs. Singletary entered her house about 11:30 a.m. through a side door and immediatly noticed that cabinet drawers and doors were open. She did not hear anything, but she went to the phone to call her son. As she was talking on the phone, a masked man carrying a pistol came out of the bedroom down the hall toward her. The man said he was going to kill her. She knocked the gun up as it fired, and he began to beat her with it. She managed to escape out of the house. When she returned from the hospital, she went into the bedroom with police. She discovered that a window had been broken and that several items of personal property were missing. Upon this evidence, it was reasonable to infer that Edwards had attempted to frighten Mrs. Singletary and that, as soon as she left the house, he went back into the bedroom and took property which did not belong to him.

In urging dismissal, defendant Nance relies on and cites the case of *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). *Powell* is inapposite here. In *Powell*, the Court upheld the defendant's convictions for first degree murder and rape, but reversed the denial of a motion to dismiss the armed robbery charge because there was no evidence, and no reasonable inference to be adduced therefrom, that the defendant took objects from the victim by force while she

was alive. The evidence merely indicated "that defendant took the objects as an afterthought once the victim had died." 299 N.C. at 102, 261 S.E. 2d at 119. The instructive case is *State v. Clemmons*, 35 N.C. App. 192, 241 S.E. 2d 116, *review denied*, 294 N.C. 737, 244 S.E. 2d 155 (1978). In *Clemmons*, the co-owner of a store went into an adjoining room after being threatened with force and was shot by the unidentified robber. The other co-owner then gave the money to the defendant. This Court held that the evidence supported a conviction for robbery with a firearm.

> The word "presence" must be interpreted broadly and with due consideration to the main element of the crime-intimidation or force by the use or threatened use of firearms. "Presence" here means a possession or control by a person so immediate that force or intimidation is essential to the taking of the property. And if the force or intimidation by the use of firearms for the purpose of taking personal property has been used and caused the victim in possession or control to flee the premises and this is followed by the taking of the property in a continuous course of conduct, the taking is from the "presence" of the victim.

We construe the term "presence" broadly and hold that the evidence against defendants was sufficient to support convictions for armed robbery. *See State v. Brown*, 300 N.C. 41, 265 S.E.2d 191 (1980); *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980).

[9] Defendant Nance additionally contends that the court should have dismissed the charge against him as an aider and abettor. To support such a conviction, the State's evidence must show the existence of the following three elements: (1) defendant's actual or constructive presence during the crime; (2) defendant's intent to aid in the commission of the offense if necessary; and (3) the communication of defendant's intent to assist to the actual perpetrator. *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975); *see, e.g., State v. Corbin*, 48 N.C. App. 194, 268 S.E. 2d 260 (1980).

The State's evidence showed that defendant Nance was parked on the road near the woods leading to Mrs. Singletary's house at the time of the crime. The car belonged to defendant Edwards. An officer had seen the car parked at the same location two weeks earlier. In his statement to Deputy Little, Nance admitted that he had lied

about the brake problem and knew about the "hit" at Mrs. Singletary's. The hatchet found in the bedroom, the ladder outside the window, and the hatchet holster and belt belonged to Nance. Viewed in the light most favorable to the State, this evidence supports the conclusion that Nance communicated to Edwards his intent to aid him by driving the car and waiting for his return, by supplying the tools used to gain entry into the building and by remaining close enough to the scene to render assistance if it became necessary. *See State v. Sanders, supra; State v. Gregory*, 37 N.C. App. 693, 247 S.E. 2d 19 (1978). We affirm the denial of defendant Nance's motion to dismiss the charge for aiding and abetting.

We have carefully reviewed defendants' remaining assignments of error concerning the manner in which the verdicts were taken and recorded and the denial of various post-verdict motions. These assignments lack merit, fail to disclose any prejudicial error and are overruled.

No error.

Judges MARTIN (Robert M.) and WELLS concur.

STATE OF NORTH CAROLINA v. JOHNNNY JORDAN

No. 8012SC356

(Filed 2 December 1980)

1. Criminal Law § 66.18— in-court identification — objection by defendant — failure to hold voir dire — harmless error

The failure of the trial court to hold a voir dire examination and make findings of fact upon objection by a defendant to an in-court identification, while not approved, will be deemed harmless error where the record shows that the pretrial identification was proper or that the in-court identification of defendant had origin independent from the pretrial identification.

2. Criminal Law § 66.18— in-court identifications of defendant — voir dire not required

The trial court did not err in failing to hold a voir dire examination of two witnesses concerning their identifications of defendant before they were allowed to testify, since one of the witnesses saw defendant at the sheriff's department within approximately one hour of the crime, but this pretrial confrontation was not impermissibly suggestive; the witness's in-court identification of defendant

was based upon her observation of defendant as their automobiles met on the highway and so the in-court identification was independent in origin from her confrontation of defendant at the sheriff's department; there was no evidence that the second witness ever saw defendant after their encounter at her home on the morning of the crime until the time of trial; and the second witness's identification was based upon a face to face conversation she had with defendant when he stopped at her door to ask directions.

3. Criminal Law § 102.5— cross-examination of defense witness — comment on truthfulness — failure of defendant to object — no correction by court required

The prosecutor's comments as to the truthfulness of defendant's witness were not so grossly improper as to require the trial court to correct them in the absence of defendant's objection at trial.

4. Criminal Law § 96— questions withdrawn from jury consideration — defendant not prejudiced

Defendant was not prejudiced by the prosecutor's asking of two improper questions concerning a witness's and defendant's involvement in unrelated offenses, since the defendant objected, both objections were sustained, and the jury was told by the court not to consider the questions.

APPEAL by defendant from *Braswell, Judge*, 29 November 1973 Session of Superior Court held in CUMBERLAND County. Heard in the Court of Appeals 16 September 1980.

Defendant was charged in cases numbered 72CR6611, 72CR6613, 72CR6614 and 72CR6615 with felonious breaking, entering, larceny and receiving. He pleaded not guilty to all of these charges.

The evidence for the State tended to show the following: Defendant and his accomplice, Norris Wayne Horne (also known as Norris Wayne Benson), broke into four Cumberland County residences and took items of personal property therefrom without the authorization of the owners on the morning of 7 March 1972. The perpetrators of these crimes were driving a 1970 model red and white Cadillac with a U-Haul trailer attached.

On the day of the break-ins, defendant and Norris Wayne Horne were stopped and questioned by law enforcement officers at approximately noon. At that time, defendant was driving a red and white Cadillac with the U-Haul trailer attached. With defendant's permission, the officers searched the U-Haul trailer where they discovered many of the stolen items. Defendant and Norris Wayne Horne were placed under arrest for the offenses charged. In a search of defendant's vehicle pursuant to the arrest, the officers

found a number of weapons which had been taken from the residences earlier that morning.

Defendant's evidence consisted chiefly of the testimony of his alleged accomplice, Norris Wayne Horne. Horne testified that he had previously pleaded guilty to the same offenses with which defendant was charged. Although he admitted his own participation in these offenses, he claimed that the defendant had not been involved with him. Horne testified that he and a fellow prison escapee borrowed defendant's car to carry out the crimes on the morning of 7 March 1972, and when the law enforcement officers subsequently stopped him and the defendant for the search, defendant was unaware that the stolen items were in the trailer or the car.

In cases number 72CR6611, 72CR6613 and 72CR6615 the jury returned verdicts of not guilty as to the felonious breaking, entering, and receiving charges and verdicts of guilty to the charges of felonious larceny. In case number 72CR6614 the jury found defendant guilty of the felonious breaking, entering and larceny charges, but not guilty of the charge of felonious receiving. Defendant was sentenced by the court to four consecutive ten-year terms of imprisonment. Defendant appealed from the entry of these judgments.

Additional facts necessary for this decision are set forth in the opinion.

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

Assistant Public Defender Gregory A. Weeks for defendant appellant.

MORRIS, Chief Judge.

In his brief defendant specifically abandons his assignments of error numbered one and three, and we, therefore, do not consider them here. Rule 28, N.C. Rules of Appellate Procedure.

By his second assignment of error defendant argues that the trial court erred by overruling his general objections to the in-court identifications of defendant by State's witnesses Hilda Gray and Emma Jones, and by denying his motion to strike the testimony of witness Gray. In conjunction with this argument, he contends that the trial court erred by failing to hold a *voir dire* examination of

these witnesses concerning their identifications before they were allowed to testify.

The record shows that State's witness Gray testified that on the morning the larcenies occurred she was at work. She was notified by her mother, who lived nearby, that someone was attempting to break into her home. Mrs. Gray's mother gave her a description of defendant's car as the one being used by the individuals entering her home. Mrs. Gray left work on the alert for a car fitting that description. On her way home she observed a red and white Cadillac pulling a U-Haul trailer. She slowed the speed of her own vehicle and was able to get a good view of the defendant who was driving the Cadillac and looking directly at her. Mrs. Gray testified that she was "approximately a hundred feet" from defendant's vehicle when she observed him.

Mrs. Gray later saw the defendant at the sheriff's department. As to the events of this encounter she testified:

> I saw the defendant shortly after this incident down at the sheriff's department. There were detectives there at the time. I gave the detectives a description of the automobile that I had seen. At that time, I did not identify the defendant as being the driver of the car. I did tell the officers that the defendant looked like the driver of the car, but I would not swear that he was. This was within an hour after I had seen the car.

This is the only evidence of Mrs. Gray's confrontation with the defendant after the break-ins.

At the trial Mrs. Gray was allowed to make an in-court identification of the defendant over his objection. When asked if she could identify anyone in the courtroom as the driver of the red and white Cadillac she saw the day of the robbery she responded, "[w]ell, the defendant looks very much like him."

State's witness Emma Jones testified at trial that she lived across the street from one of the residences that was broken into on the morning of 7 March 1972. Early that morning she was at home when a man came to her door inquiring about the location of a certain mill. Mrs. Jones told this man that she did not know where the mill was located and she observed him return to the road where he had a red car parked. When Mrs. Jones was asked by the prosecu-

tor if she had ever before seen the man who came to her door the morning of the break-in, she replied:

A. Well, he looked like him; I couldn't say it is.

Q. Looked like him?

A. The one I seen.

Q. Who looks like him?

A. This one over here (indicating the defendant).

On cross-examination Mrs. Jones stated "I can't positively say that the defendant is the man who came to my house on that date." She also testified that she did not come to the sheriff's office in connection with these events nor did she see the defendant from the time of her encounter with him on the morning of the break-ins until trial.

[1] Defendant made general objections to the admission of each of these in-court identifications as they were made. However, he failed specifically to request a *voir dire* examination of either of the State's witnesses. A general objection has been held sufficient to cause the trial court itself to invoke the *voir dire* procedure in this situation. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534 (1970), *cert. denied*, 400 U.S. 946, 27 L.Ed. 2d 252, 91 S.Ct. 253 (1970). The courts are not, however, in every instance required to conduct a *voir dire* examination to determine the admissibility of an in-court identification. The general rule in this State is that the failure of the trial court to hold a *voir dire* examination and make findings of fact upon objection by a defendant to an in-court identification, while not approved, will be deemed harmless error where the record shows that the pretrial identification was proper or that the in-court identification of defendant had an origin independent from the pretrial identification. *State v. Stepney, supra; State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968).

[2] State's witness Gray's identification meets both of the criteria set forth in this general rule. Substantially, all of the evidence in the record concerning Mrs. Gray's pretrial confrontation with the defendant is set out above. There is nothing to suggest that her encounter with defendant at the sheriff's department was improper or unnecessarily suggestive in any way. Our courts have held on numerous occasions that confrontations between a victim or wit-

ness and a suspect following the crime are not automatically so suggestive as to violate a defendant's constitutional rights. *State v. Thomas*, 292 N.C. 527, 234 S.E. 2d 615 (1977); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Saunders*, 33 N.C. App. 284, 235 S.E. 2d 94, *cert. denied*, 293 N.C. 257, 237 S.E. 2d 539 (1977); *State v. Ervin*, 26 N.C. App. 328, 215 S.E. 2d 845 (1975). The degree of suggestiveness of the pretrial confrontation must be judged by this Court from the circumstances surrounding the incident.

We must determine whether these circumstances were so unnecessarily suggestive and conducive to irreparable misidentification as to offend fundamental standards of decency, fairness and justice. *Foster v. California*, 394 U.S. 440, 22 L.Ed. 2d 402, 89 S.Ct. 1127 (1969); *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967); *State v. Henderson, supra.*

The only facts in evidence concerning the witness's pretrial confrontation with the defendant are those quoted above from her testimony. These facts do not show that any impermissibly suggestive procedures were used by the authorities during the confrontation. There is no evidence which would indicate that the confrontation was planned. The only possible suggestive element is the fact that the confrontation occurred in the sheriff's office. We conclude that this pretrial confrontation was not impermissibly suggestive.

Even had the facts of this particular case indicated that the pretrial confrontation was impermissibly suggestive, they would still pass the second criterion of the general test of admissibility. An in-court identification is competent even if the pretrial confrontation was improper, if the State's witness's in-court identification is independent in origin from the pretrial confrontation. *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Knight*, 282 N.C. 220, 192 S.E.2d 283 (1972); *State v. Bass*, 280 N.C. 435, 186 S.E.2d 384 (1972). We think the "totality of the circumstances" requires the conclusion that witness Gray's in-court identification was independent in origin from her confrontation of the defendant at the sheriff's department. Her in-court identification of defendant was based upon her observation of the defendant as their automobiles met on the highway. The facts show that at the time Mrs. Gray initially saw the defendant she had been alerted to the breaking and entering of her home, and she was on the lookout for a car fitting the

distinctive description of the defendant's. Upon seeing defendant's car, she slowed her own car, and the defendant looked directly at her. On cross-examination she explained the uncertainty of her identification of the defendant upon direct examination by stating "I did not state on direct that the defendant was driving the car because, at that time, his hair looked a little bit lighter than it does now." We think that all of these factors taken together provide ample evidence that Mrs. Gray's in-court identification of defendant was independent in origin from their pretrial confrontation, and the failure of the trial court to order a *voir dire* examination was, therefore, harmless error.

The trial court's admission of State's witness Jones's in-court identification of the defendant without a *voir dire* examination was not erroneous for the same reasons. There is no evidence that Mrs. Jones ever saw the defendant after their encounter at her home on the morning of the robbery until the time of trial. Her testimony is based upon a face to face conversation she had with the defendant when he stopped at her door to ask directions. Without any evidence of a pretrial identification procedure that would impermissibly taint the witness's in-court identification we find that the trial court's failure to hold a *voir dire* examination of the State's witness was not in error.

One of the bases for defendant's argument that the admission of the identifications of State's witnesses Gray and Jones into evidence was prejudicial error is that their identification testimony was uncertain. A witness may give his opinion as to the identity of a person whom he saw sometime in the past. The witness's lack of positiveness in his identification affects only the weight to be given the testimony by the jury and not its admissibility. *State v. Brown*, 280 N.C. 588, 187 S.E. 2d 85, *cert. denied*, 409 U.S. 870, 34 L.Ed. 2d 121, 93 S.Ct. 198 (1972); *State v. Willis*, 22 N.C. App. 465, 206 S.E. 2d 729 (1974); *State v. Stitt*, 18 N.C. App. 217, 196 S.E. 2d 532 (1973). Defendant's argument is without merit.

By his fourth assignment of error defendant complains that the prosecutor committed prejudicial error by improperly questioning defendant's witness, Norris Wayne Horne. First, he objects to the prosecutor's assertion of his opinion on two occasions during his cross-examination that the defense witness was telling a lie. Second, he complains about questions repeatedly put to the same defense witness by the prosecutor concerning his and the defend-

ant's involvement in prior unrelated offenses. The improper question was repeated despite the court's sustaining defendant's objection thereto.

[3] As to defendant's complaint that the prosecutor should not have been allowed to give his opinion as to the witness's truthfulness, we note that defendant failed to object to these statements during the trial.

The general rule is that where no objection or exception is made at trial to the allegedly improperly admitted evidence, the appellant may not challenge the item for the first time on appeal. *State v. Smith*, 291 N.C. 505, 231 S.E.2d 663 (1977); *Sutton v. Sutton*, 35 N.C. App. 670, 242 S.E. 2d 244 (1978). Failure to object at trial is normally held to constitute a waiver of the error.

Defendant claims that the errors he cites in this instance come under an exception to this rule. He contends that the prosecutor's statements were so grossly improper that it was erroneous for the trial court not to have corrected them *ex mero motu*. As authority for this argument he cites *State v. Smith*, 240 N.C. 631, 83 S.E. 2d 656 (1954); and *State v. Locklear*, 294 N.C. 210, 241 S.E. 2d 65 (1978). Both of these cases are easily distinguishable from the case under consideration.

In the case before us the prosecutor's comments as to defendant's witness's answers to his questions consisted of the following:

> I ask you if you didn't say you took the diamond ring and over two hundred dollars from Mrs. Gray? *You know that is a lie.* You did not get the two hundred dollars from the Gray house that you got when you got the pistol? . . . *You know that is a lie don't you?*

In *State v. Smith, supra*, the statements were clearly grossly unfair and made by the State solicitor in his argument to the jury, not in cross-examination where the witness had an opportunity to deny them vigorously, as defendant did here.

In *State v. Locklear*, 294 N.C. 210, 241 S.E. 2d 65 (1978), the prejudicial statement occurred in the district attorney's cross-examination of the defendant, Clarence Leonard. The district attorney stated, "Clarence, you are lying through your teeth and you know you are playing with a perjury count; don't you? . . . Now,

think fast, Leonard. Think up a good story while you are up there." 294 N.C. at 214-15; 241 S.E. 2d at 68. The Court held that the trial court erred in allowing the statement to remain for jury consideration and that defendant's failure to object to these comments did not constitute a waiver of the error on appeal. The Court stated:

> Yet, even absent an objection, "it may be laid down as law, and not merely discretionary, that where the counsel *grossly* abuses his privelege, to the manifest prejudice of the opposite party, it is the *duty* of the judge to stop him then and there. And if he fails to do so and the impropriety is gross, it is good ground for a new trial." *Jenkins v. Ore. Co.*, 65 N.C. 563, 564-65 (1871); . . .

294 N.C. at 218, 241 S.E. 2d at 70. The Court emphasizes the fact that counsel must make *grossly* improper statements in order for the exception to the rule to apply.

The evidence presented by the State in the instant case strongly suggests that defendant was guilty of the crimes charged. The prosecutor was trying to impeach the defense witness on cross-examination when he made these allegedly improper statements. He was endeavoring to point out inconsistencies in the statements made by the witness on direct examination and those he made on cross-examination. The prosecutor's reasoning was warranted by discrepancies in the evidence.

We have considered the totality of the facts and the nature of the wording of the prosecutor's statements in the present case. We do not think that these statements reach the level of the grossly improper statement which would require us to find sufficiently prejudicial error in the trial court's failure to correct them *ex mero motu*. We hold that since the defendant failed to object to these statements at trial, any error was waived.

We certainly discourage the making of statements similar to those which the prosecutor made in this case. However, in view of the overwhelming evidence of defendant's guilt presented by the State in this case, the prosecutor's remarks could not have contributed to conviction. *See State v. Thompson*, 278 N.C. 277, 179 S.E. 2d 315 (1971).

[4] In the same assignment of error defendant asserts that the following cross-examination of defense witness, Norris Wayne

Horne, by the prosecutor was improper:

> Q. What were you and Mr. Johnny Jordan going to do with the jewelry?
>
> ATTORNEY NIMOCKS: OBJECTION.
>
> COURT: SUSTAINED. Do not consider the question, Members of the Jury; the Court rules it is not competent in any way.
>
> Questions continued by Attorney Grannis:
>
> Q. I ask you if the defendant, Johnny Jordan was not arrested on the same break-ins in Kinston that you were arrested on?
>
> ATTORNEY NIMOCKS: OBJECTION.
>
> COURT: SUSTAINED.
>
> ATTORNEY NIMOCKS: I would like to argue in front of the jury, if this line of questioning is going to continue. I am perfectly willing to bring out the whole thing in front of the jury.
>
> COURT: Both of you sit down. OBJECTION SUSTAINED.

The reason for his complaint is that the prosecutor's questions dealt with unrelated offenses committed by the defense witness and the alleged involvement of the defendant with the witness in those offenses.

The record shows that the prosecutor asked only two improper questions concerning this matter, to both of which the defendant promptly objected. Both of defendant's objections were sustained, and the jury was told by the court not to consider the questions. Any error in these questions was amply remedied by the actions of the trial court.

Finally, defendant contends that because he was denied his constitutional right to the effective assistance of counsel he is entitled to a new trial.

The general rule is that the caliber of an attorney's representation in a criminal prosecution is a denial of the constitutional rights

of his client only when it is so lacking that the trial becomes a farce and mockery of justice. *State v. Sneed*, 284 N.C. 606, 201 S.E. 2d 867 (1974), and cases cited therein. The record discloses that defendant's trial counsel presented evidence on the defendant's behalf, entered objections to the State's evidence, and conducted effective cross-examination of the State's witnesses. It is quite clear that defendant's representation at trial was not so lacking that his trial became a farce and mockery of justice. His constitutional rights were not violated.

The defendant has had a fair and impartial trial free from prejudicial error.

No error.

Judges HEDRICK and WHICHARD concur.

HAYDEN P. OXENDINE AND WIFE, DOROTHY W. OXENDINE v. CATAWBA COUNTY DEPARTMENT OF SOCIAL SERVICES

No. 8025SC280

(Filed 2 December 1980)

1. Rules of Civil Procedure § 42; Trial § 8— superior and district court actions — consolidation for trial — no authority by nonpresiding judge

A superior court judge had no authority under G.S. 1A-1, Rule 42 (a) to order the consolidation for trial in the superior court of plaintiffs' district court action for permanent child custody and plaintiffs' superior court action for adoption of the child where the judge entered the order out of term and out of session, he was not presiding at the trial of this matter when he entered his preliminary order of consolidation, and he was not scheduled to preside at the session of court at which the consolidated cases were set for trial.

2. Infants § 6— child placed by department of social services — standing of foster parents to seek permanent custody

Foster parents had no standing to bring an action for permanent custody of a child temporarily placed with them by the county department of social services where the rights of the child's natural parents had been surrendered to the department of social services, and the department had legal custody of the child and the right to place the child for adoption. G.S. 7A-289.33.

3. Infants § 6— right to bring child custody action — effect of G.S. 50-13.1

G.S. 50-13.1 gives a right to bring a child custody action only in instances where custody disputes have arisen in the context of separation and divorce and

does not give foster parents standing to bring an action for permanent custody of a child temporarily placed with them by the county department of social services.

4. **Adoption § 2.1— consent by department of social services — reasonableness of withholding of consent**

Although plaintiff foster parents agreed "to initiate no proceedings for the adoption or custody of a child without the prior written permission of the supervising agency," the trial court in a proceeding instituted by plaintiffs to adopt a child placed with them by the county department of social services must determine whether the consent of the department to plaintiffs' adoption of the child was unreasonably and unjustly withheld, and if the court finds that a failure to allow plaintiffs to petition for adoption would be inimical to the best interests and welfare of the child, it may proceed as if permission had been given.

5. **Adoption § 2; Clerks of Court § 3— adoption proceeding — transfer to civil issue docket**

The clerk of superior court properly transferred an adoption petition to the civil issue docket of the superior court where issues of law and fact were raised. G.S. 1-273.

APPEAL by plaintiff from *Ferrell, Judge.* Order entered 13 November 1979 in Superior Court, CATAWBA County. Heard in the Court of Appeals 17 September 1980.

The minor child involved in this case was, on 19 April 1978, placed in the custody of and surrendered to the defendant, Department of Social Services, for adoptive placement by his biological mother. On 20 October 1978, the biological father of the child executed a consent for this child to be placed for adoption by defendant.

On 2 June 1978, when the child was approximately five weeks old, he was placed by defendant in plaintiffs' home. Plaintiffs were to provide care and supervision for the child as licensed foster parents under the Foster Home Program. This child had, and still suffers from, severe respiratory problems and, as a result, was subject to seizures. These medical problems required special care and attention including constant special supervision of the child, which necessary care plaintiffs supplied. The child slept in the same room with the plaintiffs from the time it was placed in their care due to the danger of death to the child from its seizures. In April of 1979, plaintiffs requested defendant's consent to adopt this child. Defendant denied their request on the bases that plaintiffs were ineligible because (1) at ages forty-four and forty-three they were too old and because (2) their residency was in Catawba County, which under the circumstances greatly increased the like-

lihood that the natural parents of the child would learn of his identity and whereabouts. Soon after this denial, on 7 May 1979, plaintiffs were informed by defendant that adoptive placement of the child in another home was imminent and that they could expect removal of the child in the near future.

Consequently, plaintiffs filed a complaint in Catawba County District Court on 25 May 1979 seeking permanent custody of the child. This action for custody was brought pursuant to G.S. 50-13.4 and G.S. 50-13.5 (b) (1). On the same day, Judge Tate entered an interlocutory custody order awarding plaintiffs custody of the child pending the final outcome of their custody action.

On 12 June 1979, plaintiffs filed a petition for adoption of Jeffrey Thomas Brown with the Clerk of Superior Court of Catawba County. Defendant answered plaintiffs' petition by denying that plaintiffs' custody of the child would be in its best interest and enumerating several justifications for this conclusion. Defendant also claimed that plaintiffs failed to state a claim for relief in their adoption petition, that they are barred by their Agency Foster Parents Agreement from bringing the adoption proceeding, and that they have no standing before the court due to the terms of this agreement.

On 11 October 1979, the Clerk of Superior Court ordered the adoption proceeding transferred to the civil issue docket of Catawba County Superior Court for hearing, for that both factual and legal matters were at issue in this cause.

Thereafter defendant moved, pursuant to Rule 42 (a) of the North Carolina Rules of Civil Procedure, to consolidate for hearing in the superior court plaintiffs' district court custody action with plaintiffs' petition for adoption.

Plaintiffs were given notice that defendant's motion to consolidate the adoption proceeding and custody action would be heard 26 October 1979. Plaintiffs filed notice of limited appearance challenging the jurisdiction of the superior court to hold a hearing on the consolidation matter. Plaintiffs contended that the district court had exclusive jurisdiction over child custody matters pursuant to G.S. 50-13.5 (h) and, further, that the superior court had no jurisdiction to consider the adoption proceeding prior to an appeal from a determination by the Clerk of Superior Court. In support of

the latter contention plaintiffs argued that G.S. 48-12 gave the Clerk original exclusive jurisdiction of adoption proceedings and the superior court had no jurisdiction except on appeal.

Despite plaintiffs contentions, Judge Ferrell entered an order on 13 November 1979 consolidating the custody action and adoption proceedings for trial in the superior court. He dismissed plaintiffs' motion to vacate the Clerk of Superior Court's order transferring the adoption proceeding to superior court.

On 16 November 1979, plaintiffs filed notice of appeal from Judge Ferrell's order consolidating the two proceedings and dismissing plaintiffs' motion to vacate the Clerk's transfer of the adoption proceeding to the superior court.

On 26 November 1979, defendant filed a motion asking the trial court to declare plaintiffs' notice of appeal and appeal entries null and void. Defendant also asked that the superior court set the consolidated actions for trial. 3 December 1979 was set as the hearing date for this motion.

Plaintiffs objected to this hearing on the grounds that the superior court had no jurisdiction in either case and that the matter was already on appeal to the Court of Appeals involving jurisdictional issues.

Subsequently, Judge Ferrell entered an order on 10 December 1979 concluding that his order of 13 November 1979 was a nonappealable interlocutory order and that the notice of appeal and appeal entries which he had signed earlier were a nullity. Judge Ferrell set the trial of the consolidated actions for 4 February 1980. Plaintiffs' petition for a writ of certiorari was allowed by this Court on 23 January 1980.

Rudisill and Brackett, by J. Richardson Rudisill, Jr., and Chambers, Stein, Ferguson and Becton, by John W. Gresham and Adam Stein, for plaintiff appellants.

Sigmon and Sigmon, by W. Gene Sigmon, and Thomas W. Warlick for defendant appellee.

MORRIS, Chief Judge.

[1] This case presents for decision one major issue and several ancillary issues. The key issue is whether it was proper for Superior

Court Judge Ferrell to enter his interlocutory order consolidating plaintiffs' custody action and plaintiffs' petition for adoption for hearing in the superior court. Judge Ferrell heard defendants' motion for consolidation and issued his order out of term and out of session.

G.S. 1A-1, Rule 42 (a) authorizes a superior court judge to order the consolidation of actions pending in both the superior and district court divisions of the same county when the actions to be consolidated involve common questions of law and fact. The custody action and petition for adoption in the case *sub judice* do involve related issues of fact and law. However, from a procedural standpoint, this consolidation was in error.

Prior to the effective date of the current Rules of Civil Procedure in our State, this Court decided that only the judge who would preside at the trial of the matters to be consolidated could order their consolidation. In *Pickard v. Burlington Belt Corp. & Burlington Belt Corp. v. Clark Bldg. Co.*, 2 N.C. App. 97, 162 S.E. 2d 601 (1968), Judge Brock, now Justice Brock, stated with regard to this issue: "Whether cases should be consolidated for trial is to be determined in the exercise of his sound discretion by the judge who will preside during the trial; a consolidation cannot be imposed upon the judge presiding at the trial by the preliminary Order of another trial judge." 2 N.C. App. at 103, 162 S.E. 2d at 604-05.

The effect of this decision has been carried forward in interpreting the applicability of Rule 42 (a). In *Maness v. Bullins*, 27 N.C. App. 214, 218 S.E. 2d 507 (1975), this Court reasserted the validity of *Pickard* with regard to consolidation. There we cited Justice Brock's statement in *Pickard* and added "Since consolidation of claims cannot be thrust upon a presiding judge by edict of another judge, then, correspondingly, one judge should not have to follow the decision of another judge granting new trials on the joint claims previously presented in the earlier action." *Maness v. Bullins*, 27 N.C. App. at 217, 218 S.E. 2d at 509.

Judge Ferrell was not presiding at the trial of this matter when he entered his interlocutory order of consolidation. He heard defendant's motion and entered his order out of term and out of session. Nor was he scheduled to preside at the session of court at which the consolidated cases were, by him, set for trial. Under the foregoing rules we must conclude that his consolidation of these

proceedings was improper.

[2] We must now consider whether plaintiffs had the required standing to bring their custody action.

Under G.S. 48-9.1 (a) (1) the county department of social services or the child placing agency to which the child has been surrendered and parental consent has been given has the legal custody of the child to be adopted. That legal custody does not ever pass to the foster parents, although the child has been placed in their physical custody. The department or child placing agency also possesses all rights of the consenting parties, except inheritance rights, upon surrender of the child. The department or agency retains legal custody of the child as well as the rights of the consenting parties until entry of the interlocutory decree provided for in G.S. 48-17, or until the final order of adoption is entered if the interlocutory decree is waived by the court in accordance with G.S. 48-21, or until consent is revoked within the time permitted by law, or unless otherwise ordered by a court of competent jurisdiction.

In an earlier case, *Browne v. Dept. of Social Services*, 22 N.C. App. 476, 206 S.E. 2d 792 (1974), Judge Britt, now Justice Britt, decided in circumstances similar to those before us that foster parents had no standing to sue for the custody of a child that had been placed with them by a department of social services. Judge Britt reasoned:

> G.S. 7A-288 provides for the custody of, and the termination of parental rights in, neglected children. The statute contains the following provision: "In such cases, the court shall place the child by written order in the custody of the county department of social services or a licensed child-placing agency, *and such custodian shall have the right to make such placement plans for the child as it finds to be in his best interest.* Such county department of social services or licensed child-placing agency shall further have the authority to consent to the adoption of the child, to its marriage, to its enlistment in the armed forces of the United States, and to surgical and other medical treatment of the child." (Emphasis added).
>
> We hold that the petitioner had no standing to have the court determine the custody, temporary or permanent, of the children in question.

22 N.C. App. at 478, 206 S.E. 2d at 793.

G.S. 7A-288 under which *Browne* was decided was repealed in 1977, 1977 N.C. Sess. Laws Ch. 879, § 7. Plaintiffs filed their complaint asking for custody of the minor child on 25 May 1979. On that date the issue of custody of a minor child whose parents' parental rights and obligations have been permanently terminated by a termination order was governed by G.S. 7A-289.33 (repealed 1979). That statute governs our decision. The applicable provisions of G.S. 7A-288 and G.S. 7A-289.33 are essentially the same in meaning. G.S. 7A-289.33 states:

> (1) If the child had been placed in the custody of or released for adoption by one parent to, a county department of social services or licensed child-placing agency and is in the custody of such agency at the time of such filing of the petition, that agency shall, upon entry of the order terminating parental rights, *acquire all of the rights for placement of said child* as such agency would have acquired had the parents whose rights are terminated released the child to that agency pursuant to the provisions of G.S. 48-9 (a) (1), including the right to consent to the adoption of such child. (Emphasis added).

Due to the similarity of the two statutes we think *Browne* is controlling and requires that we hold that plaintiffs did not have standing to seek custody of the child under these circumstances.

[3] Plaintiffs base their claim of standing to sue for custody on G.S. 50-13.1 which provides:

> Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided.

Considered in isolation that statute would appear to be a general grant of standing to any individual to seek the custody of a child under any circumstances. Therefore, G.S. 50-13.1 appears to be in conflict with G.S. 7A-289.33. However, when G.S. 50-13.1 is examined in context with the other sections of Chapter 50 it becomes apparent that the legislature did not intend that G.S. 50-13.1 apply to grant standing for custody actions in the area of adoption.

Chapter 50 of which this section is a part is entitled "Divorce and Alimony". The clear implication is that G.S. 50-13.1 was intended to apply only in instances where custody disputes arose in the context of separation or divorce.

> [F]or the purpose of learning and giving effect to the legislative intention, all statutes relating to the same subject are to be compared and so construed in reference to each other that effect may be given to all provisions of each, if it can be done by any fair and reasonable interpretation. *Alexander v. Lowrance*, 182 N.C. 642, 109 S.E. 639.

In Re Blalock, 233 N.C. 493, 508, 64 S.E. 2d 848, 858 (1951).

G.S. 50-13.1 is preceded by G.S. 50-11.2 which provides:

> Where the court has the requisite jurisdiction and upon proper pleadings and proper and due notice to all interested parties the judgment in a *divorce action* may contain such provisions respecting care, custody, tuition and maintenance of the minor children of the marriage as the court may adjudge. . . . (Emphasis added).

When these two sections are read together as required by the rule of construction of *In Re Blalock, supra*, it seems evident that the legislature did not intend that the general grant of standing in G.S. 50-13.1 apply to custody actions in the adoption context. Plaintiffs' contention that G.S. 50-13.1 gives them standing to seek custody in the case *sub judice* is without merit.

[4] We turn now to the question of whether the foster parents have legal standing to seek adoption of the child. Defendant contends that it should be granted specific performance of its foster parent agreement with plaintiffs. The agreement is not a part of the record nor has it been submitted as an exhibit. The only portion which is before this Court indicates that plaintiffs agreed "to initiate no proceedings for the adoption or custody of a child without the prior written permission of the supervising agency." Defendant contends that, pursuant to this contract, its permission is necessary before plaintiffs can attempt to adopt the child.

A prior North Carolina case in which an analagous issue was decided was *In Re Daughtridge*, 25 N.C. App. 141, 212 S.E. 2d 519

(1975). The question before this Court in *Daughtridge* was whether the Edgecombe County Department of Social Services could withhold its statutorily granted right to consent to a petition for adoption under G.S. 48-9 (b). We found that the department's statutory right to consent was not absolute, but that the court could proceed in the absence of the department's consent as if consent had been given if the court found it to be in the best interest of the child.

The best interest and welfare of the child is the paramount concern of the court in these cases. The reasoning of *Daughtridge* is likewise applicable to the situation in the instant case. The court must be allowed to determine whether the consent of the department of social services to the plaintiffs' attempt to adopt the child was unreasonably and unjustly withheld. If the Court should find that a failure to allow the plaintiffs to petition for adoption would be inimical to the best interests and welfare of the child, it may proceed as if the permission which it finds ought to have been given had been given.

For a good discussion of the law in other jurisdictions concerning the enforcement of these agreements see: *Validity and Enforcement of Agreement by Foster Parents That They Will Not Attempt to Adopt Foster Children*, Annot., 78 A.L.R. 3d 770 (1977).

[5] Finally, plaintiffs argue that the Clerk of Superior Court erred by transferring plaintiffs' adoption petition to the civil issue docket of the superior court. G.S. 1-273 provides:

> If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing session of the superior court.

This Court has previously held that this statute controls the transfer of a petition for adoption from the clerk to the superior court docket. *In re Norwood* and *In re Haigler*, 43 N.C. App. 356, 258 S.E. 2d 869 (1979), *review denied*, 299 N.C. 121, 261 S.E. 2d 922 (1980). We think it applies in the present case.

From the pleadings and affidavits contained in the record we think there were such issues of law and fact. Therefore, we find the Clerk properly transferred the case to the superior court for the determination of these issues.

Defendant's contention that the superior court's order of 10 December 1979 concluding that its 12 November 1979 order consolidating these matters for trial was a nonappealable interlocutory order, and that plaintiffs' notice of appeal and appeal entries were nullities was in error has been rendered moot by our consideration of this matter upon petition for a writ of certiorari.

Accordingly, the superior court's order of 13 November 1979 consolidating the custody action and adoption proceeding for trial in the superior court is vacated. The custody action is remanded to the district court with instructions to dismiss due to plaintiffs' lack of standing. The petition for adoption is remanded to the superior court for determination of any issues of fact and law presented.

Judges HEDRICK and WHICHARD concur.

REBECCA BROWN STURGILL, PLAINTIFF-APPELLEE v. GEORGE C. STURGILL, JR., DEFENDANT-APPELLANT, AND PIEDMONT AVIATION, INC., GARNISHEE

No. 8021DC413

(Filed 2 December 1980)

1. Divorce and Alimony § 21— alimony arrearage held by clerk — order of garnishment stricken — defendant not entitled to funds held by clerk

Where plaintiff obtained a judgment against defendant for arrearages in child support and alimony, plaintiff moved for an order of garnishment for the amount of the judgment, defendant's employer was served with a summons to garnishee, notice of levy in garnishment proceeding, and order of attachment, the employer paid the amount of the judgment into the clerk's office, the court entered an order garnishing defendant's salary, and the order of garnishment was subsequently stricken, defendant was not entitled to have the sum in the clerk's office refunded to him pursuant to G.S. 1-440.45, since defendant could not claim to have prevailed in the principal case, the order striking the garnishment order not resolving any action in defendant's favor; the order of attachment was not dissolved by the order striking garnishment; and defendant could not assert the lack of service upon him for the reason that he failed in his response to motion for garnishment and countermotion to raise the defense of lack of proper service.

2. Garnishment § 1; Divorce and Alimony § 21.4— judgment for alimony arrearage — garnishment of defendant's wages proper

The means used to obtain the $2438.42 necessary to satisfy plaintiff's judgment against defendant was garnishment where plaintiff held a personal judgment against defendant; defendant was in willful contempt for failure to pay

alimony as it came due; plaintiff filed a motion seeking an order of garnishment; defendant's employer was served with summons to garnishee, notice of levy in garnishment proceeding, and order of attachment; and pursuant thereto defendant's employer withheld from his net disposable income an amount sufficient to satisfy the garnishment lien and paid that sum into the court pending an order from the district court to disburse the funds to plaintiff. Furthermore, garnishment of the $2438.42 was permissible under the circumstances of this case, since the amount garnished was a debt already accrued to defendant's benefit and not future earnings, and since defendant was not entitled to the 60 day exemption of G.S. 1-362 of earnings "necessary for the use of a family supported wholly or partly by his labor," as defendant's bare allegation that his income was necessary to support his new family was insufficient to support his claim for the exemption.

3. **Assignments § 1; Divorce and Alimony § 21; Rules of Civil Procedure § 70—assignment of defendant's wages to secure future alimony payments —execution by judge improper**

Defendant's contention that the trial judge was without authority to execute an assignment of defendant's wages on the ground that the judge could direct the act to be done by someone else but could not do it himself was without merit; however, though defendant's history of willful and intentional nonpayment of alimony was sufficient to justify the judge's entry of an order to defendant to execute an assignment of wages to secure future alimony payments, the judge was without authority himself to execute such an assignment absent defendant's failure to comply with a judgment within the time specified.

APPEAL by defendant from *Keiger, Judge.* Order entered 19 December 1979 in District Court, FORSYTH County. Heard in the Court of Appeals 16 October 1980.

Plaintiff, Rebecca Sturgill, and defendant, George Sturgill, were divorced in 1971 under a consent decree which awarded alimony and child support to plaintiff. Although the amount of the alimony and child support has been subsequently modified by amendment, defendant's obligation remains in full force under the 1971 judgment.

Defendant moved to Virginia some time after entry of the judgment. Since that time plaintiff has had difficulty on several occasions with collecting the amounts due her. In a judgment and order of arrest entered 31 August 1979, defendant was found in arrears in his payments to plaintiff in the amount of $2,438.42 and was found in willful contempt of the court.

On 8 October 1979, plaintiff filed a motion to have the wages of defendant garnished for the full amount of the 31 August judgment. The motion was not verified nor was it served upon defendant. On 9 October, defendant Piedmont Aviation, Inc., defendant

Sturgill's employer, was served with a summons to garnishee, notice of levy in garnishment proceeding, and order of attachment. Defendant Piedmont acknowledged its debt to defendant Sturgill and paid into court the full amount of the 31 August judgment. On 24 October 1979 an order was entered garnishing defendant's salary.

Defendant Sturgill filed a response to plaintiff's 8 October motion on 29 October 1979. In an order entered 1 November 1979, the order of 24 October was stricken, a hearing on the 8 October motion was scheduled, and plaintiff was ordered to return any moneys received under the stricken order to the clerk of court pending determination of the matter.

Prior to the hearing plaintiff filed numerous further motions, including motions seeking an assignment of wages to secure defendant's obligations to pay alimony and garnishment of defendant's wages for child support. Defendant answered these motions and counterclaimed for damages, attorney's fees, and punitive damages.

All motions were heard 14 December 1979. The trial judge found as facts: that defendant had deliberately set upon a course of action calculated to evade previous court orders; that defendant willfully failed to pay all alimony and child support payments; that defendant had the financial means to comply with the court's order; that plaintiff was in need of a continuing order of garnishment on defendant's wages to secure past, present, and future child support; and that, due to defendant's history of willful evasion of previous court orders, plaintiff was also in need of an assignment of wages and funds presently in the clerk's office for alimony payment.

The judge, pursuant to G.S. 50-16.7 and G.S. 1A-1, Rule 70, ordered the assignment of the $2,438.42 on deposit in the clerk's office to satisfy the judgment of 29 August 1979, and ordered an assignment of wages for past, present, and future alimony. In addition, pursuant to G.S. 110-136 the court ordered Piedmont to pay 20% of defendant's net earnings per pay period to the clerk to be applied to the child support arrears and thereafter to be applied to the continuing child support payments. Finally the court also ordered the defendant to pay the plaintiff's attorney's fees in the sum of $1,250.00.

Defendant appealed the 19 December 1979 order.

Yokley and Teeter by D. Blake Yokley and Lynn P. Burleson for plaintiff appellee.

Morrow, Fraser and Reavis by Larry G. Reavis for defendant appellant.

Womble, Carlyle, Sandridge & Rice by Francis C. Clark for garnishee appellee.

CLARK, Judge.

Since the defendant expressed acquiescence in the trial court's order with regard to the provision for garnishment for child support under G.S. 110-136, we need deal herein only with that portion of the order of 19 December 1979 which assigns the wages of defendant to the plaintiff in payment for his alimony obligation. The assignment of wages must be considered in two parts. First, we must consider whether the trial court's assignment of the $2,438.42 on deposit with the clerk was error. Second, we must consider whether the court's assignment of defendant's future wages is error.

[1] With regard to the amount on deposit with the clerk, defendant argues that the sum should have been refunded to him when the 24 October order was stricken. Defendant cites in support of his argument G.S. 1-440.45 which states in part:

> "If the defendant prevails in the principal action, or if the order of attachment is for any reason dissolved, dismissed or set aside, or if service is not had on the defendant as provided by § 1-440.7,
>
> (1) The defendant shall be entitled to have delivered to him
>
> . . . .
>
> c. All attached property remaining in the officer's hands . . . ."

We believe defendant's reliance on G.S. 1-440.45 is misplaced for the reason that he meets none of the three conditions upon which return of attached property is conditioned.

First, defendant cannot claim to have prevailed in the principal case. The order of 1 November 1979 striking the order of 24

October 1979 did not *resolve* any action in defendant's favor. It merely allowed the court to consider defendant's countermotion (which was filed after the 24 October order) and provided for hearing on all motions prior to disbursal of the attached funds.

Second, the order of attachment was *not* dissolved. The order of attachment was dated 8 October 1979. The order of 1 November 1979 was clearly limited by its terms to the Order of 24 October 1979.

Third, the defendant may not assert the lack of service upon him for the reason that he failed in his response to motion for garnishment and countermotion to raise the defense of lack of proper service, although he did raise the defense of failure to state a claim upon which relief can be granted. These circumstances work a waiver of any objection based upon jurisdiction or service of process under G.S. 1A-1, Rule 12 (h) (1).

Defendant was not entitled to have the funds returned to him, since he failed to satisfy any of the statutory conditions placed upon the return. The attached funds were properly held pending a hearing on the motions of both parties, to be held on 19 December 1979.

At that hearing the trial judge elected to grant plaintiff relief in the form of an assignment of wages rather than a garnishment. Defendant argues strenously that the judge was without authority to order garnishment, and that the assignment executed under Rule 70 was simply a means of granting garnishment indirectly to plaintiff when she was not entitled to it directly.

[2] As to the sum held on deposit by the clerk and disbursed to the plaintiff under the 19 December order, we hold that the action of the District Court, however denominated, was indeed a garnishment. A review of the record reveals: that plaintiff held a personal judgment against defendant in the amount of $2,438.42; that defendant was in willful contempt for failure to pay alimony as it came due; that on 8 October plaintiff filed a motion seeking an order of garnishment; that defendant's employer was served with a summons to garnishee, notice of levy in garnishment proceeding, and order of attachment; and that *pursuant thereto* defendant's employer withheld from his net disposable income an amount sufficient to satisfy the garnishment lien and paid that sum into the court pending an order from the District Court to disburse the funds to the plaintiff. Such an order was entered on 24 October 1979 although

later vacated by the court because it was entered before defendant's time for answering plaintiff's motion for garnishment had expired. Although the order of 19 December "assigns and directs" the clerk to pay to the plaintiff the $2,438.42, we believe the actual procedure followed to create the fund, as the record clearly discloses, was that of garnishment.

Having held that the means used to obtain for plaintiff the $2,438.42 necessary to satisfy her judgment was indeed garnishment as defendant alleges, we must next determine whether garnishment was permissible under the circumstances of this case. We hold that, as to the $2,438.42 disbursed to plaintiff under the 19 December order, garnishment was proper. G.S. 50-16.7(e) clearly states that: "[t]he remedies of attachment and garnishment, as provided in Article 35 of Chapter 1 of the General Statutes, shall be available in actions for alimony . . . ." Defendant cites *Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E. 2d 668 (1978), and *Phillips v. Phillips*, 34 N.C. App. 612, 239 S.E. 2d 743 (1977), as authority for "the long standing rule against paying alimony directly by the use of deducting amounts from a person's salary (garnishment)." We have examined those cases and find that in *Elmwood*, our Supreme Court *approved* garnishment for the amounts due as alimony with the following limitations: (1) *future* earnings may not be garnished and (2) a defendant is entitled to a 60-day exemption if he can show that his "earnings are *necessary* for the use of a family supported wholly or partly by his labor." G.S. 1-362. We conclude then that the garnishment of the defendant's wages was improper only if it violated one of the above two limitations.

The amount withheld from defendant's October wages was a debt already accrued to defendant's benefit and therefore garnishable under the rationale of *Elmwood, supra.* The comptroller of Piedmont Airlines testified at the 19 December hearing. Although he stated, "At the time I received the order, I did not owe any monies to Mr. Sturgill," and later, "Mr. Sturgill had a check due on the 20th, and I would not pay him until the 20th," we believe that other statements make clear that the comptroller was confusing the date the debt for wages *accrued* to defendant with the date the debt would be paid. The comptroller testified that on the date he was served with the order compelling him to withhold funds from defendant, he "had a check forthcoming that I had already written . . . . The check I was to send him . . . was *for services that he had rendered*

to the company on prior dates. He had earned monies but they were not yet due and payable to him until the 20th." We hold that as long as the order of garnishment did not attach wages for services *yet to be rendered*, the District Court's action was within the first of the above limitations.

The exemption under G.S. 1-362 would exempt from garnishment the wages of a defendant earned in the sixty days next preceding the order where "it appears, by the debtor's affidavit or otherwise, that these earnings are necessary for the use of a family supported wholly or partly by his labor." Defendant's varified pleadings were admitted in the hearing as affidavits. In his pleadings defendant alleged, "that he and his new family . . . are in need of the defendant's total income to maintain their welfare." We hold that the bare allegation by defendant that his income is necessary to support his new family is insufficient to support his claim for the exemption. We believe that defendant was required under G.S. 1-362 to state sufficient facts in his affidavit to allow the trial judge to determine that the exemption was necessary. We realize that if it appears to the court that the defendant's salary is necessary to support his second family, the court is *required*, however illogically, to grant the exemption [*Cf., Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E. 2d 668 (1978) (suggesting that the legislature never contemplated "that the needs of a wage-earner's second family should be supplied at the expense of the legitimate claims of his first family," but granting the exemption anyway, "*it plainly appearing from the defendant's affidavit* that his pay was necessary to his second family)]; nonetheless, since it does not plainly appear from defendant Sturgill's affidavit *what* the needs of his present family are, the trial court had no basis upon which to grant the exemption.

Based on the foregoing analysis there appears to us no impediment to the garnishment of defendant's wages to satisfy the plaintiff's judgment against the defendant for $2,438.42. Amounts earned thereafter, however, were clearly prospective earnings at the time of service on Piedmont, and therefore not subject to garnishment. *Finance Co. v. Putnam*, 299 N.C. 555, 50 S.E. 2d 670 (1948). *See Elmwood, supra.* Only if the District Court's purported assignment of wages was in fact authorized may any amounts beyond the $2,438.42 be properly paid directly from the defendant's employer to the plaintiff.

The order of 19 December 1979 purports to assign "30% of the

defendant's net earnings . . . to plaintiff . . . to be applied as follows: 15% of said net earnings . . . to be credited as payment of future alimony as said payments become due each and every month . . .; the remaining 15% . . . shall be applied toward alimony arrears in the amount of $1,305.06 . . ." until the arrearage is paid. The District Court cites as authority for its assignment of defendant's wages G.S. 50-16.7 and G.S. 1A-1, Rule 70.

[3] The District Court clearly had authority to order the defendant to execute an assignment of wages under G.S. 50-16.7. The only issue before us is whether the judge could *himself* execute the assignment. Under Rule 70:

> "If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the judge may direct the act to be done at the cost of the disobedient party by some other person appointed by the judge and the act when so done has like effect as if done by the party . . . ."

The defendant argues that the judge was without authority to execute an assignment of his wages for two reasons. First, defendant had not failed "to comply [with a judgment] within the time specified . . ." Second, the rule authorizes the judge to "direct the act to be done . . . by some other person appointed by the judge . . . ." It does not authorize the judge to act for the defendant, as was the case herein.

The second argument is the easier to deal with and will therefore be addressed first. We believe Rule 70 allows "some other person appointed by the judge" to carry out the judgment on the defendant's behalf as a convenience to the judge, to relieve the judge of the burden of acting himself. Where, as here, the judgment of the court can be fulfilled by simply executing a written authorization to defendant's employer to pay a percentage of his wages to the plaintiff, the judge may prefer to act *ex mero motu* on the defendant's behalf. Indeed the burden on the judge might be increased by involving a third party in so simple a procedure. Since the intent and effect would be the same whether the judge executed the assignment or some third person (*e.g.*, defendant's lawyer) executed it, we hold that the judge acted properly in authorizing the Rule 70 assignment *ex mero motu*.

We note additionally that defendant failed to demonstrate how the judge's assignment, even if it were error, could have possibly prejudiced him. Had the judge appointed a third party to assign defendant's wages, the end result would have been identical. *Turner v. Turner*, 261 N.C. 472, 135 S.E. 2d 12 (1964).

The defendant's first argument is not as easily dismissed. We believe that the defendant is correct in interpreting Rule 70 to require that he first fail to comply with a judgment within the time specified before authorizing the judge to proceed thereunder. We believe further that the portion of the order of 19 December 1979 which assigned 15% of defendant's net earnings to satisfy alimony arrears of $1,305.06 was proper under Rule 70. Defendant had failed to comply with the amended consent judgment, first entered in 1971, which directed him to pay support to plaintiff. Rule 70 thus authorized the judge, upon such failure, to direct the act to be done. The judge did so direct.

The judge acted outside the authority of Rule 70, however, when he assigned 15% of defendant's net earnings in satisfaction of future alimony payments. While we agree that defendant's history of willful and intentional nonpayment of alimony was sufficient to justify the judge's entry of an order to the *defendant* to execute an assignment of wages to secure future alimony payments, G.S. 50-16.7, we believe the judge was without authority to himself execute such an assignment absent defendant's "failure to comply with the judgment within the time specified." As to future alimony payments, there was no such failure. Since the judge had entered no prior order for defendant to assign his wages to plaintiff, he cannot be said to have failed of compliance so as to necessitate the judge directing such an assignment. Further, since future payments are not yet due, defendant cannot be said to have failed to comply with the amended consent judgment.

The defendant argues that plaintiff was not entitled to attorney's fees in the amount of $1,250.00. This argument is without merit. Plaintiff alleged in her pleadings and testified at the 19 December hearing that defendant's failure to pay the full amount of his support obligation had subjected her and her daughter to financial hardship and caused her to have to borrow money for living expenses. She had already been adjudged a dependent spouse. The order of 19 December contains findings of fact and conclusions of law to this effect, concluding that plaintiff had insufficient funds

with which to defray the expenses of her action and ordering defendant to pay her attorney's fees. We hold that the trial judge's finding and conclusions were properly supported by the evidence. *See Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980).

In light of our resolution of this matter, defendant's counterclaim for damages, attorney's fees, and punitive damages was properly dismissed.

Since the brief filed by Piedmont Aviation, Inc., garnishee-assignee herein, argued none of the issues properly before this Court on appeal, we do not address the point raised therein.

The portion of the 19 December 1979 order directing the Clerk of the Superior Court of Forsyth County to disburse to plaintiff the $2,438.42 then on deposit is affirmed. The portion of the said order assigning 15% of the defendant's wages under Rule 70 to satisfy alimony arrears in the sum of $1,305.06 is affirmed. The portion of the said order assigning 15% of defendant's wages for the payment of future alimony is reversed. The award of attorney's fees to plaintiff and the denial of attorney's fees, damages, and punitive damages to defendant are both affirmed.

Affirmed in part and reversed in part.

Judges WEBB and WHICHARD concur.

HARVEY H. WALTERS, INDIVIDUALLY AND AS ELDER OF THE EBENEEZER TRUELIGHT CHURCH OF CHRIST AND ROBERT JONES, HERMAN B. WALTERS AND BLAKE E. LEE AND THE MEMBERS OF THE EBENEEZER TRUELIGHT CHURCH OF CHRIST v. HERMAN FLAKE BRASWELL, GLENN AUSTIN, RAPHAEL PRICE, JOHN RABOR, JR. AND RUSSELL McCLEOD, AND ALL OTHER PERSONS IN ACTIVE CONCERT WITH THEM

No. 8020SC442

(Filed 2 December 1980)

Religious Societies and Corporations § 3.1— true elder of church — right to use church property — insufficient evidence

In an action seeking to have one plaintiff declared the ruling elder of a church and to restrain defendants from interfering with religious services at the church, defendants' motion for directed verdict should have been granted where there was insufficient evidence in the case from which the jury could determine

either (1) who constitutes the governing body of the church or (2) who that governing body has determined to be entitled to the use of the church property.

APPEAL by defendants from *Walker, (Ralph A.), Judge.* Judgment entered 8 February 1980 in Superior Court, UNION County. Heard in the Court of Appeals 5 November 1980.

This civil action was brought by plaintiffs, seeking to have plaintiff Walters declared the ruling Elder of the Ebeneezer Truelight Church of Christ and to restrain defendants and other persons in active concert with them from interfering with or disrupting the religious services at the Ebeneezer Truelight Church.

In their complaint, plaintiffs alleged that the Ebeneezer Truelight Church of Christ building is located in Union County, North Carolina. They further alleged that: no services were held at the Ebeneezer Truelight Church of Christ from February to May of 1977; that on or about 22 May 1977, plaintiff Walters, the other plaintiffs and other persons met in the Ebeneezer Truelight Church of Christ in Union County and formed a new church body and/or society, and by assent, elected plaintiff Walters as ruling Elder of the church with the expressed purpose of forming an autonomous self-governing church and/or society; and that they did form an automonous church.

Plaintiffs further alleged that those acting in concert with them have attempted to hold church services at the Ebeneezer Truelight Church of Christ each and every Sunday since 22 May 1977, and that on 29 May 1977, defendant Braswell, other defendants and other persons acting in concert with them attempted to interfere with the church services. Plaintiffs also alleged that plaintiff Walters is the ruling Elder of the church and that he and his followers have the right to use the church without the interference of the defendants and those acting in concert with them.

Defendants answered and counterclaimed. In their answer defendants alleged that by custom, practice and conference rule of the church, regular services were temporarily suspended at the church during February, March and April of 1977. The named defendants, along with other members of the conference body of the church, compose six different societies or local congregations of the church, including the Ebeneezer Society in Union County. It is the custom, practice and rule of the True Light Church of Christ to meet at each of the separate societies on a rotating basis and the church has met

and does meet on a rotating basis at the different societies.

In February 1977, an internal problem arose at the Ebeneezer Society. The conference of the church decided not to hold meetings at that facility until the internal problem was resolved. The internal problem was resolved on 21 May 1977 and thereafter the True Light Church of Christ began to meet again on a regular basis at the Ebeneezer Society facility. Defendants further alleged that as the True Light Church attempted to carry out its worship service at the Ebeneezer Society after 21 May 1977, the plaintiffs and those acting in concert with them have interfered with the church services, and that the plaintiffs and their immediate families are a minority group of the Ebeneezer Society congregation.

In their counterclaim, defendants alleged that they are members of the conference of the True Light Church of Christ, composed of the six different societies or local congregations, including the Ebeneezer Society. Defendant Braswell is the Head Elder of the True Light Church. As the Head Elder he is the administrative and spiritual leader of the conference body, and as such, he has the authority to appoint elders at each of the local societies. Defendant Braswell, with the advice, consent and approval of the conference body, appointed one Joe Cox as the Elder of the Ebeneezer Society on or about 21 May 1977. Cox was then and still is the duly acting Elder of the Ebeneezer Society congregation. The Ebeneezer Society is composed of approximately thirty-five active members, who meet regularly with the True Light Church whether services are conducted at the Ebeneezer Society or at any of the other societies. Plaintiffs have engaged in various disruptive and threatening activities and have interfered with the regular church services at the Ebeneezer Society. Defendants further alleged that plaintiff Walters is not the ruling Elder of the true and regularly constituted membership of the Ebeneezer Truelight Church and that he has no authority, real or apparent, to organize the congregation of the Ebeneezer Society.

Defendants prayed that the plaintiffs' action be dismissed and that the plaintiffs and all other persons acting in concert with them be permanently restrained from going upon, interfering with, or disrupting the religious or administrative services at the Ebeneezer Society facility or any of the other society facilities of the True Light Church of Christ.

At the trial, plaintiffs presented the testimony of Harvey H. Walters and Herman B. Walters. Defendants presented the testimony of Raphael Price, Joseph R. Cox, and Ray C. Long. At the close of the plaintiffs' evidence and at the close of all the evidence, defendants' motion for a directed verdict was denied.

The issues submitted to the jury and the jury's answers are as follows:

> 1. Are the Plaintiffs' followers the congregation of the Ebeneezer Truelight Church of Christ as of May 22, 1977 and thereafter, and entitled to the use of the church property on Walters Mill Road?
>
> ANSWER: Yes
>
> 2. Are the Defendants' followers the congregation of the Ebeneezer Truelight Church of Christ as of May 22, 1977 and thereafter, and entitled to the use of the church property on Walters Mill Road?
>
> ANSWER: No

Upon the jury's verdict, the trial court entered, in pertinent part, the following judgment:

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiffs' followers are the congregation of Ebeneezer Truelight Church of Christ and are entitled to the use of the church property on Walters Mill Road.

From that judgment, defendants have appealed.

James E. Griffin for plaintiff appellees.

Clark & Griffin, by Richard S. Clark and Bobby H. Griffin, for defendant appellants.

WELLS, Judge.

In one of their assignments of error, defendants have excepted to the trial court's denial of their motion for a directed verdict. The exception is well taken, and we hold that defendants' motion should have been granted.

Although the allegations in the complaint do not suggest it,

plaintiff's evidence makes it clear that the precipitating cause of this lawsuit was a doctrinal dispute between plaintiff Harvey Walters and defendant Flake Braswell. In *Atkins v. Walker*, 284 N.C. 306, 200 S.E. 2d 641 (1973), our Supreme Court, quoting with approval from *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, et al.*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed. 2d 658 (1969), held that the First Amendment to the United States Constitution "commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine", *Atkins v. Walker, supra*, at 317, 200 S.E. 2d at 648, and that the function of the courts in litigation of disputes such as the one in the case *sub judice* is to determine (1) who constitutes the governing body of the church and (2) who has that governing body determined to be entitled to use the properties. *Id.* at 319, 200 S.E. 2d at 650. As was stated by the court in *Atkins*, these determinations must be made pursuant to neutral principles of law, developed for use in all property disputes. *Id.* at 316, 200 S.E. 2d at 648. *See Jones v. Wolf*, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed. 2d 775 (1979); *see also Church v. Church*, 27 N.C. App. 127, 218 S.E. 2d 223, *disc. rev. denied*, 288 N.C. 730, 220 S.E. 2d 350 (1975).

The plaintiffs' complaint contains two paragraphs which set forth the essentials of plaintiffs' claim. They are as follows:

> 4. That no services were held at the Ebeneezer Truelight Church of Christ from February to May of 1977. That on or about May 22nd, 1977, Harvey H. Walters, the remaining plaintiffs and other persons met at the Ebeneezer Truelight Church of Christ in Union County, North Carolina, formed a new church body and/or society and by assent thereto elected Harvey H. Walters as ruling Elder of said church with the expresed purpose of forming an autonomous self-governing church body and/or society and did form an automonous church.
>
> . . . .
>
> 7. That Harvey H. Walters is the ruling Elder of said church and he and his followers have the right to use said church without the interferences of the plaintiffs [*sic*] and those acting in active concert with him.

In support of their claims that they organized a new, autono-

mous self-governing church body or society and formed an autonomous church, that plaintiff Walters is the ruling Elder of the said church, and that he and his followers have the right to use the church without the interference of the defendants and those acting in concert with them, plaintiffs offered the testimony of plaintiff Harvey Walters and Herman Walters.

Harvey Walters, recounting a disagreement between himself and defendant Braswell over church doctrine, and certain events and circumstances pertaining to that disagreement, testified that he is an Elder in the Ebeneezer Truelight Church of Christ and is the treasurer of the church. He keeps the records for the Ebeneezer Church. Before 27 February 1977, services were held at the Ebeneezer Society Church practically every Sunday, but from time to time services were held with other societies of the church. On 27 February 1977 there were thirty-five or forty members of the Ebenezzer Church. From 27 February 1977 to 22 May 1977 there were no services at Ebeneezer because Braswell called the meetings of the society at Rocky River and High Hill rather than at Ebeneezer. Harvey Walters made a decision on 21 May 1977 to return to Ebeneezer to hold services. He made this decision as a result of a disagreement with Braswell concerning doctrine at a meeting of the preachers and elders of the other societies of the church on that date at the Rocky River Church. He informed the meeting at Rocky River that he was going to return to Ebeneezer.

Harvey Walters held a meeting at the Ebeneezer Church on 22 May 1977. There were around twenty to twenty-three people present at the meeting. Since 22 May 1977, except for one or two Sundays, Harvey Walters has continued to hold services at Ebeneezer. The congregation governs or controls the Ebeneezer Truelight Church of Christ and does so by vote. Prior to May 1977, no minutes were kept of the Ebeneezer Truelight Church meetings. The record shows that Harvey Walters' direct examination concluded with the following questions and answers:

> Q. I say by what authority do you hold the position of elder there at the church?
>
> A. By what authority?
>
> Q. Yes. How were you elected, or how did you become the elder?

A. I was already the elder there and this dispute come [*sic*] up between Flake Braswell and myself and I went back to Ebeneezer and reestablished the forsaken for several weeks . . . that they had forsaken for several weeks and I was the elder right on as I had always been since 1975. The congregation of the Ebeneezer True Light Church determines who is to be elder.

On cross examination, Harvey Walters testified in essence that he first became Elder of the church in March 1975, when the previous elder, V. H. Cox, died. He was appointed as Assistant Elder prior to the death of Mr. Cox. Upon the death of Mr. Cox, Mr. Braswell appointed him as the Elder. Walters did not keep a list of the people who were present at the meeting on 22 May 1977, nor did he keep any minutes of what transpired at that meeting. Prior to 22 May 1977, Walters had been appointed, but never elected, Elder of Ebeneezer Church.

During his direct examination, Harvey Walters identified as plaintiffs' exhibit 1 a list of the membership of Ebeneezer Truelight Church of Christ, consisting of thirty-five names. On cross examination, he testified that he did not keep a list of the persons at the 22 May 1977 meeting but made up a list of those persons from memory. Specifically, he testified as follows:

I did not keep a list of the people who were present on May 22, not in writing. I knew who was there. I didn't keep any minutes of what transpired there that day. I didn't write anything down. I relied on memory as to who might have been present that day. I didn't know it was all that important as to who would come and go. We didn't have any election. We didn't take a vote on anything.

Q. So, Mr. Walters, before May 22, 1977, there had never been an election of you as the elder of Ebeneezer Church?

A. Election?

Q. Yes.

A. No more than only what he come [*sic*] down that Sunday.

Q. Made the appointment of you?

A. Yes.

Q. With Mr. Price being present?

A. Yes.

Q. Now, there has not, to be truthful about it, been an election since May 21 or 22 to elect you as elder of that congregation, has there?

A. No, sir.

He was then shown a list of the membership of the church (which was identified as defendants' exhibit 1, consisting of about 250 names). Walters identified this list as the membership roll of the church, and testified that he had struck through many of the names on that membership list.

Herman Walters, the other witness for the plaintiffs, testified that he had been a member of the Ebeneezer Church for many years, that he attended the church from May 1977 until December 1977, and that approximately 200 to 250 people were attending the church during that time. He knew that some of these people lived in Charleston, Leesville, Lake City, Hartsville, and Camden, South Carolina. During the twelve years Herman Walters had been a member of the Ebeneezer Church both V. H. Cox and Harvey Walters had been pastor. When Cox died in 1975, Harvey became the preacher. Herman Walters testified that Harvey Walters is the Elder at Ebeneezer Church. He then identified plaintiffs' exhibit 3, consisting of a deed to the property of the church. The grantees in the deed are the trustees of Ebeneezer Church. Herman Walters further testified that he did not believe there was a vote of the congregation when Harvey became Elder of the church in 1975, that Harvey was Assistant Elder at that time, and that the defendant Braswell designated Harvey as the Elder. He did not recall that the local congregation had anything to say about who was going to be designated Elder.

Defendants' witness Price testified that he was a member of the Truelight Church and was an Elder of the High Mill Church in South Carolina. He was installed as an Elder by E. H. Mullis of Mint Hill, North Carolina. Mullis' successor was Flake Braswell. As one of the elders of the local church of High Mill, Price is a member of the conference body. The conference body is made up of preachers, elders, and deacons of all of the local churches.

Price attended the meeting of 21 May 1977 as did other elders, assistant elders, deacons or preachers. Joe Cox and Harvey Walters were present at that meeting. The purpose of the meeting was to try to work out a way for the Ebeneezer Society to have regular services again. The services had been suspended for several weeks prior to the meeting because of a doctrinal dispute between the conference members and Harvey Walters. The meeting lasted about two hours. Before it broke up, Flake Braswell informed Harvey Walters that he was removing him as an elder of the Ebeneezer Church and was appointing Joe Cox as elder. The conference body named Joe Cox to take the place of Harvey Walters at that meeting.

He testified that the conference body had various sources of authority, but that he did not know of any rules about the meeting on 21 May 1977 at the Rocky River Chrch. He did testify that Mr. Walters had been notified that there was going to be a meeting at that time. He further testified that he was not a member of the Ebeneezer Church but that the Truelight Church membership is one membership throughout.

Joseph R. Cox testifed that he was a member of the Ebeneezer Church and that he was appointed Harvey Walters' assistant on 2 May 1975, the same day Walters was appointed elder by Mr. Braswell. The meeting of 21 May 1977 was for the purpose of working out a solution to the problems at Ebeneezer so meetings could be held there again.

Taking plaintiffs' evidence as true and considering it in the light most favorable to plaintiffs, taking defendants' evidence which tends to support plaintiffs' claim in any way as true and viewing it in the light most favorable to plaintiffs, and giving plaintiffs the benefit of every reasonable inference which may be drawn from the evidence, *Home Products Corp. v. Motor Freight, Inc.*, 46 N.C. App. 276, 277, 264 S.E. 2d 774, 775, *disc. rev. denied*, 300 N.C. 556, 270 S.E. 2d 105 (1980), we hold that there was not sufficient evidence in this case from which the jury could determine either (1) who constitutes the governing body of the Ebeneezer Society of the True Light Church of Christ, or (2) who that governing body has determined to be entitled to the use of the Ebeneezer Society church property. *See Atkins v. Walker, supra.*

Defendants' motion for a directed verdict at the close of all the evidence should have been granted. The judgment of the trial court

is

Reversed.

Judges VAUGHN and MARTIN (Robert) concur.

WILLIAM FULTON HURST AND WIFE, DORIS CLARK HURST v. TED G. WEST AND H. HOUSTON GROOME, JR., D/B/A WEST & GROOME, ATTORNEYS AT LAW; TED G. WEST AND WIFE, CLAUDINE G. WEST, INDIVIDUALLY; H. HOUSTON GROOME, JR. AND WIFE, MARSHA D. GROOME, INDIVIDUALLY

No. 8019SC367

(Filed 2 December 1980)

Assignments § 4.2; Contracts § 24— assignment of contract — assignee proper defendant in breach of contract action

In an action for breach of a contract whereby defendants agreed to defend plaintiff on murder and assault charges, plaintiff agreed to convey all his interest in certain property, and defendants agreed to collect rents and profits for two years, then sell the property and give plaintiff the proceeds above $20,000, there was no merit to plaintiff's contentions that defendants breached the contract by (1) failing to collect the rents and apply them to the indebtedness on the property and failing to account for collections and expenditures, and (2) disposing of the property without adequate consideration, since the parties' contract did not impose a duty of accounting upon defendants; there was no evidence that defendants did not properly apply the rents received on the property; the parties' contract was assignable, as it contained no prohibition against assignment and did not involve an element of personal skill, once criminal charges against plaintiff were dropped, which would have made it unassignable; under the assignment contract the assignee agreed to assume all liabilities and responsibilities under the original contract; and plaintiff's cause of action, if one existed at all, was against the assigneee and not defendants.

APPEAL by plaintiffs from *Mills, Judge.* Judgment signed 3 October 1979 in Superior Court, ROWAN County. Heard in the Court of Appeals 10 October 1980.

Plaintiffs brought this action alleging that defendant law firm, West & Groome, breached its contract with plaintiff William Fulton Hurst and charged him excessive attorney fees.

The evidence tends to show the following:

William Hurst and West & Groome entered into the contract here set out:

This agreement made and entered into this *6* day of December, 1973, by and between the Law Firm of West & Groome (hereinafter referred to as Attorneys) and William F. Hurst (hereinafter referred to as Client):

W I T N E S S E T H:

Whereas Client desires to employ Attorneys to represent him in two (2) charges of murder and one charge of felonious assault now pending in Rowan County arising out of an incident at the property of one Clyde Christy on Nov. 4, 1973, and

Whereas, Attorneys are willing to engage in such employment upon the following terms and conditions, and the parties hereto agree as follows:

1.

Attorneys Ted G. West, H. Houston Groome, Jr., and associated attorney, J. D. Hurst, will actively and diligently represent Client at his preliminary hearing, at the trial in Superior Court, if necessary, and if necessary, and desired by Client, through appeals to the North Carolina Court of Appeals and the North Carolina Supreme Court.

2.

As compensation, Client will convey to Attorneys all his interest in the property described in Exhibit "A" hereto attached.

3.

Attorneys will hold said property, subject to an existing outstanding lease agreement and option on said property for up to two (2) years if leaseholders desire to perform the terms and conditions of said lease and option to purchase, Attorneys will receive all rents paid during the two (2) year period and apply them to debts and mortgages outstanding. Upon the exercise of said option to purchase by leaseholders, Attorneys will withhold as compensation for services rendered, irrespective of whether said cases were disposed of at the preliminary

hearing, or whether trial and appeals were necessary, the sum of twenty thousand dollars ($20,000.00) and remit to Client any excess from the proceeds from sale of said property.

4.

In the event leaseholders do not desire to exercise their lease and option to purchase, Attorneys will sell said property at reasonable market value, and, after payment of all outstanding indebtedness and costs of sale, retain all net proceeds therefrom up to the sum of twenty thousand dollars ($20,000.00), and remit any net sums in excess thereof to Client.

Plaintiffs executed a deed to the property, conveying their one-half interest in a club and motel to defendant law firm pursuant to the contract.

William Hurst was not tried on the charges. Subsequent to the preliminary hearing, the case against him was dismissed. Plaintiffs paid $500 in attorney fees by check.

After two years the option on the property had not been exercised and West & Groome conveyed its interest to Hurst Distributors, Inc., pursuant to a contract of 8 January 1976 between West & Groome and J. D. Hurst, individually, and Hurst Distributors, Inc., of which J. D. Hurst was president. The agreement included the following:

Whereas, Seller and J. D. Hurst, Attorney, in association together, represented one William Hurst on two charges of Murder in the First Degree; and as compensation for said services, Seller received title to one half interest in a tract of realty in Rowan County, N.C., . . . Seller and J. D. Hurst, Attorney, completed their obligations of representation, and said William Hurst has never made any redemption payments under the terms of the contract; and

Whereas, said premises have first, second and third liens upon it exceeding $30,000.00, some of which are in default; and

Whereas, some of the liens enure to the benefit of Hurst

Distributors, Inc., and also to J. D. Hurst individually; and

Whereas, said premises are in a run down condition and are not in its present condition, readily marketable, and

Whereas, J. D. Hurst, Attorney, was to receive a portion of the total renumeration provided in said contract;

THEREFORE, in consideration of the above premises and the further consideration of the above premises and the further consideration set out below, the Seller does hereby agree to sell and the Buyer agrees to buy the premises described in said deed upon the following terms and conditions:

1. Seller will convey to Hurst Distributors, Inc., their one half undivided interest in said property, and Hurst Distributors, Inc., assumes and agrees to pay all liens, taxes, and encumbrances against the . . .

2. Both Hurst Distributors, Inc., and J. D. Hurst, individually, will execute a note to Seller payable as follows: $2,000.00 by February 1, 1976, $5,500.00 by April 1, 1976, with interest thereafter in the event of default at 9% per annum.

3. Seller will assign to Purchaser all of their right, title and interest in said property and also the contract between Seller and William Hurst. The Purchaser, by the execution of this agreement, hereby assume all rights, liabilities, and responsibilities under said contract, and by these premises hereby hold harmless Seller, their heirs, and assigns from any and all persons, firms or corporations, from any liability or responsibility under said contract and particularly from any liability or claim of any kind or description William Hurst may now or hereafter make against the Seller for accounting or sale of property.

After the transfer, the property was foreclosed. Proceeds from the foreclosure sale were ordered not to be disbursed until disposition of this case.

On 26 January 1977, plaintiffs filed a complaint alleging, *inter alia*:

> 14. That the Defendants, WEST & GROOME, breached the sealed contract which was entered on December 6, 1973, and heretofore incorporated by reference as Exhibit A, by failing to collect the rents as agreed in the contract, by failing to sell the property in a reasonable commercial manner at a reasonable market value, and by failing to make an accounting to the said WILLIAM FULTON HURST concerning the disposition of the property.
>
> 15. That the Plaintiff was charged with two (2) counts of murder arising out of an incident at the property of one CLYDE CHRISTY on November 4, 1973, and that said charges were ill founded and were dismissed after the preliminary hearing. That the said sum of Twenty Thousand Dollars ($20,000) attorney fee is an unreasonable and unconscionable amount to charge for such services.

In the same complaint plaintiffs made allegations against J. D. Hurst and Hurst Distributors, Inc. Summary judgment was granted those defendants on 10 November 1977.

Defendants filed a counterclaim for recovery of attorney fees for representing William Hurst on the murder and assault charges. On 27 November 1978 Judge Walker dismissed counterclaim.

The cause was heard by Judge Mills and a duly empaneled jury. At the close of plaintiffs' evidence, defendants moved for a directed verdict. The motion was granted.

From the order dismissing the action with prejudice, plaintiffs appeal.

Other facts necesary for decision are set out below.

James L. Roberts for plaintiff appellants.

West, Groome and Correll, by Ted G. West, H. Houston Groome, Jr., and Edward H. Blair, Jr., for defendant appellees.

MARTIN (Harry C.), Judge.

Plaintiffs' primary assignments of error relate to the trial court's refusal to submit to the jury the issues tendered by plaintiffs

and granting defendants' motion for directed verdict. After careful review of the record on appeal, we conclude that the motion for directed verdict was properly granted.

At the close of plaintiffs' evidence, after the jury was out, the following dialogue took place between counsel for the parties and Judge Mills:

> MR. ROBERTS: In regards to the Counterclaim, if you will look at the Exhibit, I believe it's Seven, wherein they made agreement with J. D. Hurst and said they conveyed all their rights, title and interest for the Seventy-Five Hundred Dollars.
>
> THE COURT: Okay, I understand what your motion is.
>
> MR. ROBERTS: As a result of that they would not be the proper party to being [*sic*] the motion. J. D. Hurst would be proper party and he's not here and not in the lawsuit and for that reason, it could not be submitted.
>
> MR. GROOME: Your Honor, under Rule 41(b) we move for a dismissal of Plaintiff's case in its entirety and would like to direct your attention for the Complaint in the prayer for relief, paragraph Ten of Plaintiff's Complaint. [That the Defendant, J. D. Hurst, caused the property described in Exhibit B to be fraudulently conveyed in the name of HURST DISTRIBUTING COMPANY, INC. . . .] (Argues Motion).
>
> (Attorneys for both sides argue their contentions of law to the Court.)
>
> THE COURT: The Court will grant your motion to dismiss at the close of the plaintiff's evidence and the Court will also find on Mr. Roberts' motion that the Court has improvidently reinstated your claim that for the same reasons found by Judge Collier on the Dismissal of those Counterclaims for attorneys fees. The Court will reaffirm that and adopt that position and find that I improvidently should not have allowed you to reassert that claim based on that finding by Judge Collier. Your Counterclaim is dismissed on those bases and your claim is dismissed on that basis.

Although it is not contained in the record, it is apparent that Judge Mills had reinstated defendants' counterclaim for attorney fees and later reconsidered that reinstatement because their claim had been effectively assigned to J. D. Hurst and Hurst Distributors, Inc. under the contract of 8 January 1976. For the same reason, plaintiffs' claim against defendants was dismissed.

Plaintiffs contend that defendants breached the contract by disposing of the property without adequate consideration and by failing to collect the rents and apply the same to the indebtedness on the property and to account for collections and expenditures. We note that the contract set out above did not impose a duty of accounting upon defendants. Plaintiffs' evidence includes testimony by Donald Weinhold, an attorney who formerly represented William Hurst regarding the property in question. Weinhold's testimony was that he requested and received an accounting of the rents during the time defendants had possession. We are unable to find any evidence in the record that defendants did not properly apply any rents received on the property. The issue remaining, then, is whether defendants breached their agreement to sell the property at its reasonable market value and remit any amount in excess of $20,000 plus costs to plaintiff William Hurst by conveying the property, subject to the contract, to Hurst Distributors, Inc. We hold that the contract was assignable and therefore defendants committed no breach.

The general rule is that contracts may be assigned. "The principle is firmly established in this jurisdiction that, unless expressly prohibited by statute or in contravention of some principle of public policy, all ordinary business contracts are assignable, and that a contract for money to become due in the future may be assigned." *Bank v. Jackson*, 214 N.C. 582, 585-86, 200 S.E. 444, 446 (1939). *Accord, Lipe v. Bank*, 236 N.C. 328, 72 S.E. 2d 759 (1952); *Horne-Wilson, Inc. v. Wiggins Bros., Inc.*, 203 N.C. 85, 164 S.E. 365 (1932).

In *Lipe, supra* at 331, 72 S.E. 2d at 761, the Supreme Court stated:

> A valid assignment may be made by any contract between the assignor and the assignee which manifests an intention to make the assignee the present owner of the debt. [Citations omitted.] The assignment operates as a binding transfer of the title to the debt as between the

assignor and the assignee regardless of whether notice of the transfer is given to the debtor.

Exceptions to the rule that contracts are freely assignable are when the contract expressly provides that it is not assignable, *Edgewood Knoll Apartments v. Braswell*, 239 N.C. 560, 80 S.E. 2d 653 (1954), or when performance of some term of the contract involves an element of personal skill or credit. *Boney, Insurance Comr. v. Insurance Co.*, 213 N.C. 563, 197 S.E. 112 (1938). *See also Oil Co. v. Furlonge*, 257 N.C. 388, 126 S.E.2d 167 (1962). "Whether or not a contractual duty requires personal performance by a specific individual can be determined only by interpreting the words used in the light of experience." 4 A. Corbin, Contracts § 866, 455 (1951).

The contract between William F. Hurst and West & Groome contained no express prohibition against assignment. Although the duty of defendant attorneys to defend plaintiff William Hurst on the charges then pending against him involved an element of personal skill and would not have been assignable to a third party, those obligations were fulfilled and discharged when the criminal charges against Hurst were dismissed. The remaining obligation of defendants under the contract, that they sell the property at a reasonable market value if the option to purchase were not exercised, was not personal in nature, as such a performance can be rendered with equal effectiveness by an assignee of the contract. Thus it is clear that no breach occurred merely by West & Groome's assignment of the contract to J. D. Hurst and Hurst Distributors, Inc.

Traditionally the assignment of a contract did not operate to cast upon the assignee the duties and obligations or the liabilities of the contract if the assignee did not assume such liabilities. *Koppers Co, Inc. v. Chemical Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970). But in *Rose v. Materials Co.*, 282 N.C. 643, 194 S.E.2d 521, 67 A.L.R. 3d 1 (1973), our Supreme Court held that unless a contrary intention is apparent, an assignee under a general assignment of an executory bilateral contract becomes the delegatee of the assignor's duties and impliedly promises to perform them. The Court adopted and reaffirmed as the more reasonable rule:

"The assignment on its face indicates an intent to do more than simply to transfer the benefits assured by the con-

> tract. It purports to transfer the contract as a whole, and since the contract is made up of both benefits and burdens both must be intended to be included. It is true the assignor has power only to delegate and not to transfer the performance of duties as against the other party to the contract assigned, but this does not prevent the assignor and the assignee from shifting the burden of performance as between themselves. Moreover common sense tells us that the assignor, after making such an assignment, usually regards himself as no longer a party to the contract. He does not and, from the nature of things, cannot easily keep in touch with what is being done in order properly to protect his interests if he alone is to be liable for non-performance. Not infrequently the assignor makes an assignment because he is unable to perform further or because he intends to disable himself for further performance. The assignee on the other hand understands that he is to carry out the terms of the contract, as is shown by the fact that he usually does . . . ."

Id. at 662, 194 S.E.2d at 534.

In the present case, J. D. Hurst and Hurst Distributors, Inc. expressly agreed to assume all liabilities and responsibilities under the original contract and to hold defendants harmless "from any liability or responsibility under said contract and particularly from any liability or claim of any kind or description William Hurst may now or hereafter make against the Seller [defendants] for accounting or sale of property." J. D. Hurst and Hurst Distributors, Inc., as assignees of the contract, could take by transfer only what rights and interests the assignor had at the time of the assignment, *Holloway v. Bank*, 211 N.C. 227, 189 S.E. 789 (1937), and took subject to any setoffs and defenses available to plaintiffs against the assignor. *Amusement Co. v. Tarkington*, 247 N.C. 444, 101 S.E.2d 398 (1958). The assumption of the duties under the contract gives the other party new and additional security. *Brown v. Construction Co.*, 236 N.C. 462, 73 S.E.2d 147 (1952). The assignor is then in substantially the position of a surety. 4 A Corbin, *supra* § 866. If a breach of the contract in question was committed, it was committed by J. D. Hurst and Hurst Distributors, Inc. As assignees, they were the real parties in interest. *Morton v. Thornton*, 259 N.C. 697, 131 S.E.2d 378 (1963); *Trust Co. v. Williams*, 201 N.C. 464, 160 S.E. 484 (1931).

Plaintiffs had the right to bring suit against the assignees of the contract. This they did; and summary judgment was entered against them. No appeal from that order is now before us. We note that the subsequent foreclosure precluded a private sale at a reasonable market value.

Because plaintiffs' evidence did not establish the necessary elements of breach of contract, we hold that the directed verdict in favor of defendants was proper. The assignment of error is overruled.

Plaintiffs' other assignment of error deals with the exclusion of testimony offered by plaintiffs' witnesses. Most of that testimony dealt with opinions as to the value of the property in question at the time it was tranferred by defendants to J. D. Hurst and Hurst Distributors, Inc. As we have found on other grounds that there was no breach of the contract, the exclusion of such testimony was not erroneous.

The other testimony that plaintiffs contend was improperly excluded dealt with customary or average attorney fees in capital cases. It appears, although the record and briefs are far from illuminating on this issue, that plaintiffs are no longer pursuing their claim as to excessive attorney fees because of the dismissal of the counterclaim for recovery of such, and because of defendants' failure to perfect their appeal on this issue. In any case, there is no evidence that such fees were unreasonable. The record does not show what answers the witness would have given to the questions regarding this issue; therefore exclusion of the testimony cannot be held to be prejudicial. *Service Co. v. Sales Co.*, 259 N.C. 400, 131 S.E.2d 9 (1963); *Abbitt v. Bartlett*, 252 N.C. 40, 112 S.E.2d 751 (1960); *Board of Education v. Mann*, 250 N.C. 493, 109 S.E.2d 175 (1959).

We find no merit in plaintiffs' assignments of error.

No error.

Judges ARNOLD and HILL concur.

IN THE MATTER OF: THE APPEAL OF LAND AND MINERAL COMPANY FROM THE VALUATION OF CERTAIN OF ITS PROPERTY, TO WIT: 9,000 ACRES OF MINERAL RIGHTS BY THE AVERY COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1978

No. 8024SC427

(Filed 2 December 1980)

Taxation § 25.4— ad valorem taxes — value of mineral rights

A finding by the State Board of Equalization and Review that a county's revaluation of petitioner's mineral rights from $2.00 per acre to $50.00 per acre was not in excess of the true value of the rights was not supported by competent, material and substantial evidence in view of the whole record where (1) petitioner rebutted the presumption of correctness of the tax assessment by showing that the county's valuation was arbitrary in that it was based upon values for mineral rights in two adjoining counties, and the county did not consider the advantages or disadvantages of the location, availability of water, or the nature of the mineral, quarry or other valuable deposits as required by G.S. 105-317(a)(1), and (2) petitioner showed that the $50.00 valuation was substantially greater than the "true value" of the rights where the only attempt to estimate a market value for the mineral rights on petitioner's land was testimony by petitioner's witness that $10.00 an acre would be a big price, and the county's evidence of value consisted only of previously determined values of mineral rights in two other counties and deeds showing values of mineral rights conveyed in the county ranging from $50.00 to $156.00.

APPEAL by respondents from *Ervin, Judge.* Judgment entered 29 February 1980 in Superior Court, AVERY County. Heard in the Court of Appeals 17 October 1980.

Land and Mineral Company is the owner of approximately 9,000 acres of mineral rights in Avery County, North Carolina. Prior to 1978, these mineral rights had been appraised for *ad valorem* tax purposes by Avery County at $2.00 per acre. In 1978, the Avery County Board of Equalization and Review reappraised these mineral rights and placed a value on them of $50 per acre. Land and Mineral Company appealed this valuation to the North Carolina Property Tax Commission, sitting as the State Board of Equalization and Review (hereinafter State Board).

The State Board conducted a hearing in this matter. Francis E. Fields, President of Land and Mineral Company, testified that he knew of no mineral deposits on the Land and Mineral Company lands, and that felspar and mica were minerals generally found in Avery County. On cross-examination, Mr. Fields testified that

Harris Mining Company had leased 189 acres of land from Land and Mineral Company at an annual rate of $1,000 and that Ray Wiseman was leasing the mineral and mining rights on 20 acres of land in Avery County for $600 per year from Land and Mineral Company. Arthur Buchanan, an employee of Land and Mineral Company testified:

> That he has been employed by Land and Mineral Company since the early 1950's; that the minerals commonly found on the Land and Mineral Company lands are mica, felspar, kaolin and olivene; that there are no mining operations currently being carried out on Land and Mineral Company lands; that Harris Mining Company is not actively mining now; that "eighty percent of it (Land and Mineral Company land) is in the mountains or it's hard to get to . . .";
>
> . . .
>
> That in the last ten years no one has wanted to lease any Land or Mineral company mining rights; that nothing has occurred on the Land and Mineral Company lands that has affected the value of mining rights in the last ten years.

On re-direct examination, Mr. Buchanan testified:

> That in his opinion the value of mineral rights owned by Land and Mineral Company in Avery County would be ten dollars an acre;
>
> . . .
>
> [B]ut these things that have been exposed have been mined on that property and we know what they're selling for, the present day price, and we know what they are, and in seventeen years there hasn't been any mines leased and until something happens, I think ten dollars an acre would be a big price.

Mr. Buster Hayes, the Tax Supervisor for Avery County, was the sole witness for the county. Mr. Hayes testified that Avery County based its 1978 reappraisal solely upon valuations in adjoining counties, Yancey and Mitchell.

The State Board made findings of fact and concluded that Avery County's valuations of the mineral rights were not in excess

of their true value and sustained the $50 figure. Land and Mineral Company appealed the decision of the State Board to the Superior Court by filing a petition for review pursuant to G.S. 150A-43 *et seq.*

No additional evidence was offered by either party at the Superior Court hearing. The Superior Court considered the record of the hearing before the State Board, the arguments of counsel for the county and the petitioner, and the written briefs of both the county and petitioner. The court concluded, and entered judgment accordingly, that Avery County had not complied with the requirements of G.S. 105-283, *Uniform appraisal standards*, and G.S. 105-317, *Appraisal of real property; adoption of schedules, standards, and rules;* that the Conclusions, Decision and Order of the Board in sustaining the reappraisal of the petitioner's mineral rights were unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-130, and that the Board's decision be reversed and the matter remanded to the Board with directions that the Board remand the matter to Avery County with directions that the Avery County Board of Commissioners cause the mineral rights of Land and Mineral Company to be appraised in accordance with law.

Respondent, Avery County, appealed from this judgment.

Adams, Hendon, Carson and Crow, by Philip G. Carson, for petitioner appellee.

William B. Cocke, Jr., for respondent appellant.

MORRIS, Chief Judge.

In this case we are asked to determine whether the Superior Court correctly determined that the evidence presented to the State Board did not support its conclusions.

Here, we must review the actions of a State administrative agency, and of the Superior Court which determined that the agency's conclusions were in error. When reviewing an order of a State agency such as the State Board, the Superior Court may not make findings contrary to the State Board's when the findings of the State Board are supported by "competent, material, and substantial evidence". *In re Appeal of Amp, Inc.*, 287 N.C. 547, 561, 215 S.E. 2d 752, 761 (1975), and cases cited therein.

G.S. 150A-51 specifies the scope of review and the power of the courts in disposing of a case appealed from the decision of a State

agency. That statute provides in part:

> 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:
>
> . . .
>
> (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.

Upon considering the judicial rule of *Amp* in conjunction with G.S. 150A-51 the standard of review derived therefrom, which we must apply in this case, is whether the decision of the State Board was supported by "competent, material, and substantial evidence."

The scope of judicial review of agency decisions required by G.S. 150A-51 has been construed by the Supreme Court in *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). There the Court stated:

> This standard of judicial review is known as the "whole record" test and must be distinguished from both *de novo* review and the "any competent evidence" standard of review. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456 (1951); *Underwood v. Board of Alcoholic Control*, 278 N.C. 623, 181 S.E. 2d 1 (1971); Hanft, *Some Aspects of Evidence in Adjudication by Administrative Agencies in North Carolina*, 49 N.C.L. Rev. 635, 668-74 (1971; Hanft, *Administrative Law*, 45 N.C.L. Rev. 816, 816-19 (1967). The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. *Universal Camera Corp., supra.* On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record

> fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. *Universal Camera Corp., supra.* 292 N.C. at 410, 233 S.E. 2d at 541.

In the present case it does not appear from a view of the "whole record" that the decision of the State Board was supported by "competent, material, and substantial evidence". In this instance the State Board, rather than Superior Court, is the fact finding body. Therefore, we examine the record to determine whether the evidence presented to the State Board was sufficient to support its conclusions.

It is a principle of law in this State that *ad valorem* tax assessments are presumed to be correct. *See, In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975); *Electric Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E. 2d 811 (1972); 72 Am. Jur. 2d *State and Local Taxation* § 713 (1974). This presumption places the burden of proof that they are incorrect with the taxpayer, here the petitioner.

Justice Copeland's opinion in *In re Appeal of Amp, Inc., supra*, sets out the two-pronged test the court must apply when making its determination with respect to whether the taxpayer has overcome that presumption. He states that:

> [I]n order for the taxpayer to rebut the presumption he must produce "competent, material and substantial" evidence that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property. *See Albemarle Electric Membership Corp. v. Alexander, supra*, 282 N.C. 410, 192 S.E. 2d at 816-17. Simply stated, it is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e., that the valuation was *unreasonably high. Id.* . . .

In re Appeal of Amp, Inc., 287 N.C. 547, 563, 215 S.E. 2d 752, 762 (1975).

In our opinion petitioner's evidence was sufficient to meet the requirements of this test and rebut the presumption of correctness.

The record clearly indicates that the Avery County tax supervisor employed an "arbitrary" method of valuation. Guidelines for the proper appraisal of real and personal property are set out in the General Statutes.

G.S. 105-317 provides in part:

> *Appraisal of real property; adoption of schedules, standards, and rules.* — (a) Whenever any real property is appraised it shall be the duty of persons making appraisals:
>
> (1) In determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; water privileges; mineral, quarry, or other valuable deposits; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value except growing crops of a seasonal or annual nature.
>
> (b) In preparation for each revaluation of real property required by G.S. 105-286, it shall be the duty of the tax supervisor to see that:
>
> (1) There be developed and compiled uniform schedules of values, standards, and rules to be used in appraising real property in the county. (The schedules of values, standards, and rules shall be prepared in sufficient detail to enable those making appraisals to adhere to them in appraising the kinds of real property commonly found in the county; they shall be:
>
> a. Prepared prior to each revaluation required by G.S. 105-286;

b. In written or printed form; and

c. Available for public inspection upon request.)

(2) Every lot, parcel, tract, building, structure, and improvement being appraised be actually visited, observed, and appraised by a competent appraiser, either one appointed under the provisions of G.S. 105-296 or one employed under the provisons of G.S. 105-299.

The record does not support the State Board's conclusion that the evidence supports the county's reappraisal. The reappraisal method used in this instance was not in accord with the statutory requirements set forth above. It is clear from the county's evidence that it based its valuation upon previously determined values for mineral rights in two adjoining counties, Mitchell and Yancey. Buster Hayes, the Avery County Tax Supervisor, testified that the *only* criteria he used in reappraising the value of the mineral rights was the value placed on similar rights in the adjacent counties.

The land in question is a 9,000 acre tract. The $50 per acre reappraisal was a blanket valuation. It is hard to believe that all 9,000 acres of this tract deserve exactly the same valuation. There is no evidence that the county considered the advantages or disadvantages of the location; availability of water; or the nature of the mineral, quarry, or other valuable deposits consideration of which, among other facts, is required by G.S. 105-317(a)(1). Further, and perhaps most importantly, there is no evidence that any representative of Avery County ever visited or observed any portion of the tract in question as required by G.S. 105-317(b)(2).

Having shown, we think most adequately, that the county's valuation method was arbitrary, the petitioner had to meet the second part of the *Amp* test and show that the value determined was substantially greater than the "true value" of the property assessed. The facts before the State Board do not support its conclusion that the $50 figure was correct.

"True value" is defined by G.S. 105-283 as "meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller."

There is no evidence in the record substantially supporting the State Board's implied conclusion that $50 is the "true value" of these mineral rights. The evidence presented by the county as to the "true value" of the mineral rights consisted of the previously determined values of mineral rights in Mitchell and Yancey Counties, and three deeds dated and recorded in 1977 conveying mineral rights on relatively small tracts in Avery County. The documentary stamps affixed to these last three deeds indicated that the per acre purchase price for these mineral rights ranged from $50 to $156.

In the present case, the values placed on mineral rights on other lands is not, standing alone, substantial evidence under the statutory definition of the "true value" of the mineral rights in the tract in question. There may be great variances in factors such as location, topography, accessibility, and mineral content, to name a few, which would cause the "market value" of one tract to be quite different from another.

The only evidence in the record which reflects an attempt to estimate a "market value" for this particular parcel of land is the testimony of petitioner's witness, Arthur Buchanan. The record shows that Mr. Buchanan had been employed by the petitioner "since the early 1950's", and he had some special knowledge of the value of the mineral rights in this locality. The witness testified as to the value he would place on the mineral rights: "in seventeen years there hasn't been any mines leased and until something happens, I think ten dollars an acre would be a big price".

Expert appraisal of the value of the mineral rights on the actual parcel of land in question is more substantial evidence of the "true value" of those particular rights than the reports of similar previous sales of mineral rights from various other tracts of land. The peculiar nature of mineral rights must be kept in mind when considering this evidence.

The county's own evidence illustrates the variance which can occur in the "market price" for mineral rights from separate parcels of land located in the same proximity. Even assuming that the three deeds introduced into evidence convey only mineral rights on the three separate tracts of land located within Avery County, they show values ranging from $50 to $156. This indicates that the value that "able buyers" are willing to give for the mineral rights on different parcels of land varies a great deal according to the proper-

ties of the particular piece of land.

The $50 per acre value which the county placed on the mineral rights on petitioner's 9,000 acres is five times the amount of $10 per acre which Mr. Buchanan estimated as being a "big price" for these rights. When we take the "whole record" into consideration, the value determined by the county appears to be substantially in excess of the only estimate of the "true value" of the mineral rights appearing therein. The evidence does not substantially support the State Board's implied finding that the county's $50 value is not in excess of the "true value" of the mineral rights on this land.

Our review of all the evidence in the record results in our conclusion that the findings, conclusions and decisions of the State Board are not supported by competent, material and substantial evidence. Accordingly, the judgment of the Superior Court is

Affirmed.

Judges ARNOLD and HILL concur.

THE STANDARD SUPPLY COMPANY, INC. v. RELIANCE INSURANCE COMPANY; GEORGE W. EAVES; AND EAVES INSURANCE AGENCY, INC.

No. 8010DC348

(Filed 2 December 1980)

1. **Insurance § 128.1— fire insurance — failure to provide insured copy of policy — failure of agent to inform insurer of vacancy of premises**

In an action to recover the proceeds of a fire insurance policy, the trial court properly directed verdict for defendant insurance agency and the president of the agency since there was no merit to plaintiff's contention that there was a causal relationship between the failure of defendants to provide plaintiff with the renewal policy and plaintiff's subsequent loss, nor was there merit to plaintiff's contention that defendant agency and its president were negligent in not informing defendant insurance company, whose policy provided an exclusion if insured premises were vacant or unoccupied for longer than 60 days, that the dwelling house was unoccupied.

2. **Insurance § 128— fire insurance — unoccupied dwelling — waiver of exclusion — jury question**

In an action to recover the proceeds of a fire insurance policy which excluded coverage on buildings which were vacant or unoccupied beyond 60 days, plain-

tiff's evidence properly raised issues as to whether defendant insurer had constructive knowledge that the dwelling insured was unoccupied and as to whether defendant insurer was on such notice of the non-occupancy of the house at the time the policy was renewed that its subsequent issuance of the policy constituted a waiver of the exclusionary provision or condition.

3. Insurance § 136; Principal and Agent § 8— fire insurance — company's investigation of dwelling — company as agent of insurer — erroneous instructions

A company employed by defendant insurer to make a fire inspection and report on a dwelling on which plaintiff sought coverage was, for that purpose, acting as agent of defendant insurer so that knowledge of the conditions of the property bearing on occupancy or non-occupancy as was gained by the company as a result of its investigation was imputable to defendant insurer, and the trial court's instruction to the contrary was erroneous

APPEAL by plaintiff from *Barnette (H. V.), Judge.* Judgments entered 14 December 1979 in District Court, WAKE County. Heard in the Court of Appeals 8 October 1980.

Plaintiff brought this action to recover the proceeds of a fire insurance policy written by defendant Reliance Insurance Company (Reliance) and issued by defendant Eaves Insurance Agency, Inc. (Eaves Agency) by its president, George W. Eaves (Eaves). The policy covered a dwelling house owned by plaintiff and situated in rural Chatham County. The policy contained an exclusion clause, as follows:

> Unless otherwise provided in writing added hereto: This company shall not be liable for loss occurring while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of 60 days.

Plaintiff's evidence may be summarized as follows. Since 1961 or 1962, plaintiff had purchased fire and extended coverage insurance on the Chatham County dwelling through defendant Eaves Agency. Prior to 4 March 1976, defendant Reliance had written the coverage on the dwelling. In March 1976, plaintiff procured through Eaves Agency a renewal of its coverage with Reliance. In February 1976, prior to the writing of the renewal policy, defendant Reliance requested Tar Heel Reporting Company, Inc. (Tar Heel) to make a fire inspection and report on the dwelling. John Edward Jennings, Jr. (Jennings), president of Tar Heel subsequently made the investigation and submitted the report to Reliance. (His investigation and report will be discussed in more

detail in the body of the opinion.) His report described the condition of the property in some detail, and included a statement that the property was not vacant. The report did not otherwise specify whether the dwelling was occupied or unoccupied.

Following Jennings' inspection and report, Reliance furnished a summary of the report to Eaves Agency in which they expressed their concern about the state of disrepair of the front porch and steps of the dwelling. Eaves Agency requested plaintiff to furnish them the name of the tenant, but plaintiff did not respond to this request. At the time of the inspection and at the time the renewal policy was issued, the house was unoccupied and had been unoccupied since January 1975. Eaves Agency issued the renewal policy on or about 22 March 1976. The house was destroyed by fire on 5 July 1976. Other evidence for the plaintiff will be discussed in the body of the opinion.

Defendants did not offer evidence. At the close of plaintiff's evidence, the trial court granted defendants Eaves Agency's and Eaves' motions for a directed verdict, but denied defendant Reliance's motion for directed verdict. The trial court also denied plaintiff's motion for a directed verdict.

The issue submitted to the jury and the jury's answer were as follows:

> 1. Is the defendant, Reliance Insurance Company, estopped to assert the exclusion in the policy relating to non-occupancy?
>
> ANSWER: NO

Plaintiff moved for summary judgment notwithstanding the verdict and for a new trial as to all defendants. These motions were denied.

Reynolds & Howard, by E. Cader Howard, for plaintiff.

Johnson, Patterson, Dilthey & Clay, by Ronald C. Dilthey, for defendant Reliance Insurance Company.

Young, Moore, Henderson & Alvis, by Joseph C. Moore, Jr., and Walter Brock, Jr., for defendants Eaves.

WELLS, Judge.

[1] Plaintiff first assigns as error the granting of defendants Eaves Agency's and George Eaves' motions for directed verdict. Taking plaintiff's evidence to be true and giving plaintiff the most favorable interpretation of the evidence, it remains that plaintiff, as a matter of law, has failed to make out a case of actionable negligence against Eaves Agency or Eaves individually. Plaintiff asserts that there was evidence of failure to provide plaintiff with the renewed policy, and that since Eaves had a duty to furnish plaintiff with the policy, this breach of duty constitutes negligence on their part. While accepting, *arguendo*, that there was evidence as to failure to furnish the policy to plaintiff, there is no showing of any causal relationship between such omission and plaintiff's subsequent loss, *i.e.*, plaintiff's evidence lacked the ingredient of proximate cause essential in establishing actionable negligence. Plaintiff argues that had it received the policy, it would have then been on notice of the exclusion and could have acted to procure a different type of coverage, presumably without the exclusion. Plaintiff's witnesses — the principal officers in the corporation — testified, however, that they had never read the predecessor policies (which were duplicative of the renewal policy) and that even if they had received renewal policy, they would not have read it.

Neither can we accept plaintiff's argument that defendants Eaves were negligent in not informing Reliance that the dwelling house was unoccupied. The evidence clearly shows that Reliance ordered its own investigation of the status of the property and that its investigator reported the property to be "not vacant". Plaintiff's failure to respond to Eaves' request for the name of plaintiff's tenant cannot be translated into an act of negligence on the part of Eaves. Eaves had no duty, independent of Reliance, to inspect the property or to determine whether the property was occupied.

[2] Plaintiff next assigns as error the failure of the trial court to direct a verdict in its favor against Reliance. The heart of plaintiff's claim against Reliance lies in the theory of waiver, based upon the proposition that Reliance had constructive knowledge that the house was unoccupied and that Reliance issued the policy while possessed of such knowledge. Whether or not Reliance had the constructive knowledge contended by plaintiff is a jury question. Plaintiff's evidence showed that the dwelling was in a state of substantial disrepair when it was inspected by Jennings. There was no electricity to the house and several windows were broken. There

was no observed heat source in the house and the house was sparsely furnished. On the other hand, a neighbor informed Jennings that people were living in the house and Jennings observed a "puppy" dog on the premises during his visit. Another of plaintiff's witnesses, Thomas Urquhart, testified that he visited and inspected the house in February of 1976. He described the poor condition of the house, its lack of electricity and sparse furnishings and the broken windows. These physical conditions suggested to him that the house was vacant, and that the conditions "to me say that you can't live there." Plaintiff presented similar testimony from Richard Urquhart.

The jury question arising on this evidence is whether a reasonable person, seeing the property in the conditions existing when Jennings visited it, could have concluded that the property was occupied, or, whether these conditions were such as to put Jennings on such notice of non-occupancy as to require further investigation. Our Supreme Court, quoting from 16 Appleman, Insurance Law and Practice, has stated the rule as follows:

> "Knowledge of facts which the insurer has or should have had constitutes notice of whatever an inquiry would have disclosed and is binding on the insurer. The rule applies to insurance companies that whatever puts a person on inquiry amounts in law to 'notice' of such facts as an inquiry pursued with ordinary diligence and understanding would have disclosed."

Gouldin v. Insurance Co., 248 N.C. 161, 165, 102 S.E. 2d 846, 849 (1958).

In addition to the evidence of non-occupancy based on the observed conditions of the property, Reliance was never furnished with the name of a tenant for the property. This is further evidence from which the jury might, but need not, infer that Reliance was on notice of non-occupancy.

[3] The question of whether there was notice to Reliance depends in substantial degree on whether Jennings' knowledge was imputable to Reliance. In another assignment of error, plaintiff excepted to the portion of the trial court's charge to the jury in which the court instructed the jury on the issue of agency, as follows:

> I will instruct you that the Tarheel Reporting Com-

> pany was acting not as an agent of the Reliance Insurance Company but as an independent contractor, and if you should find that Ed Jennings — or John Ed Jennings of the Tarheel Reporting Company failed to ascertain there were no tenants living in the house or if you should find that Mr. Jennings wrongfully concluded that the house was not vacant, that this fact is not imputed to Reliance Insurance Company, since Mr. Jennings and Tarheel Reporting Company were not agents of Reliance Insurance Company but were acting in the capacity of an independent contractor. And the issue before you is not a determination of whether or not Mr. Jennings and Tarheel Reporting Company wrongfully concluded that the dwelling was not vacant.

We hold that the foregoing instruction was erroneous. While recognizing that Tar Heel was not generally subject to the control and direct supervision of Reliance and that in the general sense Tar Heel was an independent contractor, this aspect of the relationship is not determinative of the question of agency here. An independent contractor may also be an agent. 2A C.J.S. Agency § 12, at 574 (1972); Restatement of the Law of Agency 2d § 14N, at 80 (1958). We hold that for the purposes of making the investigation and report Tar Heel was employed to make, Tar Heel was acting as the agent of Reliance, so that such knowledge of the conditions of the property, bearing on occupancy or non-occupancy, as was gained by Tar Heel as a result of its investigation, was imputable to Reliance.

In another assignment of error, plaintiff excepts to the following portions of the trial court's charge:

> If you find from the facts and circumstances of this case that the plaintiff should have known about the non-occupancy clause prior to the renewal then this would be constructive knowledge and they were then required to answer the defendant's inquiry as to who the tenant was, which they have testified to that they did not answer. Knowing failure to do this would prohibit the plaintiff from relying on the doctrine of equitable estoppel.
>
> . . . .
>
> Finally, on the issue that is to be submitted to you, if

you find that the plaintiff by the greater weight of the evidence has proven to you both of the following things, first, that the defendant, Reliance Insurance Company, at the time of the renewal had constructive knowledge of the non-occupancy of the building, and second, that the plaintiffs did not have constructive knowledge of the non-occupancy at the time of the renewal, if the plaintiff has proven to you both of these things then I instruct you to answer this issue in favor of the plaintiff, and that would be YES.

If, on the other hand, the plaintiff has not so proven both of these things, or you are unable to tell where the truth lies as to either of these things then answer the issue in favor of the defendant, which would be NO.

[2] Plaintiff argues that the evidence shows either that Reliance waived the exclusionary clause, or, that it should be estopped to deny coverage. Plaintiff also argues that plaintiff should not be estopped to assert coverage, even if it had constructive knowledge of the exclusionary clause.

In a case such as the one before us, the line between waiver and estoppel is often blurred. In previous opinions, this Court and our Supreme Court have dealt with and commented upon the characteristics which may either distinguish these two principles of law, or, may show the kinship of one to the other. *See Thompson v. Insurance Co.*, 44 N.C. App. 668, 262 S.E. 2d 397, *disc. rev. denied*, 300 N.C. 202, 269 S.E. 2d 620 (1980); *see also* 13 Strong's N.C. Index 3d, *Waiver*, § 2, at 294-95; 5 Strong's N.C. Index 3d, *Estoppel*, § 4, at 671-72; 18 Couch, Insurance 2d § 71:3, at 7, § 71:15, at 15 (1968); 16A Appleman Insurance Law and Practice § 9081, at 279 (1968).

In *Horton v. Insurance Co.*, 122 N.C. 498, 503, 29 S.E. 944, 945 (1898) our Supreme Court enunciated the rule that conditions in an insurance policy working a forfeiture are matters of contract and not limitation and may be waived by the insurer. Thus when the insurer, knowing the facts, does that which is inconsistent with its intention to insist on a strict compliance with the conditions precendent of the contract, it is treated as having waived their performance. *See also Gouldin v. Insurance Co., supra; Johnson v. Insurance Co.*, 172 N.C. 142, 90 S.E. 124 (1916); *Wells v. Insurance Co.*, 43 N.C. App. 328, 258 S.E. 2d 831 (1979), *disc. rev. denied*, 299 N.C. 124, 261

S.E. 2d 926 (1980); and *Stuart v. Insurance Co.*, 18 N.C. App. 518, 197 S.E. 2d 250 (1973).

We believe that plaintiff's evidence in the case *sub judice* properly raises an issue of whether Reliance was on such notice of the non-occupancy of the house at the time the policy was renewed that its subsequent issuance of the policy constituted a waiver of the exclusionary provision or condition. The question of whether plaintiff had notice, constructive or actual, that the policy contained such a provision has no bearing on the liability of Reliance. Such notice on the part of plaintiff would not estop plaintiff from asserting coverage.

The trial court should have given a charge properly explaining the law of waiver as it applies to the evidence in this case, and the instruction given was erroneous.

For the reasons given, there was no error in the trial court's denial of defendant Reliance's motion for directed verdict, nor in denying plaintiff's motions for directed verdict, nor in allowing defendants Eaves Agency's and George Eaves' motions for directed verdict. For errors committed in the trial, there must be a new trial as to the Standard Supply Co., Inc. v. Reliance Insurance Company.

The result is:

As to the Standard Supply Company, Inc. v. George W. Eaves and Eaves Agency, Inc.,

Affirmed.

As to Standard Supply Company, Inc. v. Reliance Insurance Company,

New trial.

Chief Judge MORRIS and Judge VAUGHN concur.

JOYCE J. MACON AND GRADY S. MACON v. HELEN R. EDINGER AND CLYDE C. EDINGER

No. 809SC359

(Filed 2 December 1980)

1. **Partition § 7.1; Rules of Civil Procedure § 5— partition — report of commissioners — necessity for service on parties**

The report of the commissioners in a partition proceeding is a "similar paper" under G.S. 1A-1, Rule 5(a) which must be served upon each of the parties, and the Rule 5(a) provision which obviates the need for service on parties who are "in default" does not apply to a partition proceeding for failure of respondent to answer the petition for partition.

2. **Partition § 7.1— report of commissioners — notice**

The notice provision of G.S. 1-404 does not apply to the report of the commissioners in a partition proceeding but only to the clerk's confirmation order.

3. **Partition § 7.1; Rules of Civil Procedure § 60.2— report of commissioners — absence of actual notice — "mistake" — relief from confirmation order**

The failure to give respondents actual notice of the entry of the report of the commissioners in a partition proceeding was a "mistake" under both G.S. 46-19 and G.S. 1A-1, Rule 60(b), and respondents are entitled to have the clerk's confirmation order set aside pursuant to G.S. 46-19 if they had no actual notice of and no opportunity to file exceptions to the commissioners' report either because of the failure of the clerk to mail the report to them as required by G.S. 1A-1, Rule 5(b) or because mail delivery was not made to them.

APPEAL by respondents from *Brewer, Judge.* Judgment entered 12 December 1979 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 9 October 1980.

Appellees, the Macons, filed a petition for partition of certain real property located in Franklin County which Mrs. Macon held in tenancy in common with appellant (respondent in the partition proceeding) Mrs. Edinger. The petition and summons were duly served on the Edingers, who failed to answer.

On 5 May 1978, approximately eight months after the filing of the petition, the Clerk of Superior Court of Franklin County, entered an order appointing commissioners to partition the property subject of the petition. The commissioners were notified and took their oaths on 9 May. An order was entered 6 July 1978 extending the time for the commissioners to file their report until 5 September 1978. The commissioners' report, filed on 8 September, allotted each tenant the same acreage (exactly 40.25 acres) but charged

petitioners with an owelty of $8,652.30. The clerk entered an order of confirmation on 20 September 1978.

On 10 November 1978, respondents filed a petition to set aside the confirmation order under G.S. 46-19 listing exceptions and objections to the order. Respondents based their exceptions upon : (1) the failure of the commissioners to timely file their report; (2) the failure of the clerk to serve on them a copy of the report of the commissioners; and (3) the division of the property made by the commissioners, which they alleged was unjust. The clerk, in an order filed 9 January 1980, found as facts that: (1) the late filing of the report worked no prejudice on respondents; (2) on the same day it was filed, the clerk mailed a copy of the commissioners' report to respondents at the same address where they acknowledged they later received a copy of the confirmation; and, (3) respondents failed to adduce any evidence of fraud, mistake, or collusion. The clerk concluded that the time for filing objections and exceptions to the report had expired, that the time for appeal from the decree of confirmation had expired, and that the respondents were not entitled to have the decree set aside on the grounds of mistake, fraud or collusion.

Respondents appealed from the order and in a hearing *de novo* presented the testimony of five witness. This testimony tended to show that the additional value of the land allotted to petitioners greatly exceeded the owelty assessed by the commissioners, that the partition was inequitable, and that the respondents were entitled to a greater owelty than that allowed. The respondents themselves testified that they never received notice or a copy of the report of the commissioners, although Mrs. Edinger acknowledged that she did receive a copy of the confirmation order on 5 September 1978. [Respondents in their brief point out that, since the order was not entered until 20 September, Mrs. Edinger probably meant 5 *October*.]

Petitioners offered evidence that they had spent more than $1,500.00 on repairs and improvements on the allotted tract since the decree of confirmation, and that the division was fair and equal.

The trial judge entered judgment on 12 December 1979, the sole finding of fact being that respondents had offered no evidence of mistake, fraud or collusion. The court thereupon concluded that respondents were not entitled to relief under G.S. 46-19.

Harris & Harris by Jane P. Harris; and I. Beverly Lake, Sr., for petitioner appellees.

Norman L. Sloan; and Robert E. Monroe for respondent appellants.

CLARK, Judge.

The question presented by this appeal is whether the trial court erred in ruling that respondents have offered no evidence of "mistake" within the meaning G.S. 46-19. This statute provides in part that "Any party after confirmation may impeach the proceedings and decrees for mistake, fraud or collusion by petition in the cause." The respondents do not claim fraud or collusion.

In their petition to set aside the report of commissioners the respondents allege three mistakes: (1) the failure of the commissioners to timely file their report (the order of 6 July 1978 required the report to be filed by 5 September, but it was not filed until 8 September); (2) the division of the property was unjust (G.S. 46-10 requires the tracts allotted the cotenants be equal in *value* not in *acreage*); and (3) the failure to give respondents notice of the report of commissioners. The first two claims relate to ordinary errors which were deemed waived when respondents failed to file exceptions to the report. If no exceptions to the report are filed within ten days after entry as provided by G.S. 46-19, errors or irregularities in the report should be confirmed by the clerk as a matter of law. *Roberts v. Roberts*, 143 N.C. 309, 55 S.E. 721 (1906); *Ex parte White*, 82 N.C. 378 (1880); *Hewett v. Hewett*, 38 N.C. App. 37, 247 S.E. 2d 23, *disc. rev. denied*, 295 N.C. 733, 248 S.E. 2d 863 (1978). Therefore, the only question raised by this appeal is whether the failure to give to the respondents notice of the entry of the report of commissioners was a "mistake" which would entitle them to relief under G.S. 46-19. If so, the clerk and the superior court erred in ruling that they had offered no evidence of mistake and in confirming the report of the commissioners.

Since an opportunity for correcting ordinary error or irregularities is provided to a party by the filing of exceptions in G.S. 46-19 and by appeal from the decree of confirmation in G.S. 1-272, it should be clear that the legislature did not intend the word "mistake" in G.S. 46-19 to apply to ordinary error and irregularities by the commissioner or the clerk. The words "mistake, fraud or collu-

sion" in the statute construed *in pari materia* are applicable to substantial defects or omissions in the proceedings which probably would not be discovered in time to assert rights within the ten-day limit for filing exceptions to the report of commissioners or appeal from the confirmation order and which would likely result in the denial of a substantial right if not corrected.

Besides G.S. 46-19, G.S. 1A-1, Rule 60(b)(1) also authorizes relief from "a final judgment order or proceeding" for "mistake, inadvertence, surprise or neglect." As one commentator suggests, "If the defendant has no actual notice of an action pending against him, this would at least seem to constitute excusable inadvertence or neglect." W. Shuford, N.C. Civil Practice and Procedure § 60-6 (1975). Were respondent not entitled to the relief he seeks under G.S. 46-19, we could properly view his petition as a motion under Rule 60(b)(1). *Cf. Bell v. Moore*, 31 N.C. App. 386, 229 S.E. 2d 235 (1976) (motion not denominated as such treated as Rule 60(b)(6) motion). Since the filing of the commissioners' report entitles the petitioner to confirmation as a matter of law upon the passage of ten days, we think such filing is sufficiently "final" to warrant relief under Rule 60(b)(1) if respondent is unable to proceed under G.S. 46-19. At any rate, the similarity of the language of the two provisions convinces us that the lack of actual notice is an appropriate basis for impeachment, whether under Rule 60(b)(1) or G.S. 46-19, when mistake is alleged.

If the respondents had no notice of the filing of the report of commissioners, they could not be expected to file exceptions under G.S. 46-19 within ten days thereafter. The mere filing of the report was not sufficient notice. If so, every party to the proceeding would have the duty of making almost daily visit to or contact with the office of the clerk to determine if the report had been filed. Such duty was rejected in *Collins v. Highway Commission*, 237 N.C. 277, 281, 74 S.E. 2d 709, 713 (1953), Ervin, J., commenting as follows:

> "The law does not require parties to abandon their ordinary callings, and dance 'continuous or perpetual attendance' on a court simply because they are served with original process in a judicial proceeding pending in it. [Citation omitted.] The law recognizes that it must make provision for notice additional to that required by the law of the land and due process of law if it is to be a

> practical instrument for the administration of justice. For this reason, the law establishes rules of procedure admirably adapted to secure to a party, who is served with original process in a civil action or special proceeding, an opportunity to be heard in opposition to steps proposed to be taken in the civil action or special proceeding where he has a legal right to resist such steps and principles of natural justice demand that his rights be not affected without an opportunity to be heard."

Petitioners rely on *Floyd v. Rook*, 128 N.C. 10, 38 S.E. 33 (1901), where the court in construing Section 1896 of The Code, a substantial prototype of G.S. 46-19, stated, in part, as follows:

> "Great inconveniences had arisen in the past, before the enactment of that section of The Code, in reference to the giving of proper notices to the often numerous parties interested in the partition of lands, of the report of the commissioners. Revised Code, p. 452; Battle's Rev., p. 655. And to make those matters certain both as to the parties themselves and to subsequent purchasers for value, conclusive notice was to be presumed that all persons interested in partition proceedings had received notice of the particulars of the partition from the filing of the report of the commissioners, and that 20 days only after that time would be allowed in which to file exceptions to the report. The requirement of The Code in that respect is not a rule of practice, nor is the report of the commissioners a pleading in the cause. The report is an act done by the representatives of the parties as well as of the Court, and of that act all parties interested must take notice."

Id. at 11-12, 38 S.E. at 33.

We are not so presumptuous as to overrule *Floyd*, but we find that the basis for the ruling in that case has been changed by modern conceptions of due process and fairness as reflected in the notice requirements of the present Rules of Civil Procedure. G.A. 1A-1, which apply to special proceedings. G.S. 1-393. G.S. 1A-1, Rule 5(a) provides:

> "*Service — when required.*— Every order required by its terms to be served, every pleading subsequent to the

> original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4."

[1] In light of the fact that the report of commissioners became final in that all errors are waived if exceptions are not filed within ten days after filing, we find that the report is a "similar paper" under Rule 5(a) which must be served upon each of the parties. It is the purpose of the Rule that every party be given due process and a reasonable opportunity to be heard.

The Rule 5(a) provision which obviates the need for service on parties who are "in default" in our opinion does not apply to a partition proceeding for failure of a respondent to answer the petition for partition. If the respondent is satisfied that the interests of the tenants in common are correctly alleged and is satisfied that relief prayed for (partition in kind or partition sale) is appropriate, his rights are not adversely affected by his failure to plead, and the petitioners are not entitled to an entry of default and respondents are therefore not "in default" under G.S. 1A-1, Rule 55. *See* W. Shuford, N.C. Civil Practice and Procedure § 5-4 (1975). *Cf. Hennessee v. Cogburn*, 39 N.C. App. 627, 251 S.E. 2d 623, *disc. rev. denied*, 297 N.C. 300, 254 S.E. 2d 919 (1979), wherein entry of default was held to relieve the other party of the duty to serve motions on defaulting party.

[2] Petitioners also rely on G.S. 1-404 which provides that ten days after the report is filed "the court may proceed to confirm the same on motion of any party and *without special notice to the other parties.*" [Emphasis supplied.] But we think it clear that this notice provision does not apply to the report of commissioners but to the clerk's confirmation order, which should be confirmed as a matter of law if exceptions are not filed in apt time. *Roberts v. Roberts, supra.*

The clerk in his order of 9 January 1979 found as a fact simply

that he had mailed a copy of the report of commissioners to the respondents on the same day it was filed. Under G.S. 1A-1, Rule 5(b) service is deemed complete upon deposit of a paper "enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service." The respondents offered evidence that they did not receive in the mail a copy of the report. The questions of proper and complete service and actual notice were raised by the evidence, evidence of a "mistake" which was not likely to be discovered within the ten-day limit for filing exceptions, resulting in the denial of the right to be heard. The respondents were entitled to findings of fact on these questions in the trial *de novo* before the superior court judge. *See* G.S. 1A-1, Rule 52(a)(1); *Allen v. Allen*, 258 N.C. 305, 128 S.E. 2d 385 (1962).

[3] We conclude that respondents' evidence that they had no actual notice of the filing of the commissioners' report is evidence of a "mistake" both under G.S. 46-19 and G.S. 1A-1, Rule 60(b), and that if respondents were foreclosed from their right to be heard either by the failure of the clerk to mail the report to them as required by G.S. 1A-1, Rule 5(b) or because of neglect or some other cause mail delivery was not made to them, the respondents are entitled to relief under G.S. 46-19. The trial court erred in ruling that respondents had offered no evidence that would entitle them to such relief, and we remand for the court to make a determination and finding of fact as to whether respondents had actual notice.

If on remand and after hearing the trial court finds as a fact that respondents had no actual notice of, and no opportunity to file exceptions to, the commissioners' report, either because of the failure of the clerk to mail the report in apt time under G.S. 1A-1, Rule 5(b), or mail delivery was not made, the court must set aside the confirmation order and remand to the clerk for hearing on respondents' exceptions to the commissioners' report. If the trial court finds that respondents had actual notice or had waived such notice, the court should affirm the clerk's order of confirmation.

Reversed and remanded.

Judges WEBB and WHICHARD concur.

MRS. N. J. CARR; ROBERT P. CARR; JULIA G. CARR; ROBERT B. CARR, BY HIS GUARDIAN AD LITEM, ROBERT P. CARR; AGNES JANE CARR, BY HER GUARDIAN AD LITEM, JULIA G. CARR; WILLIAM B. GOOCH; JULIA B. GOOCH AND DOUGLAS BRAXTON GOOCH v. GREAT LAKES CARBON CORPORATION, CARLTON WOOD AND BLAKE F. WATSON

No. 8025SC369

(Filed 2 December 1980)

Courts § 9.4— summary judgment motion denied — hearing on second motion by another judge improper

It was inappropriate for a superior court judge to determine defendant's second motion for summary judgment on the issue of punitive damages where another superior court judge had already denied defendant's first motion on the same issue, and this was true even though the materials presented to the court on the second motion were different from those at the hearing on the first motion, since the first judge, in denying defendant's motion, was ruling as a matter of law and not in his discretion; the ruling finally determined the rights of the parties with respect to that issue unless reversed upon appellate review; and the second judge therefore did not have authority to overrule the judgment of the first judge.

APPEAL by plaintiffs from *Ferrell, Judge.* Judgment entered 28 September 1979 in Superior Court, BURKE County. Heard in the Court of Appeals 14 October 1980.

Plaintiffs are landowners and their children who reside near a plant operated by the defendant Great Lakes Carbon Corporation (hereinafter Great Lakes). The individual defendants are the present and past plant managers for Great Lakes, a manufacturer of synthetic graphite which is essential in the production of steel.

Plaintiffs seek compensatory damages for injury to their health and damages to their property, as well as punitive damages. They contend defendants, in the operation of the manufacturing plant, have emitted and continue to emit smoke, soot, offensive and noxious odors, and various poisonous gases and particulates into the air. They assert four causes of action based upon the acts of defendants: nuisance, negligence, trespass, and strict liability for engaging in ultra-hazardous activity.

Defendants answered, denying the material allegations of the complaint and alleging several affirmative defenses.

The cause of action based upon ultra-hazardous activity by defendants has been dismissed and plaintiffs have not sought appellate review of that dismissal.

The action was instituted on 3 March 1976, and on 9 September 1977, defendants filed a motion for partial summary judgment, seeking a dismissal of the claim for punitive damages. Defendants also filed a notice of hearing that the motion for summary judgment would be heard on 30 September 1977. The motion was heard "at the September 30, 1977, term" and defendants' motion for summary judgment as to the claim for punitive damages was denied. The order denying the motion was signed by Presiding Judge William T. Grist on 10 October 1977.

Thereafter, on 28 November 1978, defendants filed another motion for summary judgment as to plaintiffs' claim for punitive damages. Plaintiffs, on 7 December 1978, filed a motion to quash this summary judgment motion for the reason that it was the same issue previously decided by Judge Grist. On 18 December 1978, Judge Forrest Ferrell heard the defendants' second motion for summary judgment on the issue of punitive damages, and on 8 June 1979 signed an order concluding that he had the power to hear the motion on the merits. He also allowed the parties additional time to file further affidavits and "memoranda." Judge Ferrell, on 28 September 1979, entered an order allowing defendants' motion for summary judgment as to plaintiffs' claim for punitive damages. From this order, plaintiffs appeal.

Hudson, Petree, Stockton, Stockton & Robinson, by W. F. Maready and Jackson N. Steele, and Simpson, Baker, Aycock & Beyer, by Samuel Aycock, for plaintiff appellants.

Byrd, Byrd, Ervin, Blanton & Whisnant, by Joe K. Byrd and Robert B. Byrd, Patrick, Harper & Dixon, by Charles D. Dixon, and Sam J. Ervin, Jr. for defendant appellees.

MARTIN (Harry C.), Judge.

On this appeal we must determine whether Judge Ferrell had authority to enter the order of 28 September 1979 dismissing plaintiffs' claim for punitive damages. Plaintiffs contend that one superior court judge has no authority to overrule the judgment of another superior court judge in the same case on the same issue. Defendants argue that such action is proper on motions for summary judgment if the materials presented at the hearing on the second motion are different from those presented at the hearing on the first motion.

Ordinarily, one superior court judge may not overrule the judg-

ment of another superior court judge previously made in the same case on the same legal issue. *Calloway v. Motor Co.*, 281 N.C. 496, 189 S.E. 2d 484 (1972); *State v. McClure*, 280 N.C. 288, 185 S.E. 2d 693 (1972); *Public Service Co. v. Lovin*, 9 N.C. App. 709, 177 S.E. 2d 448 (1970). This rule does not apply to interlocutory orders given in the progress of the cause. An order is merely interlocutory if it does not determine the issue but directs some further proceeding preliminary to a final decree. *Greene v. Laboratories, Inc.*, 254 N.C. 680, 120 S.E.2d 82 (1961). The doctrine of *res judicata* does not apply to interlocutory orders if they do not involve a substantial right. *Calloway v. Motor Co., supra.* Therefore, a judge does have the power to modify an interlocutory order when there is a showing of changed conditions which warrant such action.

> For example, when a judge denies a motion for a change of venue upon the basis of his findings of crucial facts his order denying the motion is conclusive of the right to remove *on the facts found.* However, because of events intervening thereafter the ends of justice might then require removal of the action.

281 N.C. at 502, 189 S.E.2d at 488.

However, when the judge rules as a matter of law, not acting in his discretion, the ruling finally determines the rights of the parties unless reversed upon appellate review. For example, a ruling on a motion to strike an averment from a pleading on the ground that it is irrelevant, improper or prejudicial, is a ruling as a matter of law. *Calloway v. Motor Co., supra.*

In the granting or denial of a motion for summary judgment, the court is ruling as a matter of law, and is not exercising its discretion. In determining a motion for summary judgment, the court must decide as a matter of law whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. 1A-1, Rule 56(c); *Yount v. Lowe*, 288 N.C. 90, 215 S.E.2d 563 (1975). Such a ruling is determinative as to the issue presented. The aggrieved party has its remedy; if the summary judgment is denied, the moving party may ask for appellate review by way of certiorari, *see Patterson v. Reid*, 10 N.C. App. 22, 178 S.E.2d 1 (1970), and may preserve its rights for later appellate review by noting proper objection and exception in the record. *See Public Service Co. v. Lovin,*

supra. If summary judgment is allowed, the aggrieved party may have appellate review as a matter of right. *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E.2d 797 (1976); *Jones v. Clark*, 36 N.C. App. 327, 244 S.E.2d 183 (1978); N.C. Gen. Stat. 1-277. The aggrieved party may not seek relief by identical motion before another superior court judge. *Public Service Co. v. Lovin, supra.*

Defendant contends that the materials presented to the court on the second motion for summary judgment were different from those at the hearing on the first motion for summary judgment, and therefore, it was appropriate for Judge Ferrell to determine the motion. We do not agree. It is true that additional evidence was offered at the hearing on the second motion. At the hearing before Judge Grist, he considered twenty-two pages of pleadings, one hundred eight pages of interrogatories and answers, depositions of five of the plaintiffs, and an affidavit of David Marsland. At the hearing on the second summary judgment motion, 18 December 1978 and 21 September 1979, Judge Ferrell had before him, in addition to the above materials, fourteen depositions and seven affidavits of witnesses.

Nevertheless, the legal issue raised by the second motion was identical to the legal issue on the first motion. The ruling by Judge Grist determined the issue as to punitive damages with respect to the motion for summary judgment. Defendants cannot thereafter relitigate the issue by way of motion for summary judgment. *Biddix v. Construction Corp.*, 32 N.C. App. 120, 230 S.E.2d 796 (1977). If defendants' contention is permitted to prevail, an unending series of motions for summary judgment could ensue so long as the moving party presented some additional evidence at the hearing on each successive motion.[1] This would defeat the very purpose of summary judgment procedure, to determine in an expeditious manner whether a genuine issue of material fact exists and whether the movant is entitled to judgment on the issue presented as a matter of law. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 1971).

It must be remembered that defendants asked for the hearing before Judge Grist upon their motion. If they needed additional evidence, they should not have requested the hearing, or should have requested a continuance of the hearing.

[1] This position was presented by defendants' counsel upon oral argument.

This is not to say that there can never be more than one motion for summary judgment in a lawsuit. Where a second motion presents legal issues that are different from those raised in the prior motion, such motion would be appropriate. For example, plaintiff sues agent and principal in an automobile negligence case. Principal files motion for summary judgment, contending solely that there was no agency relationship. The denial of this motion would not bar principal from thereafter filing motion for summary judgment on the question of negligence.

Defendants rely upon *Fleming v. Mann*, 23 N.C. App. 418, 209 S.E.2d 366 (1974); *Alltop v. Penney Co.*, 10 N.C. App. 692, 179 S.E. 2d 885, *cert. denied*, 279 N.C. 348 (1971); *Miller v. Miller*, 34 N.C. App. 209, 237 S.E.2d 552 (1977); *State v. Turner*, 34 N.C. App. 78, 237 S.E.2d 318 (1977), and several federal cases. In *Fleming* defendants moved to dismiss pursuant to Rule 12(b)(6). The motion was denied. Thereafter, plaintiff amended the complaint and the defendant Chace moved to dismiss the amended complaint under Rule 12(b)(6). This Court held the trial court had authority to determine the motion as it did not present the same legal question resolved by the first motion. There was also a difference in the parties involved. In *Alltop* this Court properly held that the denial of a motion to dismiss under Rule 12(b)(6) does not preclude the subsequent determination of a motion for summary judgment. Again, different legal issues are presented by the motions. *Miller* presented the question whether a judge who rules on a motion for summary judgment may thereafter strike the order, rehear the motion for summary judgment, and allow the motion. Such procedure does not involve one judge overruling another, and is proper under Rule 60. In *Turner*, the Court approved the action of a second judge in allowing the state's motion to continue a case after another judge had previously ordered the case to be tried or dismissed at a certain term of court. The order setting the case for trial was a pretrial order dealing with procedural matters of the case and not the merits. It did not determine any of the issues involved in the case and was interlocutory in nature. The doctrine that one superior court judge has no authority to overrule another does not apply to such orders. *Greene v. Laboratories, Inc., supra.*

Defendants cite several federal court decisions, none from the Fourth Circuit. We have carefully examined these cases and do not find them persuasive. Several are concerned with orders in which

the judge expressly stated the ruling was made without prejudice to the filing of a subsequent motion. The federal courts are not troubled by the problems attendant to North Carolina's "salutary principle" of rotation of judges, N.C. Const. art. IV, § 11. The court in *Castner v. First National Bank of Anchorage*, 278 F.2d 376, 379 (9th Cir. 1960), did observe the general rule: "[V]arious judges who sit in the same court should not attempt to overrule the decisions of each other."

It appears that the case at bar could have been disposed of by jury trial during the time required by the summary judgment motions. The action was filed 3 March 1976 and answer filed 30 April 1976. Sixteen months elapsed before the first summary judgment motion was filed. Surely this was sufficient time for all reasonable discovery to be completed. More than three years have elapsed since Judge Grist's order. At best, the case has moved at a rather leisurely pace through the court of Burke County.

The conservation of judicial manpower and the prompt disposition of cases are strong arguments against allowing repeated hearings on the same legal issues. The same considerations require that alleged errors of one judge be corrected by appellate review and not by resort to relitigation of the same issue before a different trial judge. North Carolina has long observed this rule. *See Calloway v. Motor Co., supra; State v. Neas*, 278 N.C. 506, 180 S.E.2d 12 (1971); *Greene v. Laboratories, Inc., supra; Topping v. Board of Education*, 249 N.C. 291, 106 S.E.2d 502 (1959); *Wall v. England*, 243 N.C. 36, 89 S.E.2d 785 (1955); *Hoke v. Greyhound Corp.*, 227 N.C. 374, 42 S.E.2d 407 (1947); *Fertilizer Co. v. Hardee*, 211 N.C. 56, 188 S.E. 623 (1936) (and cases cited therein); *Biddix v. Construction Corp., supra*. We perceive no sound reason to depart from this rule.

We hold Judge Ferrell did not have authority to enter the summary judgment order of 28 September 1979. It is, therefore, vacated, and the cause is remanded to the Superior Court of Burke County.

Vacated and remanded.

Judges HEDRICK and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. JAMES CURTIS VONCANNON

No. 8020SC539

(Filed 2 December 1980)

1. Larceny § 7.4— larceny of tractor — possession of recently stolen property

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of felonious larceny of a tractor under the doctrine of possession of recently stolen property where it tended to show that defendant went to the home of his sister and her husband, told the husband that a man was having trouble with a tractor the man had purchased for resale, and asked if the man could park the tractor at the home of the sister and her husband overnight; the husband gave his permission; defendant left the home and the tractor was subsequently parked at the home; neither defendant's sister nor her husband saw defendant drive the tractor or saw the man referred to by defendant, although defendant's sister did see defendant leave in his truck; and the tractor parked at the home of defendant's sister and her husband at 10:30 p.m. on 5 June had been stolen during the afternoon of 3 June.

2. Constitutional Law § 30— motion at trial to examine witness's written statements — absence of *in camera* examination — due process

Defendant's due process rights were violated when the trial court denied defense counsel's motion, made at trial prior to cross-examination of a material State's witness, that counsel be allowed to examine any statements by the witness which had been reduced to writing, and failed to make an *in camera* inspection of the writing.

Judge HEDRICK dissenting.

APPEAL by defendant from *Mills, Judge.* Judgment entered 8 January 1980 in Superior Court, STANLY County. Heard in the Court of Appeals 15 October 1980.

Defendant was indicted and tried for the felonious larceny of an International tractor, the personal property of Kinlaw International. Defendant was found guilty and now appeals his conviction.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Acie L. Ward, for the State.

Joe D. Floyd for defendant appellant.

HILL, Judge.

[1] Defendant has brought forth thirteen assignments of error. In reviewing defendant's conviction, we must first address defend-

ant's argument that the trial court erred when it denied defendant's motions to dismiss the case. We find there was sufficient evidence of felonious larceny for the case to be submitted to the jury and that defendant's motions to dismiss as of nonsuit were correctly denied.

The evidence taken in the light most favorable to the State tends to show that defendant went to the home of his sister and her husband on 5 June 1979 at approximately 10:30 p.m. Defendant asked his sister if he could speak with her husband, John York Jr. Defendant then went into the living room where York was watching television, told him that a man was having trouble with a tractor the man had purchased for resale and asked if the man could park the tractor at York's home overnight. York gave his permission; and in response to defendant's further question, stated that his landlord would not care if the tractor was parked at York's home overnight.

Defendant left the house. Subsequently, the tractor was driven in. Neither defendant's sister nor her husband saw defendant drive the tractor or saw the man defendant referred to, although defendant's sister did see defendant leave in his Toyota truck. The State's evidence further shows that a tractor was stolen from the premises of Kinlaw International sometime after Sunday afternoon, 3 June, and that the tractor parked at the York home on 5 June was the same tractor that was stolen from Kinlaw.

The State relies, in this case upon the doctrine of recent possession. The doctrine is well established and provides that a "defendant's possession of stolen goods soon after the theft is a circumstance tending to show the defendant is guilty of the larceny." *State v. Eppley*, 282 N.C. 249, 253, 192 S.E. 2d 441 (1972).

The doctrine does not apply automatically, however. "It applies only when the possession is of a kind which manifests that the stolen goods came to the possessor by his own act or with his undoubted concurrence." *State v. Foster*, 268 N.C. 480, 486, 151 S.E. 2d 62 (1966). Furthermore, the inference of guilt is one of fact, not of law. *State v. Ford*, 175 N.C. 797, 801, 95 S.E. 154 (1918).

We find a three part analysis to be helpful in reaching our conclusion that the judge did not err in submitting the case to the jury. The threshold issue is whether defendant ever possessed the tractor. We find that he did.

Defendant was in such physical proximity to the tractor that

he had the power to control it to the exclusion of others and had the intent to control the tractor. *See Eppley, supra*, at p. 254. Although the evidence does not show who drove the tractor up to the York house, defendant testified that he told the stranger where to park the tractor close to the barn. Taken in the light most favorable to the State, the evidence shows that defendant meant for the tractor to be parked at the York home and was physically close enough to the tractor to direct its placement.

Before we can *infer* that the possessor, defendant, *wrongfully* took the tractor, we must answer a second question. Does the possession show a taking or privity in taking on the part of the possessor? *State v. Smith*, 24 N.C. 402, 408. *Also see Foster, supra*, at p. 486. Stated differently, does the fact that defendant was in possession, late in the evening, of a recently stolen tractor manifest that the tractor came into his possession by his own act or with his undoubted concurrence? *Ford, supra*, at p. 800. We believe so.

It is important to realize at this step in our analysis that we are not asking whether defendant's possession conclusively points to a guilty taking. Rather, we are asking if the tractor came into defendant's possession by his own action or by the action of one under his direction.

Smith, supra, is illustrative of this step in the analysis. In *Smith*, p. 408, tobacco had been stolen from a warehouse and placed in defendant's warehouse. The Court held that before the doctrine of recent possession could be applied and the inference made that defendant had participated in the theft, it would have to be shown that the tobacco could not have been placed in defendant's warehouse "without his *agency* or privity." In the instant case, it is clear from the evidence that defendant came into possession of the tractor by his own action.

The third step in our analysis is the inference itself. When it is shown that defendant came into possession of recently stolen property, through his own action, the jury may *infer* a guilty taking. The trial court's denial of defendant's motion to dismiss was proper.

[2] We have carefully examined each of defendant's remaining assignments of error and find one to be meritorious. Defendant correctly argues that the trial court violated his due process rights when it denied his counsel's motion, made prior to cross-examina-

tion of State's witness John York Jr., that counsel be allowed to examine any witnesses' statements that had been reduced to writing, and failed to make an *in camera* inspection of the writing.

Mr. York is defendant's brother-in-law. York testified much as we have already stated the State's evidence to be. York further testified that the morning after the tractor was parked at his home he went to work around 6:00 a.m. York returned home at 4:00 p.m. and backed the tractor away from his shed so he could get some tools and do some gardening. York testified that he moved the tractor by just "touching the two wires in the front together."

York left the tractor where he had parked it and went to work the next day, 7 June. Upon his return, York's wife informed him that carloads of people had stopped to examine the tractor that day. York then looked at the tractor, along with his landlord Baxter Varner, and asked Varner to call Kinlaw International. Varner called, and it was at this point that Maxwell Kinlaw, owner of Kinlaw International, first learned that his tractor was missing.

When the prosecution concluded its direct examination of York, defense counsel moved to examine any witnesses' statements that had been reduced to writing. The trial judge denied the motion, and defendant objected. The denial violated defendant's due process rights.

Our Supreme Court points out in *State v. Hardy*, 293 N.C. 105, 127, 235 S.E. 2d 828 (1977), that the United States Supreme Court has held "the prosecutor is constitutionally required to disclose . . . *at trial* evidence that is favorable and material to the defense." *See United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S.Ct. 2392 (1976). Due process is concerned that the suppressed evidence might affect the outcome at trial. *Hardy* at p. 127.

The issue then becomes: Who is to decide what evidence is favorable and material to the defense? The federal government has answered the question by providing that a defendant is *automatically* entitled to inspect, immediately prior to cross-examination, any prior statement of a material State's witness. *See Jencks v. United States*, 353 U.S. 657, 1 L. Ed. 2d 1103, 77 S. Ct. 1007 (1957); *See also* 18 U.S.C. § 3500.

The North Carolina Supreme Court has mandated a different procedure. The Court held in *Hardy*, at p. 128, that when a specific

request is made at trial for disclosure of evidence in the State's possession, the judge must "*at a minimum*, order an *in camera* inspection and make appropriate findings of fact.... [I]f the judge, after the . . . examination, rules against the defendant . . . , the judge should order the sealed statement placed in the record for appellate review." (Emphasis added.)

The procedure outlined by our Supreme Court is imminently logical. It insures defendant that no material, exculpatory pretrial statement will be suppressed. The procedure also provides the appellate branch with the text of the statement so that upon review we may effectively determine whether the defendant's substantive due process rights have been protected.

The trial court failed to follow the *Hardy* procedure when it denied defendant's motion and failed to make the *in camera* inspection prior to cross-examination.

Defendant's procedural due process rights were violated.

For the reason set out above, defendant must be granted a

New trial.

Judge ARNOLD concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

I respectfully dissent from that portion of the majority opinion which awards defendant a new trial on the grounds that defendant's due process rights were violated. Since the procedure suggested by our Supreme Court in *Hardy* with respect to the *in camera* inspection of the statement was not followed by the trial judge in the present case and we do not have in the record before us the statement of the witness in question, we cannot say that the error committed was not prejudicial. I can say, however, in my opinion the error was harmless beyond a reasonable doubt. The obvious purpose of letting the defendant examine the statement immediately before cross-examination is to allow the defendant to use such statement to impeach the witness. The evidence of defendant's guilt in the present case is not at all dependent upon the testimony of the brother-in-law. The record is replete with other evidence that the tractor was stolen and the defendant's own sister

described in detail the circumstances surrounding the tractor being brought to their home and parked near the barn until the following day. The testimony of the witness John York is essentially identical to that of his wife, except that the wife's testimony is more detailed with respect to the fact that defendant was present when the tractor was brought to the house and parked near the barn. John York did not even testify that the defendant was present when the tractor was brought to his home. Obviously, the wife's testimony is more damaging to defendant than that of her husband. The husband was not present when defendant talked to the wife, but the wife was present when defendant talked to her husband.

I realize, however, that the evidence of defendant's guilt is largely circumstantial; however, any impeachment of the testimony of John York which might have been accomplished by defendant by the use of the statement John York gave the investigating officers would not make the circumstantial evidence against defendant any less convincing.

In my opinion any error committed by the court's not requiring the District Attorney to allow defendant to see the statement of John York was harmless beyond a reasonable doubt. G.S. § 15A-1443(b).

BARNER A. HUNT, PERSONAL REPRESENTATIVE OF THE ESTATE OF JACQUELINE W. HUNT, DECEASED v. MONTGOMERY WARD AND COMPANY, INC.

No. 8019DC361

(Filed 2 December 1980)

1. Negligence § 57.10— customer burned on stove in store — negligence and contributory negligence as question for jury

In an action to recover for burns sustained by plaintiff's decedent when she brushed her hand across the surface of a stove displayed in a store owned and operated by defendant, the evidence presented a question for the jury as to whether defendant failed to exercise ordinary care in that it failed to maintain its premises in a reasonably safe condition, whether defendant's failure to warn its patrons of a potential hidden peril or unsafe condition on its premises constituted a failure to exercise ordinary care for their safety, and whether plaintiff's decedent was contributorily negligent as a matter of law where the evidence tended to show that the stove was the newest product in defendant's line of ranges and was the "top of the line"; the stove was placed on display in the store at a place and in a

manner designed to draw attention to it; the top of the stove looked like a counter top rather than having clearly demarcated "eyes" as stoves customarily have; defendant's employees had prepared a sign with the word "HOT" on it which was placed in the middle of the cooking surface of the stove when the stove had been demonstrated; at the time plaintiff's decedent was injured, the sign was located on the back guard of the stove where it was customarily placed after the stove cooled down; there were no locking devices on the stove's knobs to prevent them from being turned on, nor was there any tape or other protective device across the knobs when the stove was not being demonstrated; there were no notices or signs indicating that the stove should not be touched; and there were no ropes or cords surrounding the stove, nor were there any employees in the immediate area of the stove at the time of plaintiff's decedent's injury.

2. Negligence § 58.1— customer burned on stove in store — instructions — failure to apply law to facts

In an action to recover damages for burns sustained by plaintiff's decedent when she brushed her hand across the surface of a stove displayed in a store owned and operated by defendant, the trial court failed to declare and explain the law arising on the evidence where the instructions to the jury on the issue of defendant's negligence consisted of a brief summary of the evidence, a statement of the issue, a statement of the burden of proof, and general definitions of negligence and proximate cause, but the trial judge failed to relate the principles of law set forth in his instructions to the evidence in this case in that he failed to specify the duties owed by defendant to plaintiff's decedent and the acts or omissions by defendant established by the evidence from which the jury could find a breach of those duties, and he failed to relate the contentions of negligence supported by the evidence.

APPEAL by defendant from *Hammond, Judge.* Judgment entered 21 January 1980 in District Court, RANDOLPH County. Heard in the Court of Appeals 9 October 1980.

Plaintiff instituted this civil action to recover damages for personal injuries consisting of burns sustained by his decedent when decedent "brushed her left hand across the surface" of a stove displayed in a store owned and operated by defendant and located at Carolina Circle Mall in Greensboro, North Carolina.

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

1. Was Jacqueline Hunt injured by the negligence of the defendant?

Answer: Yes.

2. Did Jacqueline Hunt, by her own negligence, contribute to her injury?

Answer: No.

3. What amount, if any, is the plaintiff entitled to recover from the defendant?

Answer: $3,125.00

From a judgment entered on the verdict, defendant appealed.

Pollock, Fullenwider and Cunningham, P.A., by Bruce T. Cunningham, Jr., for plaintiff appellee.

Frazier, Frazier and Mahler, by Harold C. Mahler and Patrick A. Weiner, for defendant appellant.

WHICHARD, Judge.

Defendant assigns error to the trial court's denial of its motions for directed verdict at the conclusion of plaintiff's evidence and at the conclusion of all the evidence, and the denial of its motion for judgment notwithstanding the verdict. Defendant contends the plaintiff has shown no evidence of actionable negligence on defendant's part; and that if actionable negligence was shown, by his own evidence plaintiff established his decedent's contributory negligence as a matter of law.

A motion for directed verdict under Rule 50(a) of the North Carolina Rules of Civil Procedure, G.S. 1A-1, and a motion for judgment notwithstanding the verdict under G.S. 1A-1, Rule 50(b) present the question whether the evidence was sufficient to entitle the plaintiff to have a jury pass on it. *Dickinson v. Pake*, 284 N.C. 576, 583, 201 S.E.2d 897, 903 (1974); *Kelly v. Harvester Co.*, 278 N.C. 153, 157, 179 S.E.2d 396, 397 (1971). The question of sufficiency of the evidence to send a case to the jury is a question of law. The question presented to the appellate court in reviewing the decision of the trial court "is the identical question which was presented to the trial court by defendant's motion . . . , namely, whether the evidence, when considered in the light most favorable to plaintiff, was sufficient for submission to the jury." *Kelly*, 278 N.C. at 157, 179 S.E. 2d at 397. The trial court should deny motions for directed verdict and for judgment notwithstanding the verdict when, viewing the evidence in the light most favorable to the plaintiff and giving the plaintiff the benefit of all reasonable inferences, it finds "'any evidence more than a scintilla' to support plaintiff's prima facie case in all its constituent elements." 2 McIntosh, North Carolina Practice and Procedure 2d, § 1488.15 (Phillips Supp. 1970); *see*

also Gwyn v. Motors, Inc., 252 N.C. 123, 127, 113 S.E. 2d 302, 305 (1960). In a negligence case, "[i]f the evidence in the light most favorable to the plaintiff, giving him the benefit of all permissible inferences from it, tends to support all essential elements of actionable negligence, then it is sufficient to survive the motion to nonsuit." *Lake v. Express, Inc.*, 249 N.C. 410, 412, 106 S.E. 2d 518, 520 (1959).[1]

[1] Applying these well-established principles to the evidence adduced at the trial of this case, we find the following:

Defendant's witness, Ronald Dance, an employee in the major appliance section of defendant's store testified that defendant's employees had prepared a sign containing the word "HOT" which was "placed on the middle of the cooking surface of the stove" when the stove had been demonstrated. Viewing this evidence in the light most favorable to the plaintiff, we believe the jury could have found therefrom that the defendant had the requisite notice that the stove posed a potential hidden danger or unsafe condition to its patrons. "The inviter is charged with knowledge of an unsafe or dangerous condition on his premises during business hours created by his own negligence or the negligence of an employee acting within the scope of his employment, *or of a dangerous condition of which his employee has notice.*" *Long v. Food Stores*, 262 N.C. 57, 60, 136 S.E.2d 275, 278 (1964) (emphasis supplied).

The witness Dance further testified that at the time plaintiff's decedent was injured the "'HOT' sign" was located on the "back guard" of the stove where defendant's employees customarily placed it "after the stove cools down." He testified that "[t]here [were] no locking devices on [the stove's] knobs to prevent them from being turned on nor was there any tape or other protective device across the knobs when the stove was not being demonstrated." The decedent's daughter, Tricia Burnett, testified for the plaintiff that she "did not see any signs or notices indicating not to touch the stove" at the time of her mother's injury. She also testified that "[t]here were no ropes and cords surrounding the stove"; that she

[1] The *Lake* case was decided prior to adoption of the North Carolina Rules of Civil Procedure. The reasoning of the *Lake* case with respect to the motion to nonsuit was carried forward and applied to motions for directed verdict and judgment notwithstanding the verdict in *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971).

"saw no employees of the store in the immediate area of the stove"; and that she did not recall "any kind of indication of warning." Viewing this evidence in the light most favorable to the plaintiff, we believe the jury could have found therefrom that even though defendant had notice, as set forth above, of the potential danger posed to its patrons by the stove, it failed to exercise ordinary care to keep its premises in a reasonably safe condition with regard to display of the stove. The jury also could have found from this evidence that defendant failed to exercise ordinary care to warn its patrons of the potential hidden danger or unsafe condition posed by the display of the stove. While the proprietor of a store is not an insurer of the safety of customers on the premises, "he does owe to them the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to 'give warning of hidden perils or unsafe conditions in so far as can be ascertained by reasonable inspection and supervision'." *Jones v. Pinehurst, Inc.*, 261 N.C. 575, 578, 135 S.E.2d 580, 582 (1964).

On the issue of defendant's negligence, then the evidence recited above, viewed in the light most favorable to the plaintiff, presented a question for the jury to decide as to whether defendant failed to exercise ordinary care in that it failed to maintain its premises in a reasonably safe condition. It also presented a question for the jury as to whether defendant's failure to warn its patrons of a potential hidden peril or unsafe condition on its premises constituted a failure to exercise ordinary care for their safety. Thus, the trial court properly denied defendant's motions for a directed verdict and for judgment notwithstanding the verdict insofar as they related to the issue of defendant's negligence.

Defendant further contends in this assignment of error that its motions for directed verdict and for judgment notwithstanding the verdict should have been granted because the evidence established as a matter of law the contributory negligence of plaintiff's decedent. This issue, too, "necessitates an appraisal of [the] evidence in the light most favorable to [plaintiff]." *Morgan v. Tea Co.*, 266 N.C. 221, 228, 145 S.E.2d 877, 883 (1966). As Justice Huskins stated in *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E.2d 245 (1979):

> With respect to contributory negligence as a matter of law, '[t]he general rule is that a directed verdict for a defendant on the ground of contributory negligence may

> only be granted when the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than by the trial judge.'

Rappaport, 296 N.C. at 384, 250 S.E.2d at 247.

Applying this well-established principle to the evidence adduced here, we find that defendant's witness, Ronald Dance, testified that the stove in question was "the newest product in Montgomery Ward's line of ranges" and "was the top of the line, was the best looking stove, and had the most features on it." He further testified that it "was placed on the main aisle to draw attention to it." In describing the stove he said: "The top *looks like a counter top*, but the burners are marked by spiderweb patterns in the smooth glass top." (Emphasis suplied.) Plaintiff's witness, Tricia Burnett, in her description of the stove, stated that it had "a flat ceramic white top with patterns of lines to indicate the burner areas."

Viewing this evidence in the light most favorable to the plaintiff, we believe the jury could have found therefrom that a reasonably prudent person under the circumstances could be attracted to observe the "newest product" in the "top of the line" of a product in everyday household use, especially when the product was placed on display in the store at a place and in a manner "to draw attention to it." Further, especially since the top of the product looked "like a counter top" rather than having clearly demarcated "eyes" as stoves customarily have had, we believe the jury could have found that a reasonably prudent person under the circustances might have "brushed her left hand across the surface," as plaintiff's decedent did,, without being cognizant of the potential danger in doing so.

Under the evidence in this case we cannot say *as a matter of law* that a reasonably prudent person under the circumstances could not have expected to be able to engage in a physical examination of merchandise displayed for sale as here without first testing the product for potential injury-inducing effects. Only a jury could answer the question whether under these circumstances the plaintiff's decedent could reasonably have assumed that the stove was, like other merchandise in the store, in suitable condition for physical inspection by prospective purchasers.

On the issue of plaintiff's contributory negligence, then, the trial court properly denied defendant's motions for a directed verdict and for judgment notwithstanding the verdict. Defendant's first assignment of error is overruled.

[2] Defendant also assigns error to the trial court's failure "to instruct the jury on the law pertaining to the duty owed to an invitee by a store owner." The pertinent portion of the court's charge on the issue of defendant's negligence was as follows:

> Members of the jury, as I said, there are three issues in this case. Let's take them one at a time now, the first one is: "Was Jacqueline Hunt injured by the negligence of the defendant?" On this issue, the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that she suffered a personal injury as a proximate result of the negligence of the defendant. Negligence is the lack of ordinary care. It is the failure to do what a reasonably careful and prudent person should have done, or the doing of something which a reasonably careful and prudent person would not have done, considering all the circumstances existing on the occasion in question. The party seeking damages as a result of negligence has the burden of proving not only negligence, but also that such negligence was the proximate cause of the injury. Proximate cause is a real cause, the cause without which the claimed injury would not have occurred, and one which a reasonably careful and prudent person could foresee would probably produce such injury or some similar injurious result. Members of the jury, the plaintiff contends that you should answer the first issue yes. The defendant contends that you should answer the first issue no. If you find by the greater weight of the evidence that the defendant was negligent in that he failed to act as a reasonably prudent person would have acted and further find by the greater weight of the evidence that such negligence was a proximate cause of the plaintiff's damages, then you should answer the first issue yes. If you fail to so find, or if you are unable to determine where the truth lies, you should answer the first issue no.

General Statutes section 1A-1, Rule 51(a)(1) requires the trial

court to "declare and explain the law arising on the evidence given in the case." As Judge Vaughn noted in *Redding v. Woolworth Co.*, 14 N.C. App. 12, 16, 187 S.E.2d 445, 447 (1972): "The decisions of the Supreme Court of North Carolina are consistently to the effect that a mere declaration of the law in general terms . . . is not sufficient."

In *Griffin v. Watkins*, 269 N.C. 650, 153 S.E.2d 356 (1967), Justice Sharp (later Chief Justice) said for our Supreme Court:

> Failure to exercise due care is the failure to perform some specific duty required by law. To say that one has failed to use due care or that one has been negligent, without more, is to state a mere unsupported conclusion. '(N)egligence is not a fact in itself but is the legal result of certain facts.' (Citation omitted.) *In his charge, the trial judge must tell the jury what specific acts or omissions, under the pleadings and evidence, constitute negligence, that is, the failure to use due care.*

Griffin, 269 N.C. at 654, 153 S.E.2d at 359 (emphasis supplied).

The instruction in *Griffin* was held erroneous in giving "the jury *carte blanche* to find [the defendants] generally careless or negligent for any reason which the evidence might suggest to them." *Griffin*, 269 N.C. at 654, 153 S.E.2d at 359.

Like the court in *Redding*, "we regret the necessity of prolonging the litigation." *Redding*, 14 N.C. App. at 16, 187 S.E.2d at 447. We are, however, constrained to hold, as did the court there, that the trial judge failed to "declare and explain the law arising on the evidence" as required by Rule 51(a) in accordance with the standards established therefor by the decisions of our courts. The instructions to the jury on the issue of defendant's negligence consisted of a brief summary of the evidence; a statement of the issue; a statement on the burden of proof; and general definitions of negligence and proximate cause. The trial court failed to relate the principles of law set forth in its instructions to the evidence in this case. It failed to specify the duties owed by defendant to plaintiff's decedent and the acts or omissions by defendant established by the evidence from which the jury could find a breach of those duties. It failed to relate the contentions of negligence supported by the evidence. *See* N.C.P.I. — Civil 805.55. Such failure is inherently prejudicial under the decisions of our courts. In *Investment Properties v. Nor-*

burn, 281 N.C. 191, 188 S.E.2d 342 (1972), our Supreme Court stated, per Justice Moore:

> G.S. 1-180, as now incorporated in G.S. 1A-1, Rule 51, required the judge to explain and apply the law to the specific facts pertinent to the issue involved. A mere declaration of the law in general terms was not sufficient to meet the requirements of the statute. (Citation omitted.) It is the duty of the court, without a request for special instructions, to explain the law and to apply it to the evidence on all substantial features of the case. (Citation omitted.) *A failure to do so constitutes prejudicial error for which the aggrieved party is entitled to a new trial.*

Investment Properties, 281 N.C. at 197, 188 S.E.2d at 346 (emphasis supplied).

Because of the failure of the trial court to declare and explain the law arising on the evidence in the case as required by Rule 51(a) in accordance with the standards established in the decisions cited and other decisions of the appellate courts of North Carolina, there must be a new trial.

New trial.

Judges CLARK and WEBB concur.

J. B. OAKLEY v. J. D. LITTLE, SR.

No. 803SC247

(Filed 2 December 1980)

Uniform Commercial Code § 37.7— sale of investment securities — statute of frauds — insufficient writing

In an action to recover damages for defendant's breach of a contract for the sale of investment securities to plaintiff, the evidence on motion for summary judgment was insufficient to show a writing signed by defendant showing that the parties had entered into a binding contract within the purview of G.S. 25-8-319 where plaintiff's complaint alleged that defendant agreed to purchase half of the stock of a corporation and to sell half of this stock to plaintiff; plaintiff agreed to execute a note and deed of trust for the purchase price and to purchase term life insurance on his own life when defendant so requested; plaintiff presented notes which defendant allegedly gave plaintiff during a discussion of the proposed

transaction, but these notes were not signed by defendant and were merely evidence of negotiations toward a contract in the future; and plaintiff presented an insurance policy on plaintiff's life which was signed by defendant, since plaintiff's documents, even if read together, constitute no more than proof of tentative negotiations in an effort to reach a contract in the future, and the insurance policy simply shows that some step was taken toward the agreement.

APPEAL by plaintiff from *Strickland, Judge.* Order entered 24 January 1980 in Superior Court, PITT County. Heard in the Court of Appeals 16 September 1980.

This action was instituted to recover damages allegedly caused by defendant's breach of a contract between him and plaintiff for the purchase of investment securities. Plaintiff claims that defendant agreed in this alleged contract to sell him one-fourth of the shares of stock of General Heating, Inc., a corporation located in Greenville, North Carolina. In his complaint plaintiff alleged that defendant, who already owned one-half of the stock in General Heating, Inc., agreed to purchase the remainder of the stock from its owner, T. J. Morris, and, in turn sell one-half of this newly acquired stock to plaintiff, the transaction resulting in plaintiff's acquiring a one-fourth interest in the corporation. In return for the stock, plaintiff agreed to execute a promissory note to the defendant for the purchase price of $62,500. He agreed to secure this note with a second deed of trust on his home and a pledge of the stock he was to acquire from defendant. To further secure the note plaintiff also agreed to purchase term life insurance on his own life when defendant so requested. He alleged that defendant subsequently did request that he buy the life insurance and that he complied with this request. Plaintiff claimed that he was ready to perform his part of the agreement but that defendant refused to transfer the stock in question to him.

Defendant's answer denied all allegations of the complaint with the exception of the allegation of residence, and included a motion for dismissal pursuant to G.S. 1A-1, Rule 12(b)(6), and a demand for a jury trial.

On 8 November 1979, defendant moved for summary judgment on the grounds that there was no genuine issue of any material fact and that defendant was entitled to judgment as a matter of law. Plaintiff and defendant each filed affidavits with the court. In addition to these affidavits, the court considered the depositions of both parties, and plaintiff's exhibits Nos. 1 and 2 (hereinafter des-

cribed). At the hearing on this motion, the court heard the testimony of defendant's insurance agent, J. D. McLawhorn, Sr. The trial judge granted defendant's motion for summary judgment, and from the entry of the order allowing the motion plaintiff appeals.

Williamson, Herrin and Stokes, by Mickey A. Herrin, for plaintiff appellant.

James, Hite, Cavendish and Blount, by M. E. Cavendish, for defendant appellee.

MORRIS, Chief Judge.

Appellant contends generally that the trial court erred by granting defendant's motion for summary judgment. Under G.S. 1A-1, Rule 56, summary judgment shall be rendered if the trial court determines from a consideration of the pleadings, depositions, and affidavits that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. Summary judgment allows quick and final disposition of claims where there is no real question as to whether plaintiff should recover, or where the defendant has established a complete defense. Here it appears the latter is the case. Defendant had a complete defense in the statute of frauds.

Plaintiff failed to produce a writing sufficient to show a contract between him and defendant.

The sale of investment securities is governed by Article Eight of the Uniform Commercial Code. G.S. 25-8-319 is the statute of frauds applicable to such transactions in North Carolina.

Section (a) of that statute states:

> A contract for the sale of securities is not enforceable by way of action or defense unless
>
> (a) There is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price.

To be sufficient to comply with the requirements of this statute the writing must (1) evidence a contract for the sale of invest-

ment securities, (2) be signed by the party against whom enforcement is sought, and (3) contain terms stating the quantity and price of the securities. The essential point of these basic requirements is that the written memorandum be reasonably sufficient to prove the existence of a contract obligating the defendant to buy or sell investment securities.

Plaintiff's exhibit No. 1 consists of two pages of notes that defendant allegedly gave plaintiff during a discussion of the proposed transaction. The notes are entitled "Outline of Proposed Sale." They disclose many of the important terms, including the price and quantity, of the proposed transaction. Since there is no evidence that this document was signed by defendant, it cannot, standing alone, fulfill the requirements of the statute of frauds. Plaintiff's exhibit No. 2 consists of a Pilot Life insurance policy in the amount of $65,000. Plaintiff is listed as the insured, and defendant is named as the beneficiary of the policy. The signatures of both plaintiff and defendant appear on the policy. Defendant is listed as the owner of the policy and he is designated as "Business Partner". Presumably, this label refers to plaintiff.

There are few cases construing the statute of frauds applicable to the sale of investment securities. Prior decisions involving the construction of the statute of frauds applicable to the sale of goods, U.C.C. § 2-201, are instructive in determining the correct application of G.S. 25-8-319. Where there are similar provisions in these two statutes of frauds the courts should give a similar construction to both. The intent of the draftsmen of the Code was to make the investment securities provision conform to the policy underlying the statute of frauds of Article Two. Official Comment, G.S. 25-8-319; 3 Anderson, *Uniform Commercial Code* § 8-319:3 (2d ed. 1971).

G.S. 25-2-201 does not require a writing which embodies all of the essential and complete terms of a contract. However, it does require some good writing sufficient to indicate that a definite contract for the sale of goods has been made. Where writings only represent negotiations for agreements to be made in the future the courts have held under U.C.C. § 2-201 that they were not binding contracts. *In re Flying W. Airways, Inc.*, 341 F. Supp. 26 (D.C. Pa. 1972) [where the Court said: "[A]lthough the statute of frauds will permit the piecing together of memoranda to establish the *terms* of the contract, nevertheless, it is essential, in order to satisfy the

statute of frauds, that the 'signed memoranda,' standing alone, acknowledge the existence of a 'contractual status.' *Oswald v. Allen*, 417 F. 2d 43, 46 (2d Cir. 1969)."] 341 F. Supp. at 72. *See also Arcuri v. Weiss*, 198 Pa. Super. Ct. 506, 184 A. 2d 24 (1962).

Applying this reasoning to the instant case it appears that plaintiff's exhibits are insufficient to show a contract for the sale of the stock, because they merely represent tentative negotiations.

Plaintiff's exhibit No. 1, although it does contain the necessary price and quantity terms, cannot be construed as a binding final contract. This document was only a working tool used by plaintiff and defendant in their discussions of a possible agreement. The first sentence of these notes labeled them "Outline of Proposed Sale of the Interest of T. J. Morris in General Heating, Inc. with additional transactions regarding the ultimate disposition of such interest and Mr. Morris' affiliation with the Company." This document is merely evidence of plaintiff's and defendant's negotiations toward the completion of a contract in the future.

Plaintiff's deposition taken on 7 September 1979 further substantiates the conclusion that his exhibit No. 1 was only tentative. While being deposed plaintiff stated that there was nothing in writing except some notes he took when they discussed the transaction, that it was understood that Little would have a document drafted by his attorney to be submitted to him and reviewed by all of them, but that that document was never drafted. This testimony clearly shows that plaintiff and defendant had not come to a final agreement concerning the purchase of this stock. Furthermore, defendant's signature does not appear on the notes to which he referred, so standing alone they do not constitute an enforceable contract.

Plaintiff argues that if both of his exhibits are considered together they are sufficient to satisfy G.S. 25-8-319(a). Exhibit No. 2 consists of the life insurance policy on plaintiff's life which is signed by the defendant. This policy was purchased pursuant to the requirements of the transaction discussed by the plaintiff and defendant and recorded in their notes. Even if both of plaintiff's documents are read in conjunction, they constitute no more than proof of tentative negotiations in an effort to reach a contract in the future. The insurance policy simply shows that some step was taken toward agreement. It does not show that plaintiff and defendant had en-

tered into a binding contract. Protective measures such as taking out term insurance on the life of a debtor may often be taken by a noteholder prior to a final agreement on the transaction. Plaintiff admits in his brief that partial performance of an alleged contract is not sufficient to remove that contract from the statute of frauds.

These two writings, whether considered alone or together, do not evidence anything more than preliminary negotiations. They do indicate that business was being transacted between plaintiff and defendant, but the transaction of business alone is not sufficient to show that a contract was made. For these reasons we do not believe that there was a writing sufficient to satisfy the requirements of G.S. 25-8-319(a).

Plaintiff contends that even if these writings are insufficient to meet the requirements of G.S. 25-8-319(a), there are facts which bring the case within G.S. 25-8-319(d). Section (d) has the effect of making even an oral contract for the sale of investment securities enforceable if the party against whom the contract is sought to be enforced makes a judicial admission of the existence of that contract. Any admission of such a contract would necessarily have to include a statement of the price and quantity terms.

We have examined the record and found no instances where defendant admitted that he and plaintiff had entered into a contract for the sale of these securities. Defendant's references in his deposition to the alleged agreement between him and plaintiff are all in terms of a tentative or incomplete agreement. These are insufficient to constitute the judicial admission by the defendant of a contract.

For these reasons we find that there was no genuine issue of any material fact. Defendant amply demonstrated a complete defense of the statute of frauds. The trial court was correct in rendering its judgment as a matter of law.

Affirmed.

Judges HEDRICK and WHICHARD concur.

HERITAGE COMMUNITIES OF NORTH CAROLINA, INC. v. POWERS, INC. AND JON S. HARDER

No. 8015SC310

(Filed 2 December 1980)

1. **Estates § 2— deed of trust conveying dominant estate and easement — servient owner's acquisition of equitable interest in dominant estate and easement — no merger**

An outstanding deed of trust, conveying a dominant estate and that estate's appurtenant easement over the servient estate, creates such an intermediate estate as will defeat application of the doctrine of merger when the legal owner of the servient estate acquires the equitable interest in the dominant estate and its appurtenant easement.

2. **Easements § 5.3— intent of parties to recognize easement — easement by implication — jury issues — summary judgment improper**

In plaintiff's action to establish its right to a 60 foot roadway easement across defendant's adjoining tract of land, issues were raised by the evidence as to whether the true intent of the parties was to reserve the disputed easement to the original grantor at the time of conveyance of the second tract to defendants and as to whether an easement by implication was reserved to the original grantor when it conveyed the second tract to defendants, and the trial court erred in entering summary judgment for defendants where the evidence tended to show that, prior to execution of the deed from original grantor to defendants, the parties' agreement to sell and purchase certain properties included provisions that the tract would be conveyed clear of all liens and encumbrances except visible easements and that title to the property would be subject to certain matters referred to in a previously conducted title search; two of the matters in the title search referred to a 60 foot right of way for ingress and egress; plaintiff produced a number of affidavits of persons to the effect that Lake View Lane (apparently a road or street running over the disputed easement) was in use as a means of ingress and egress to apartment units located on the first tract at the time the second tract was conveyed to defendants; at the time of the conveyance of the second tract by the original owner to defendants, the disputed easement had been so long continued and so obvious and manifest as to show it was meant to be permanent; and the easement was necessary to the beneficial enjoyment of the land retained by the original owner at the time of the conveyance to defendants.

APPEAL by plaintiff from *Battle, Judge.* Judgment entered 20 November 1979 in Superior Court, ORANGE County. Heard in the Court of Appeals 6 October 1980.

Plaintiff landowner brought this action pursuant to G.S. 41-10 to establish its right to an easement across defendant's adjoining tract of land. In its complaint, plaintiff alleged that it is the owner of a 22.41 acre tract of land in Orange County (first tract) and that

defendants own an adjacent 22.61 acre tract (second tract), which is crossed by a sixty foot easement for ingress, egress, and regress to plaintiff's property. There are apartment buildings located on plaintiff's tract and the easement is necessary for some of plaintiff's tenants to have ingress and egress. Defendants have threatened to block the easement and deny its use to plaintiff and plaintiff's tenants. Without the use of the easement, plaintiff would have to remove an apartment building in order to provide ingress and egress for some of its tenants.

In their answers defendants alleged that plaintiff's tenants illegally used a sixty foot private road across defendants' tract and alleged that defendants have requested that plaintiff and its tenants cease using said private road. Defendants also denied that plaintiff had a right or entitlement to the easement and admitted that defendants had threatened to barricade the right of way.

Both parties moved for summary judgment. The affidavits, exhibits, stipulations and pleadings considered by the trial judge in ruling on the two motions show that the two adjacent tracts of land were both initially owned in 1971 by Valley Forge Corporation. On 1 December 1972, Valley Forge conveyed the first tract to Brandywine Associates together with a sixty foot easement across the adjoining second tract, for purposes of ingress, egress and regress across the second tract to State Road 1009. On 28 November 1973, Brandywine Associates reconveyed the first tract and the easement back to Valley Forge. This deed provided that the conveyance was made

> UNDER AND SUBJECT to a certain Deed of Trust by Brandywine Associates to W. P. Sandridge, Jr., Trustee, dated December 28, 1972, and filed on December 29, 1972 in the Orange County Registry . . . .

Valley Forge's second tract, the servient tract burdened by the easement described in the 1972 conveyance to Brandywine, was held by Valley Forge from 1971 until 25 August 1977 at which time Valley Forge conveyed the second tract to defendants. This deed contained no express reservation of the easement.

On 27 October 1977, Valley Forge conveyed the first tract to plaintiff. This deed expressly included in the conveyance the sixty-foot easement described in the 1972 deed to Brandywine.

In its judgment granting defendants' motion for summary judgment, the trial court held *inter alia* that plaintiff has no right, title, easement or other interest in the property of the defendants. Plaintiff appeals from entry of judgment for defendants and denial of its motion.

Graham & Cheshire, by Lucius M. Cheshire and D. Michael Parker, for plaintiff appellant.

Powe, Porter & Alphin, by N.A. Ciompi, for defendant appellees.

WELLS, Judge.

[1] The first question to be determined in this appeal is whether the easement granted by Valley Forge to Brandywine was destroyed through operation of the doctrine of merger when the dominant estate (first tract) was reconveyed to Valley Forge, as contended by the defendants.

> Merger occurs
>
> when the owner of one of the estates, dominant or servient, acquires the other, because an owner of land cannot have an easement in his own estate in fee, for the plain and obvious reason that in having . . . the full and unlimited right and power to make any and every possible use of the land . . . all subordinate and inferior derivative rights are necessarily merged and lost in the higher right.

Patrick v. Insurance Co., 176 N.C. 660, 670, 97 S.E. 657, 661 (1918); 28 C.J.S. Easements § 57(a), at 720-21 (1941). For the doctrine to operate there must be no intermediate estates of other parties in the property that would interfere with the owner's unlimited right and power to make any and every possible use of the land. *See Trust Co. v. Watkins*, 215 N.C. 292, 297, 1 S.E. 2d 853, 857 (1939); 28 C.J.S. Easements § 57(b), at 721 (1941).

The evidence shows that the re-conveyance from Brandywine to Valley Forge of the first tract and its appurtenant easement was made subject to a pre-existing deed of trust. There is no evidence in the record to show that this deed of trust was cancelled prior to the date of the conveyance of the second tract from Valley Forge to the defendants.

Plaintiff argues that: (1) the interest of the trustee under a deed of trust is sufficient to prevent the operation of the doctrine of merger, and, (2) summary judgment based on the merger doctrine is improper when the evidence shows that at the time of acquisition, the property was subject to an outstanding deed of trust.

Under North Carolina law the estate of a trustee in a deed of trust is a determinable fee. *Simms v. Hawkins*, 1 N.C. App. 168, 170, 160 S.E. 2d 514, 515 (1968); Webster, Real Estate Law in North Carolina § 229, at 272 (1971); *see also Elmore v. Austin*, 232 N.C. 13, 21, 59 S.E. 2d 205, 211 (1950); 59 C.J.S. Mortgages § 367, at 524 (1949).

We hold, therefore, that an outstanding deed of trust, conveying the dominant estate and that estate's appurtenant easement over the servient estate, creates such an intermediate estate as will defeat application of the doctrine of merger when the legal owner of the servient estate acquires the equitable interest in the dominant estate and its appurtenant easement.

The doctrine of merger will not be applied where to do so would be detrimental to the rights of the holder of an intervening estate. 31 C.J.S. Estates § 124, at 225-26 (1964).

[2] Another issue to be resolved in this case arises upon the evidence before the trial court. Although the deed conveying the second tract from Valley Forge to defendants contained no express reservation of the disputed easement, the metes and bounds description in the deed was followed by a reference to a recorded plat of the property. It is settled law that a map or plat referred to in a deed becomes a part of the deed as if it were written therein. *Kaperonis v. Highway Commission*, 260 N.C. 587, 598, 133 S.E. 2d 464, 471-72 (1963). The effect of such reference to a plat is to incorporate it into the deed as part of the description of the land conveyed. The plat referred to in the subject deed depicts the disputed easement by lines and distances, the area being labeled "Private 60' RWY". This constitutes some evidence that the grantor may have intended to reserve a private right of way of sixty feet as depicted on the plat.

It thus appears that the language in the deed leaves a question or doubt as to the intent of the parties regarding the reservation of the disputed easement. In order to ascertain that intent, it is proper

to consider the situation of the parties and the situation dealt with at the time of the conveyance. *See Reed v. Elmore*, 246 N.C. 221, 224, 98 S.E. 2d 360, 362 (1957), and cases cited therein.

Prior to the execution of the deed from Valley Forge to defendants, the parties entered into an agreement to sell and purchase certain properties, including the second tract. The agreement included the following two provisions: that the second tract would be conveyed "clear of all liens and encumbrances, except visible easements"; and that the title to the property would be subject to certain matters referred to in a previously conducted title search. Two of the matters in the title search referred to a sixty foot right of way for ingress and egress. On the point of "visible easements" on the property, plaintiff produced the affidavits of a number of persons to the effect that Lake View Lane (apparently a road or street running over the disputed easement) was in use as a means of ingress and egress to apartment units located on the first tract, at the time the second tract was conveyed to defendants. These circumstances constitute additional evidence that the parties to the conveyance to defendants may have intended that the easement be reserved to the grantor.

Plaintiff's evidence was sufficient, also, to raise an issue as to whether an easement by implication may have been reserved to Valley Forge. Plaintiff's evidence tends to show that at the time of the conveyance of the second tract by Valley Forge to defendants, the disputed easement had been so long continued and so obvious and manifest as to show it was meant to be permanent; and that the easement was necessary to the beneficial enjoyment of the land retained by Valley Forge at the time of the conveyance to defendants. *See McGee v. McGee*, 32 N.C. App. 726, 233 S.E. 2d 675 (1977). *See also Oliver v. Ernul*, 277 N.C. 591, 178 S.E. 2d 393 (1971) and Glenn, *Implied Easements in the North Carolina Courts: An Essay on the Meaning of "Necessary"*, 58 N.C.L. Rev. 223 (1980).

Summary judgment may properly be entered only when it is established that there is no genuine issue of material fact in the case and that the moving party is entitled to judgment as a matter of law. *Trust Co. v. Creasy*, 301 N.C. 44, 50, 269 S.E. 2d 117, 121 (1980); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The moving party has the burden of clearly establishing by the record properly before the court the lack of any triable issues of fact. *Trust Co. v. Creasy, supra; Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189

(1972).

The triable issues of fact in this case are as follows: whether there was outstanding such an intervening estate as to defeat the operation of the doctrine of merger of estates; whether the true intent of the parties was to reserve the disputed easement to Valley Forge at the time of conveyance of the second tract to defendants; and whether an easement by implication was reserved to Valley Forge when it conveyed the second tract to defendants. Summary judgment was therefore improvidently entered, and, accordingly, there must be a new trial.

New trial.

Chief Judge MORRIS and Judge VAUGHN concur.

LAWRENCE NORMAN AND HOWARD NORMAN, T/A NORMAN'S MARKET; AND BETTY N. WESTMORELAND v. ROYAL CROWN BOTTLING COMPANY, INC., AND WILLIE LEE FOWLER

No. 8026DC500

(Filed 2 December 1980)

Automobiles § 105.1— employee driving delivery truck — liability of employer for damage — directed verdict for employer improper

In an action to recover for damages to plaintiffs' store building and car where the evidence tended to show that defendant's employee was driving defendant's delivery truck and making deliveries to plaintiffs' store and that the truck hit one plaintiff's car and pushed it into the side of plaintiffs' store, the trial court erred in directing verdict for defendant employer, since plaintiffs conclusively showed defendant employer's ownership of the truck, and G.S. 20-71.1 essentially provides that proof of ownership of a motor vehicle by one not the driver makes out a prima facie case of agency of the driver for the owner at the time of the driver's negligent act or omission.

APPEAL by plaintiffs from *Brown, Judge.* Judgment entered 14 January 1980 in District Court, MECKLENBURG County. Heard in the Court of Appeals 13 November 1980.

Plaintiffs Lawrence and Howard Norman, trading as Norman's Market, filed a complaint seeking recovery for damage to their store building. They alleged that the defendant Fowler was an employee and agent of Defendant Royal Crown Bottling Company,

Inc. (Royal Crown). While acting within the scope of that employment and with the consent and permission of his employer, Fowler negligently drove Royal Crown's delivery truck into the side of Norman's building. Plaintiffs sought damages in the amount of $600, later amended to $1,000, plus reasonable attorney's fees pursuant to G.S. 6-21.

Defendant Royal Crown answered, admitted ownership of the truck and that on the day in question, the truck was in the process of delivering beverages to Norman's Market, but denied liability. Royal Crown cross-claimed against Fowler for indemnity. Fowler did not answer or otherwise plead. Betty Westmoreland was allowed to intervene as a party plaintiff. In her complaint, she alleged that Fowler, while driving Royal Crown's truck, negligently struck and damaged her car which was parked at Norman's Market. Westmoreland sought damages of $900, later amended to $1,000. Royal Crown answered her complaint, admitted ownership of the truck and that it was in the process of delivery of beverages to Norman's Market on the day in question, but denied liability. Fowler did not answer or otherwise plead to the complaint. Royal Crown cross-claimed against Fowler, seeking indemnity.

The action was tried before a jury. At the close of the plaintiffs' evidence, the trial court granted Royal Crown's motions for a directed verdict as to each plaintiff. The trial court granted both plaintiffs' motions for a directed verdict against Fowler and entered judgment against him for damages in the amounts of $1,000 to Lawrence and Howard Norman and $1,000 to Betty Westmoreland, and attorney's fees in the amount of $1,200. Plaintiffs have appealed from the trial court's granting of Royal Crown's motions for a directed verdict.

Myers, Ray & Myers, by R. Lee Myers, for plaintiff appellants.

Golding, Crews, Meekins, Gordon & Gray, by Robert L. Burchette, for defendant appellee.

WELLS, Judge.

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. 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. *Home Products Corp. v. Motor Freight, Inc.*, 46 N.C. App. 276, 277, 264 S.E. 2d 774, 775, *disc. rev. denied*, 300 N.C. 556, 270 S.E. 2d 105 (1980).

In the case *sub judice*, plaintiffs' evidence was substantially as follows. In its answer, Royal Crown admitted ownership of the truck and that it was in the process of making a delivery to Norman's Market. In plaintiffs' request for admissions, Royal Crown admitted that defendant Fowler was its employee on the day in question and that it was the registered owner of the truck. Lawrence Norman testified that on the day in question, Mr. West and Mr. Fowler delivered RC cola drinks to Norman's Market. Both men went to the truck to get the order up and both men came back with hand trucks. West started putting the drinks in the racks. Fowler went ouside to get more drinks. Someone came in the store and told Norman to come outside. When he went outside, he observed that his sister's (plaintiff Westmoreland) car had been rammed in the back and pushed into the side of his building. The truck was pulled away from the car. The rear end of it was torn up and the car was sitting almost in the building. He saw Fowler standing in the area. He asked Fowler what he had done to the car and the building. Fowler responded that he did not think he had done any damage to the place, that his bumper got hung up, but he did not think he had damaged the car. Norman testified as to damage to the wall of the building and to a cooler inside the building. Plaintiff Westmoreland testified that on the day in question she was working at the market when West and Fowler made the delivery. As a result of someone's statement to her, she went outside and saw her car crushed into the building. She saw Fowler. Fowler later came by the check-out counter and said to her "I'm sorry I hit your car." She testified as to damage to her car.

This evidence, viewed in the light most favorable to plaintiffs, tends to negate any inferences of vehicular failure. The truck was in use for deliveries and was driven to Norman's Market. Fowler was engaged in normal physical activity before and after the event, hence, any inference of seizure or fainting on his part is negated. Fowler admitted striking Westmoreland's car. It was a clear day and the collision occurred in a parking lot. Such evidence of a driver of a motor vehicle striking stationary objects with the vehicle under

such circumstances establishes the more reasonable probability that the collision was caused by the negligence of the driver. *See Greene v. Nichols*, 274 N.C. 18, 161 S.E. 2d 521 (1968).

We hold that plaintiffs' evidence established *prima facie* the negligence of Fowler, proximately causing plaintiffs' damage. It is evidence upon which the jury could, but need not, infer that Fowler negligently operated the truck and that such negligence was the proximate cause of plaintiffs' injury and damage.

On the issue of agency, plaintiffs conclusively showed Royal Crown's ownership of the truck. As was explained by this court in *Scallon v. Hooper*, 49 N.C. App. 113, 270 S.E. 2d 496 (1980), G.S. 20-71.1[1] essentially provides that proof of ownership of a motor vehicle by one not the driver makes out a *prima facie* case of agency of the driver for the owner at the time of the driver's negligent act or omission. Plaintiffs' evidence in the case *sub judice* was clearly sufficient to take the case to the jury on agency.

Plaintiffs are entitled to a new trial. We note, however, that the judgments entered against Fowler are *res judicata* to the extent that those judgments establish the maximum amounts which plaintiffs may recover against Royal Crown on re-trial. *Pinnix v. Griffin*, 221 N.C. 348, 350-51, 20 S.E. 2d 366 (1942).

New trial.

Judges VAUGHN and MARTIN (Robert) concur.

[1] §20-71.1 Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation. — (a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be prima facie evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose.

(b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be prima facie evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment.

STATE OF NORTH CAROLINA v. FRANK M. BOLTINHOUSE

No. 8012SC523

(Filed 2 December 1980)

1. **Criminal Law § 91— Speedy Trial Act — no probable cause — new charge — time of commencement of limitation period**

Where there was a finding of no probable cause on a charge of feloniously receiving stolen property, the period of time within which trial on a new charge of felonious possession of the same stolen property must commence under G.S. 15A-701(a1)(3) began to run from the date of defendant's indictment on the new charge rather than from the date of his arrest on the original charge.

2. **Receiving Stolen Goods § 5.1— felonious possession of stolen goods — purpose of resale — sufficient evidence**

The State's evidence in a prosecution for felonious possession of stolen property was sufficient for the jury to find that defendant possessed the stolen items "for a dishonest purpose of resale" where it tended to show that the stolen property was located by its rightful owners at a pawn shop operated by defendant; defendant was extensively involved with a theft ring and often directed the actual perpetrators of the thefts as to which houses they should break and enter; the perpetrators then brought the stolen goods to defendant's home where defendant purchased them for resale; and defendant, rather than the corporation which employed him at the pawn shop, possessed the stolen items.

3. **Receiving Stolen Goods § 7— possession of stolen goods — theft by breaking and entering — felony without regard to value**

Defendant's possession of stolen goods knowing them to have been stolen by a breaking and entering constituted a felony without regard to the value of the stolen property. G.S. 14-72(c).

4. **Criminal Law § 102.6— jury argument — importance and implications of case**

Defendant was not prejudiced by the prosecutor's argument "that the case was important and had wide-ranging implications" since the comment was not abusive or inflammatory and did not suggest impermissible conclusions to the jury, and the court on its own motion sustained its objection to the comment and instructed the jury to disregard it.

5. **Criminal Law § 102.6— jury argument — jury's use of "sixth sense"**

Defendant was not prejudiced by the prosecutor's jury argument that the jury should "use their sixth sense" to find the facts where the trial court instructed the jury to follow the court's instructions and not be guided by what the attorneys argued to them.

APPEAL by defendant from *Martin, Judge.* Judgment entered 9 January 1980 in Superior Court, CUMBERLAND County. Heard in

the Court of Appeals 14 October 1980.

Defendant was arrested pursuant to a warrant issued 24 May 1979 charging that he "did unlawfully, willfully, and feloniously receive and have . . . the personal property of Elizabeth Jones, having a value of about $11,105.18, knowing and having reasonable grounds to believe the property to have been feloniously stolen, taken and carried away . . . ." On 5 September 1979 a finding of no probable cause was entered on the charge. On 24 September 1979 defendant was indicted for the felonious possession, in violation of G.S. 14-71.1, of the same stolen property which was the subject of the 24 May 1979 warrant. Defendant's trial on the charge contained in the 24 September 1979 indictment commenced 7 January 1980. The jury found defendant guilty of felonious possession of stolen property.

From a judgment of imprisonment, defendant appeals.

Other facts necessary to consideration of the errors assigned will be set forth in the opinion.

Attorney General Edmisten, by Special Deputy Attorney General Ann Reed, for the State.

Downing, David, Vallery, Maxwell and Hudson, by Edward J. David, for defendant-appellant.

WHICHARD, Judge.

[1] By his first assignment of error defendant contends the trial court erred in denying his motion to dismiss the indictment for the State's failure to afford him a speedy trial in accordance with G.S. 15A-701.

G.S. 15A-701(a1)(3) provides:

> When a charge is dismissed, other than under G.S. 15A-703, or a finding of no probable cause pursuant to G.S. 15A-612, and the defendant is afterward charged with the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, [his trial shall commence within 120 days from the date that the defendant was arrested, served with criminal process, waived an

> indictment, or was indicted, whichever occurs last, for the original charge.[1]

Defendant contends that the 24 May 1979 warrant charged him with receiving and having the same stolen goods which were the subject of his 24 September 1979 indictment for felonious possession; that he was therefore "afterward charged [in the 24 September 1979 indictment] with . . . an offense based on the same act or transaction or on the same series of acts or transactions" (as were involved in the 24 May 1979 arrest warrant) within the meaning of that phrase as used in G.S. 15A-701(al)(3); that he was indicted 122 days after the "original charge" within the meaning of that phrase as used in G.S. 15A-701(al)(3); and that therefore his motion to dismiss for non-compliance with the statute, by failure to bring him to trial within 120 days of the "original charge," should have been granted.

The phrase "or a finding of no probable cause pursuant to G.S. 15A-612" was inserted in G.S. 15A-701(al)(3) by amendment of the 1979 General Assembly. The placement of the amendment within the statute, and the language used, render the statute ambiguous; and it is admittedly subject to the interpretation for which defendant contends. It is equally subject, however, to an interpretation that when a finding of no probable cause is entered pursuant to G.S. 15A-612, the computation of time for the purpose of applying the Speedy Trial Act commences with the last of the listed items ("arrested, served with criminal process, waived an indictment, or was indicted") relating to the new charge rather than the original charge.

G.S. 15A-612(b) clearly provides that a finding of no probable cause at a probable-cause hearing does not preclude the State from instituting a subsequent prosecution for the same offense. It is well established that

> [s]tatutes dealing with the same subject matter must be construed in pari materia, and harmonized, if possible, to give effect to each. Any irreconcilable ambiguity should be resolved so as to effectuate the true

[1]This provision applied, at the time of defendant's indictment, to a defendant "who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1980." Defendant here was indicted 24 September 1979.

legislative intent.

12 Strong's North Carolina Index 3d, Statutes § 5.4, pp. 69-70, and cases cited. Construing the ambiguity in G.S. 15A-701(a1)(3) in light of the clearly expressed policy in G.S. 15A-612(b) of permitting subsequent prosecution for the same offense when a finding of no probable cause has been entered, we find the construction of G.S. 15A-701(a1)(3) for which defendant contends untenable. We do not believe the General Assembly intended by the 1979 amendment to G.S. 15A-701(a1)(3) to carve out an exception to the clear intent of G.S. 15A-612(b) to permit subsequent prosecution for the same offense where a finding of no probable cause has been entered; and, as here, that would often be the result if we construed the intent of the phrase "or a finding of no probable cause pursuant to G.S. 15A-612" in G.S. 15A-701(a1)(3) as defendant contends we should. On the contrary, we believe the General Assembly must have intended, in amending the statute to include this phrase, to preserve the policy set forth in G.S. 15A-612(b) of permitting prosecution for the same offense after a finding of no probable cause has been entered.

Construing the ambiguous language of G.S. 15A-701(a1)(3) in light of the clear intent of G.S. 15A-612(b), we find that the period for computation of the time within which trial must be commenced under G.S. 15A-701(a1)(3) began to run from the date of defendant's indictment on the new charge rather than from the date of his arrest on the "original charge," as he contends. The 24 September 1979 indictment of defendant thus constituted the last in the relevant sequence of events, and 24 September 1979 rather than 24 May 1979 (the date of the original arrest warrant) was the date on which the 120 day period prescribed by G.S. 15A-701(a1)(3) for commencement of trial began to run. Defendant's trial commenced 7 January 1980, 105 days later. The state, therefore, complied with the 120 day requirement imposed by the Speedy Trial Act as we interpret it. *See State v. Brady*, 299 N.C. 547, 264 S.E. 2d 66 (1980); *State v. Rice*, 46 N.C. App. 118, 264 S.E. 2d 140 (1980). This assignment of error is overruled.

[2] Defendant asserts in his second assignment of error that his motion for dismissal should have been granted because the State failed to prove that he possessed the stolen items of property "for a dishonest purpose of resale." The stolen property for the possession of which defendant was indicted was located by its rightful owners

subsequent to its disappearance at a pawn shop which was operated by the defendant. The basis of defendant's argument is that he was merely an employee of the pawn shop and had no ownership interest. The record contains ample evidence, however, that defendant, rather than the corporation which employed him, possessed the stolen items and that he possessed them for the purpose of resale. Evidence for the State tended to establish defendant's extensive involvement with a theft ring, in which he often directed the actual perpetrators of the thefts as to which houses they should break and enter. The perpetrators then brought the goods stolen from those houses to defendant's home, where defendant purchased them for the purpose of resale. This assignment of error is without merit and is overruled.

Defendant's third assignment of error is that the trial court erred in not adequately and fairly instructing the jury on "non-felonious possession of stolen property." While under the evidence in this case the trial court may not have been required to charge the jury on non-felonious possession, it did so; and we find the instructions entirely adequate. *See* N.C.P.I.-Criminal 216.46. This assignment of error is overruled.

[3] By his fourth assignment of error defendant contends that the trial court erred in sentencing him as a felon, in that the evidence did not establish a value of the stolen goods in excess of $400. The record contains plenary evidence from which the jury could have found that defendant possessed the stolen goods knowing them to have been stolen by a breaking and entering in violation of G.S. 14-54. Such possession is a felony "without regard to the value of the property in question." G.S. 14-72(c). This assignment of error is overruled.

Defendant by his fifth assignment of error contends that he was prejudiced by the District Attorney's comments to the jury "that the case was important, and had wide-ranging implications" and that the jury should "use their sixth sense" to find the facts. Our Supreme Court has consistently held that counsel must be allowed wide latitude in argument. "Whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury." *State v. Covington*, 290 N.C. 313, 328, 226 S.E. 2d 629, 640 (1976).

[4] The comments of the District Attorney here regarding the importance of the case were not abusive or inflammatory. They did not suggest conclusions to the jury which were impermissible under the evidence. Further, the trial court found as a fact that on its own motion it had sustained its objection to that argument and instructed the jury to disregard it.

[5] As to the comment that the jury should "use their sixth sense" to find the facts, the trial court instructed the members of the jury that it was their duty to follow the court's instructions and not to be guided by what the attorneys argued to them. We find no abuse of discretion in the trial court's having dealt with the comment in this manner.

Finally, in view of the extensive evidence against the defendant, we do not believe he could have been prejudiced by either of the District Attorney's comments to which error is assigned. This assignment of error is overruled.

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

No error.

Judges CLARK and WEBB concur.

EDWARD RAMSEY v. FRANK RUDD AND CONE MILLS CORPORATION

No. 8018SC384

(Filed 2 December 1980)

Contracts § 34— malicious interference with employment contract — no forecast of legal malice — summary judgment proper

In an action against the individual defendant for malicious interference with plaintiff's contract with his employer, summary judgment was properly entered for defendant where the evidence at the hearing on the motion tended to show that plaintiff wrote a letter to his employer stating that some unnamed person in the Greensboro facility was committing flagrant violations of company policy; as a result of plaintiff's letter, the employer investigated activities of defendant, who was plaintiff's supervisor; most of the allegations were unsubstantiated and defendant was retained by the company; defendant was directed to stop letting plaintiff and other truck drivers leave early on their trips; defendant reported to his supervisors when plaintiff left early on a trip; plaintiff was discharged from his employment when he returned from the trip; the decision to

discharge was made jointly by several of defendant's superiors; and plaintiff did not forecast evidence of legal malice which would rebut defendant's forecast of justification.

APPEAL by plaintiff from *Albright, Judge.* Judgments entered 11 September 1979, as to defendant Cone Mills, and 2 October 1979 as to defendant Frank Rudd. Heard in the Court of Appeals 14 October 1980.

Plaintiff, Edward Ramsey, worked for defendant Cone Mills for approximately 29 years, during the last 16 of which he was a long-haul truck driver.

In April 1977, he sent a letter to the president of Cone Mills alleging that some unnamed person in the Greensboro facility was committing flagrant violations of company policy. As a result of plaintiff's letter, Cone Mills investigated certain activities of defendant Frank Rudd, an employee of the defendant corporation and Ramsey's supervisor. The investigation revealed that most of the allegations were unsubstantiated, and Rudd was retained by the defendant corporation and allowed to remain in his supervisory position. Sometime thereafter Rudd was directed to stop letting plaintiff and other drivers leave early on their trips.

On 21 November 1977, plaintiff Ramsey was scheduled to drive to Athens, Georgia. He left Greensboro eight hours earlier than necessary to make his delivery to Athens. Upon returning to Greensboro his employment was terminated for violation of a company policy prohibiting truck drivers from leaving early on long hauls.

Plaintiff instituted suit against Cone Mills for breach of his contract of employment and against Frank Rudd for malicious interference with that contract. Both defendants moved for summary judgments.

Plaintiff's depositions and affidavits tend to show that there was no such policy prohibiting drivers from leaving early and that, in fact, the drivers could leave at any time after their trucks were loaded; that Frank Rudd reported plaintiff's early departure on 21 November 1977 solely in retaliation for plaintiff's letter and accusations in April 1977 which had led to the investigation of Rudd for violations of company policy; that plaintiff had been given permission to leave early on 21 November 1977; and that Rudd had been

looking for an excuse to fire plaintiff ever since he turned Rudd in for alleged misconduct.

Defendant Cone's depositions and affidavits, along with those of defendant Rudd, tend to show that defendant Rudd had been ordered by his supervisor to enforce the policy against letting drivers leave early; that Rudd had specifically been told to cease letting Ramsey leave early on his trips; that Rudd had reported plaintiff's early departure on 21 November 1977 to his immediate supervisor; and that the decision to discharge plaintiff was made by several of defendant Rudd's supervisors and not by Rudd himself.

Plaintiff appeals the trial court's entry of summary judgment in favor of both defendants.

Pfefferkorn & Cooley by J. Wilson Parker for plaintiff appellant.

Cooke & Cooke by William Owen Cooke for defendant appellee, Frank Rudd.

Smith, Moore, Smith, Schell & Hunter by Stephen P. Millikin for defendant appellee, Cone Mills Corporation.

CLARK, Judge.

The record indicates that the motion of Cone Mills for summary judgment was granted in a judgment entered 11 September 1979. On 27 September 1979, at the conclusion of the hearing on the motion of defendant Frank Rudd for summary judgment, the plaintiff first gave oral notice of appeal from the 11 September judgment. We, therefore, dismiss plaintiff's appeal of the 11 September judgment for failure to comply with Rule 3(c), N.C. Rules App. P. and G.S. 1-279, both of which require that an appeal be taken within 10 days after entry of the judgment. *Brooks v. Matthews*, 29 N.C. App. 614, 225 S.E. 2d 159 (1976).

Defendant Rudd was entitled to summary judgment if there was no genuine issue of material fact concerning an esential element of the plaintiff's claim. *Best v. Perry*, 41 N.C. App. 107, 254 S.E. 2d 281 (1979). One essential element of the tort of malicious interference with contract rights is that defendant must have acted without justification. *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176 (1954).

The defendant's forecast of evidence available to him at trial indicated that he reported plaintiff's early departure after being ordered by his superior to cease letting Ramsey leave early. It was his duty to tell his supervisors when Ramsey later did that very thing. We believe no reasonable juror could find defendant unjustified in making to his superior the factually true report that Ramsey left early.

The defendant's forecast of evidence tended to show that the decision to discharge plaintiff from employment was jointly made by several of defendant Rudd's superiors on the sole basis of plaintiff's early departure on 21 November 1977. Whether or not this decision was fair, it is clear that, even taking the evidence in the light most favorable to plaintiff, the defendant Rudd had no greater hand in the decision than merely to pass along the information that was considered.

> "[O]nce the defending party forecasts evidence which . . . tends to establish his right to judgment as a matter of law, the claimant must present a forecast of the evidence . . . to support his claim for relief."

Best v. Perry, 41 N.C. App. at 110, 254 S.E. 2d at 284.

Plaintiff, in his deposition, first stated that there was no malice on the part of anyone, but later changed his answer to state that Rudd had actual malice and ill will toward him. While it is true that a forecast of *legal malice* would rebut defendant's forecast of justification sufficiently to take the issue to trial, *Childress v. Abeles*, 240 N.C. at 674-75, 84 S.E. 2d at 182, plaintiff forecasts no evidence of such legal malice, apparently believing that this Court should be as persuaded by one kind of malice as another. Such is not the case. We believe the actual malice of defendant is irrelevant in light of the fact that he did no more than he was required to do by his employer. "An act which is lawful in itself and which violates no right cannot be made actionable because of the motive which induced it." *Elvington v. Waccamaw Shingle Co.*, 191 N.C. 515, 517, 132 S.E. 274, 275 (1926).

Summary judgment is proper when there is no genuine issue of material fact. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Here there is evidence that defendant Rudd was justified in his actions because there was sufficient lawful

reason for his conduct, *i.e.*, he was merely doing what he had been ordered by his employer to do. No evidence has been forecast to show the defendant Rudd's lack of justification. A jury which found for plaintiff on all other elements of malicious interference with plaintiff's contract, would still not be justified in returning a verdict for plaintiff unless they also found that defendant acted without justification when he reported plaintiff's early departure. We hold that if all the evidence forecast in the affidavits and depositions of both parties were presented at trial, reasonable jurors could not differ on the issue of justification. Summary judgment for defendant was therefore proper.

The plaintiff's appeal is dismissed as to defendant Cone Mills, and summary judgment against plaintiff in favor of defendant Rudd is affirmed.

Dismissed in part; affirmed in part.

Judges WEBB and WHICHARD concur.

NELSON P. CHEARS (SAME AS NELSON P. CHEARS, S.R.) PLAINTIFF v. ROBERT A. YOUNG & ASSOCIATES, INC., AND ROBERT A. YOUNG, SR., ORIGINAL DEFENDANTS, v. THOMAS CHEARS, JR., ADDITIONAL DEFENDANT

No. 801SC308

(Filed 2 December 1980)

Brokers and Factors § 6.7— agreement to split real estate commissions — default by buyer — no further commission payments by seller — action by one broker against other broker

Summary judgment was properly entered for original defendant real estate firm in an action by additional defendant to recover real estate commissions where the pleadings and evidence before the court showed that the seller of a tract of realty agreed to pay original defendant a commission of $55,000 for negotiating a sale of the tract; the commission was to be paid $15,900 at closing and the balance in two annual installments; original and additional defendants made an oral agreement that original defendant would pay additional defendant one-half of any commissions it received from the seller; the initial $15,900 commission and other sporadic commission payments made by the seller were split between original defendant and additional defendant; and the buyer defaulted on its obligation to the seller, and no additional commission payments have been or will be made by the seller, since the right to share in commissions under an agreement between brokers does not arise until the commissions have been actually received by the broker charged with liability.

APPEAL by additional defendant, V. Thomas Chears, Jr., from *Barefoot, Judge.* Order entered 22 October 1979 in Superior Court, CHOWAN County. Heard in the Court of Appeals 6 October 1980.

Plaintiff, Nelson P. Chears, instituted this action against the original defendant, Robert A. Young and Associates, Inc., (hereinafter Associates), and Robert A. Young, Sr., to recover the balance of real estate commissions allegedly due her former husband, V. Thomas Chears, Jr. Mr. Chears had by written assignment assigned all of his rights in this particular contract to plaintiff as part of a prior divorce settlement. On motion of the original defendants, Mr. Chears was made an additional defendant by order of the court dated 5 September 1978.

The pleadings, depositions and answers to interrogatories before the court show: the additional defendant (hereinafter Chears) was an attorney and was employed by Carolina Shores Development Corporation (hereinafter Carolina Shores) in 1972 and 1973 to sell a tract of land owned by Carolina Shores. This tract of land was known as the Reynolds Tract and was located in Kill Devil Hills. Chears, in conjunction with Associates, a real estate firm doing business in Kill Devil Hills, initiated and formed a group of investors to purchase the Reynolds Tract. The land was eventually conveyed to this group, Village Development Corporation (hereinafter Village Development).

In the contract of purchase and sale of the Reynolds Tract between Carolina Shores, seller, and Village Development, buyer, it was agreed that Carolina Shores would pay Associates a commission of $55,000 in return for its services in negotiating the contract. The commission was to be paid $15,900 at closing with the balance to be paid in two annual installments of $19,550.

Subsequent to the contract of sale Associates and Chears made an oral agreement to the effect that Associates would pay to Chears one-half of any commissions it received from Carolina Shores. Carolina Shores paid the initial $15,900, which Associates split with Chears. Thereafter, sporadic payments on the commissions were made directly to Chears by Carolina Shores or they were made to Associates who in turn split them with Chears. On 16 November 1974, Chears made the first of two assignments of further commission payments to the plaintiff.

Village Development defaulted on the payment of its obliga-

tion to Carolina Shores. The contract between Village Development and Carolina Shores was cancelled and the property was reconveyed to Carolina Shores.

As a result of the cancellation of this primary obligation between Carolina Shores and Village Development, Carolina Shores made no further commission payments to Associates. Consequently, Associates did not pay Chears any further commissions.

Chears filed a cross claim against Associates claiming that Associates was in breach of the oral agreement and was indebted to him for the remainder of its share of the $55,000 commission.

Upon hearing of the motion of Associates, the court ordered summary judgment in its favor on 22 October 1979. Plaintiff and Chears gave due notice of appeal from this order to the Court of Appeals. Only Chears perfected his appeal.

Broughton, Wilkins and Crampton, by J. Melville Broughton, Jr., for additional defendant appellant.

Leroy, Wells, Shaw, Hornthal, Riley and Shearin, by Norman W. Shearin, Jr., and Roy A. Archbell, Jr., for original defendant appellees.

MORRIS, Chief Judge.

Assuming arguendo that Chears is the real party in interest, and that the three-year statute of limitations, G.S. 1-52, does not bar the action to recover the commissions in question, we still affirm the trial court's order of summary judgment in favor of the original defendants.

G.S. 1A-1, Rule 56, requires that a motion for summary judgment be rendered when the pleadings, affidavits, depositions, interrogatories and admissions show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. The party moving for summary judgment, here Associates, has the burden of proving that there is no triable issue of fact. *Railway Co. v. Werner Industries*, 286 N.C. 89, 209 S.E. 2d 734 (1974). *See: Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E. 2d 667 (1977), and cases cited therein. Once the movant satisfies this burden the adverse party, here Chears, must show that there is some genuine issue of fact for trial. G.S. 1A-1, Rule 56(e); *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976).

Application of the foregoing rules to the evidentiary materials at hand demonstrates that this is an appropriate case for summary judgment.

Chears submitted no evidentiary materials in opposition to the original defendant's motion for summary judgment. He relies on the materials submitted by Associates and on his own pleadings.

The pleadings and evidence before the court show only that Associates and Chears had an oral agreement to split the commissions received from the sale of the Reynolds Tract to Village Development. There is no evidence of any agreement between the parties that Associates be obligated to pay Chears one-half of the anticipated full commission of $55,000 even in the event that only a portion of the full commission was received.

There are no North Carolina cases on point, but many cases from other jurisdictions support the proposition that the right to share in commissions under an agreement between brokers to divide commissions does not arise until the commissions have actually been received by the broker charged with liability. *See:* 71 A.L.R. 3d 586 (1976); 12 C.J.S. *Brokers* § 81. This appears to us to be sound reasoning which brings about a practical result. We adopt this majority view.

The evidence in the case *sub judice* is uncontradicted that Associates did pay to Chears his fair share of the commissions actually received. It also shows that the buyer of the subject property defaulted on its obligation to the seller which resulted in the reconveyance of the property to the seller. No additional commission payments would be forthcoming from the principal.

Chears has failed to raise any issue of fact as to the nature of the agreement in question, nor has he raised any issue of fact as to Associates' full compliance with that agreement. Therefore, the order granting the motion for summary judgment is

Affirmed.

Judges VAUGHN and WELLS concur.

STATE OF NORTH CAROLINA v. VERNON WALL

No. 8020SC261

(Filed 2 December 1980)

1. **Constitutional Law § 49— waiver of counsel — no prejudice shown**

Defendant did not show prejudicial error where the record showed he voluntarily waived his right to counsel without being advised of his right to counsel if he was indigent and without any showing that he was in fact indigent.

2. **Contempt of Court § 6.3— contacting witness in civil case — sufficiency of evidence of contempt**

Evidence that defendant had contacted a witness in a civil case and had encouraged her to disobey a subpoena and not to testify was sufficient to support the trial court's findings of fact, and the findings supported the court's conclusion that defendant was in contempt of court. G.S. 5A-11(a)(3).

APPEAL by defendant from *Burroughs, Judge.* Judgment entered 10 October 1979 in Superior Court, UNION County. Heard in the Court of Appeals 16 September 1980.

Defendant was cited to appear before Judge Robert Burroughs and show cause why he should not be held in contempt. At the outset of the hearing, the following colloquy occurred between Judge Burroughs and the defendant:

> "COURT: . . . Mr. Wall do you have an attorney?
>
> VERNON WALL: I am here by myself. I don't want one.
>
> COURT: You want an attorney?
>
> VERNON WALL: No, sir, I don't want an attorney.
>
> COURT: Mr. Wall advised in open court he did not have an attorney and did not want an attorney."

Mr. Wall subsequently represented himself at the hearing.

Linda Taylor testified that she received a telephone call from the defendant several days before a civil action was to be tried in which the defendant was a party. Mrs. Taylor further testified that the defendant told her she "was to be served a subpoena and for me to leave town." She also testified that she "was scared to come to Court as a result of [that] conversation." She nevertheless responded to the subpoena and appeared in court.

Defendant testified in his own behalf. He admitted that he had called Mrs. Taylor but denied he asked her to leave town.

At the conclusion of the hearing, the court entered an order in which it found as facts that the defendant had contacted a witness in a civil case and encouraged the witness not to testify which was a "wilful direct contempt of Superior Court of Union County, North Carolina" and committed him to the common jail of Union County for not less nor more than 30 days.

Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

James E. Griffin for defendant appellant.

WEBB, Judge.

[1] The defendant's first assignment of error is to the court's advice to the defendant in regard to his right to counsel. Defendant contends no inquiry was made as to his indigency, and he was not properly advised of his right to counsel if he was indigent. The defendant was entitled to be represented by counsel. Since he faced a possible prison sentence, he was entitled to have the State provide him with an attorney if he could not afford one. G.S. 7A-451(a)(1). In this case, the defendant informed the court he did not want an attorney. The court did not advise the defendant he was entitled to have the State provide him with an attorney if he could not afford one. There is nothing in the record to show the defendant was indigent. The question posed by this assignment of error is whether the defendant has shown prejudicial error when the record shows he voluntarily waived his right to counsel without being advised of his right to counsel if he was indigent and without any showing that he was in fact indigent. We hold the defendant has not shown prejudicial error.

[2] The defendant next assigns error to the findings of fact and conclusions of law. The defendant was charged with criminal contempt. G.S. 5A-11 provides:

> (a) Except as provided in subsection (b), each of the following is criminal contempt:
>
> * * *

(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

There was evidence that the defendant called Mrs. Taylor and tried to get her not to obey a subpoena to be issued by the court. Mrs. Taylor was frightened by the call, but she obeyed the subpoena and appeared in court. The court found facts in accordance with this evidence and concluded that the defendant was in violation of G.S. 5A-11(a)(3). We hold the evidence supports the findings of fact and the findings support the conclusion of law.

We note that in its order the court stated the defendant was in direct contempt of court. Since the call to Mrs. Taylor was not within the sight or hearing of a presiding judicial official or in immediate proximity of the courtroom, it should have been denominated indirect contempt. *See* G.S. 5A-13. This makes no difference as to the disposition of the case.

Affirmed.

Judges VAUGHN and MARTIN (Robert M.) concur.

IN THE MATTER OF STEVEN EDWARD FORD, A JUVENILE

No. 808DC641

(Filed 2 December 1980)

1. Infants § 11— juvenile — murder and breaking and entering charges — transfer to superior court

It was manifestly not an abuse of discretion for the juvenile court to transfer a breaking and entering charge against a 15 year old juvenile to superior court for trial together with the manditorily transferred charge of the capital offense of first degree murder when the two offenses arose out of the same series of events and their trial would involve production of the same evidence. G.S. 7A-666.

2. Infants § 21— juvenile proceeding — finding of probable cause not final order — evidentiary rulings not appealable

A finding of probable cause in a juvenile proceeding was not an appealable "final order" under G.S. 7A-666, and evidentiary rulings of the trial court in conducting the probable cause hearing were not properly before the Court of Appeals for review.

In re Ford

APPEAL by juvenile from *Ellis (Kenneth R.), Judge.* Order entered 27 March 1980 in District Juvenile Court, LENOIR County. Heard in the Court of Appeals 11 November 1980.

Juvenile petitions were filed in Lenoir County District Court alleging that Steven Edward Ford, age 15, on or about 23 January 1980 did:

> (1) "unlawfully, willfully, feloniously and of malice aforethought kill and murder Lillian Lee";
>
> (2) "unlawfully, wilfully and feloniously ravish, abuse and carnally know Lillian Lee by force and against her will";
>
> (3) "unlawfully, wilfully and feloniously Break and Enter the dwelling house of Lillian Lee . . . with the unlawful, wilful and felonious intent to commit a felony therein to wit: Murder, Rape and Armed Robbery"; and
>
> (4) "did unlawfully, wilfully and feloniously with the use and threatened use of certain deadly weapons . . . whereby the life of Lillian Lee was threatened and endangered . . . take, steal and carry away $30.00 in . . . money from the person and presence of Lillian Lee . . . , the personal property of Lillian Lee."

From an order finding probable cause as to the offenses of murder and breaking and entering, and transferring the offenses to the Superior Court of Lenoir County for trial as in the case of adults, the juvenile appeals.

Attorney General Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

T. Dewey Mooring, Jr., for the juvenile appellant.

WHICHARD, Judge.

We note at the outset that the record does not contain "a copy of the notice of appeal, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal" in violation of Rule 9(b)(3)(viii), North Carolina Rules of Appellate Procedure. We nevertheless consider the matter in our discretion.

Former G.S. 7A-280 (now repealed) gave the juvenile court (the District Court division) discretion, in cases where the juvenile had attained the age of 14 years, to "proceed to hear the case" or, if it found that the needs of the child or the best interest of the State would be served thereby, to "transfer the case to the Superior Court division for trial as in the case of adults." In several cases this Court has found reviewable, for abuse of discretion or as to compliance with statutory requirements, discretionary transfer orders of juvenile courts entered pursuant to that statute. *See State v. Connard,* 40 N.C. App. 765, 253 S.E. 2d 651 (1979); *In re Bunn,* 34 N.C. App. 614, 239 S.E. 2d 483 (1977); *In re Smith,* 24 N.C. App. 321, 210 S.E.2d 453 (1974); *In re Bullard,* 22 N.C. App. 245, 206 S.E.2d 305 (1974).

[1] Former G.S. 7A-280 has been replaced in the revised North Carolina Juvenile Code, which became effective 1 January 1980, by G.S. 7A-608, which provides as follows:

> *Transfer of jurisdiction of juvenile to superior court.* — The court after notice, hearing and a finding of probable cause may transfer jurisdiction over a juvenile 14 years of age or older to superior court if the juvenile was 14 years of age or older at the time he allegedly committed an offense which would be a felony if committed by an adult. *If the alleged felony constitutes a capital offense and the judge finds probable cause, the judge shall transfer the case to the superior court for trial as in the case of adults.*

G.S. 7A-608 (emphasis supplied). One of the alleged felonies as to which the juvenile court here found probable cause was the capital offense of murder. G.S. 14-17. G.S. 7A-608 *mandated* the transfer of that offense to Superior Court for trial as in the case of adults. There was thus no discretion as to that transfer for the juvenile court to exercise and for this Court to review. As to the offense of felonious breaking and entering, assuming without deciding that review by this Court of the *discretionary* transfer to Superior Court is not precluded by G.S. 7A-666, it was manifestly not an abuse of discretion to transfer this offense to Superior Court for trial together with the manditorily transferred offense of murder when the two offenses arose out of the same series of events and their trial would involve production of the same evidence.

[2] The juvenile-appellant brings forward five assignments of error, all relating to evidentiary rulings of the trial court in con-

ducting the probable cause hearing. In our opinion these rulings are not properly before this Court for review at this time. The revised North Carolina Juvenile Code, in section 7A-666, provides as follows:

> *Right to appeal.* —Upon motion of a proper party as defined in G.S. 7A-667, review of any *final order* of the court in a juvenile matter under this Article shall be before the Court of Appeals . . . A *final order* shall include:
>
> (1) Any order finding absence of jurisdiction;
>
> (2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken;
>
> (3) Any order of disposition after an adjudication that a juvenile is delinquent, undisciplined, abused, neglected, or dependent; or
>
> (4) Any order modifying custodial rights.

G.S. 7A-666 (emphasis suplied). A finding of probable cause clearly does not fall within the ambit of the four categories of final orders specified in the statute. Nor do we believe it to be within the purview of the legislative intent to permit judicial augmentation of the list which may be inferred from the use of the word "include" preceding the specified categories. A finding of *no* probable cause clearly is not a "final order," because it does not preclude the State from instituting a subsequent prosecution for the same offense. G.S. 15A-612(b). Neither should a finding of probable cause be regarded as a "final order" within the intent of G.S. 7A-666, because it merely binds the juvenile over for trial and makes no ultimate disposition of the charges against him.

The evidentiary questions presented by the juvenile-appellant's assignments of error may well merit our attention upon his appeal from a trial resulting in a disposition unfavorable to him. They are not properly before us, however, in relation to a finding of probable cause, which is not a "final order" making some ultimate disposition of the charges against the juvenile within the intent of G.S. 7A-666.

The order of the trial court transferring the offenses to the Superior Court of Lenoir County for trial as in the case of adults is affirmed. The assignments of error to the trial court's evidentiary

rulings in the probable cause hearing are not before us at this time.

Affirmed.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. BOBBY NEVILLE

No. 8015SC624

(Filed 2 December 1980)

Criminal Law § 7— entrapment — defense not raised by evidence

In a prosecution of defendant for possession with intent to sell and sale and delivery of LSD, the question of entrapment did not arise from defendant's evidence, since defendant denied committing the offenses, nor was the question of entrapment raised by the State's evidence.

Judge WELLS dissenting.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 1 February 1980 in Superior Court, ORANGE County. Heard in the Court of Appeals 6 November 1980.

Defendant was charged with possession with intent to sell and with sale and delivery of lysergic acid diethylamide (hereinafter "LSD"). He pled not guilty.

At trial, the State's evidence tended to show that James Boone, an undercover narcotics agent for the State Bureau of Investigation, and Donnie McAdoo, an informant working with Agent Boone, attempted to purchase drugs from the owner of the Disco Lounge in Chapel Hill, North Carolina, on 22 August 1979. Defendant interrupted them, stating that the lounge's owner could not provide them with drugs, but that he could. Defendant offered to take Agent Boone and McAdoo to get some LSD and cocaine. McAdoo, Boone and defendant then drove to an apartment in Chapel Hill in Boone's car. During this drive, defendant asked Boone twice if he was a police officer. Boone did not respond to defendant's questions. Defendant went into the apartment and returned to the car at which time he told Agent Boone that he could purchase 200 "hits" of LSD for $260.00. After Boone gave defendant the money, defendant went back into the apartment and returned to the car with two

strips of blue paper in a plastic bag. The paper was analyzed by a chemist for the State Bureau of Investigation and was found to contain LSD.

Defendant testified that on 22 August 1979 McAdoo approached him at the Disco Lounge and offered him $20.00 if defendant would help him "get even" with Boone who had been cheating him in prior drug dealings. McAdoo showed defendant a plastic bag containing the blue paper and said that he wanted to pretend to purchase LSD from defendant using Boone's money. Defendant agreed and rode with Boone and McAdoo to the apartment in Chapel Hill. Defendant talked with friends in the apartment for a few minutes. When he left the apartment, he waved to McAdoo to get out of the car and pretended to hand him something. They got back into the car with Boone and McAdoo handed him the plastic bag. Defendant was never paid the $20.00, never had the plastic bag in his possession and never intended to sell LSD.

The jury found the defendant guilty of both of the charged offenses. From judgments sentencing him to consecutive active prison terms, defendant appealed.

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

Charles E. Vickery, for the defendant-appellant.

MARTIN (Robert M.), Judge.

Defendant's sole assignment of error is the trial court's refusal to instruct the jury on the defense of entrapment. We hold that the trial court was correct in refusing to so instruct the jury because the evidence presented at trial was insufficient to raise the defense of entrapment.

"Entrapment is 'the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him.' (Citations omitted.)" *State v. Stanley*, 288 N.C. 19, 27, 215 S.E. 2d 589, 594 (1975).

> Whether the defendant was entitled to have the defense of entrapment submitted to the jury is to be determined by the evidence. Before a Trial Court can submit such a defense to the jury there must be some credible evidence tending to support the defendant's contention that he was

> a victim of entrapment, as that term is known to the law. (Citations omitted.)

State v. Burnett, 242 N.C. 164, 173, 87 S.E. 2d 191, 197, 52 A.L.R. 2d 1181, 1190 (1955).

A majority of jurisdictions hold that entrapment is not available as a defense when the accused denies the essential elements of the offense. *See* Annot., 61 A.L.R. 2d 677 (1958). The rationale of the cases so holding is that the law will not countenance the inconsistency involved in combining a claim that defendant did not commit the offense and a claim that he was entrapped into the commission of the very offense which he denied committing. In the case *sub judice*, the defendant denied possessing the LSD, intending to sell the LSD and selling the LSD. The question of entrapment, therefore, does not arise from the defendant's evidence in the case at bar. *See State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399, *appeal dismissed*, 402 U.S. 1006, 29 L. Ed. 2d 428, 91 S. Ct. 2199 (1971); *State v. Boles*, 246 N.C. 83, 97 S.E. 2d 476 (1957).

Although the defendant has the burden of proving his defense of entrapment to the satisfaction of the jury, the question of entrapment may be raised by the State's evidence. *State v. Braun*, 31 N.C. App. 101, 228 S.E. 2d 466, *appeal dismissed*, 291 N.C. 449, 230 S.E. 2d 766 (1976). The question of entrapment does not arise from the State's evidence in the case at bar. Our Supreme Court has stated:

> The defense of entrapment consists of two elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities. (Citations omitted.) In the absence of evidence tending to show *both* inducement by govenment agents *and* that the intention to commit the crime originated not in the mind of the defendant, but with the law enforcement officers, the question of entrapment has not been sufficiently raised to permit its submission to the jury. (Citations omitted.)

State v. Walker, 295 N.C. 510, 513, 246 S.E. 2d 748, 749-50 (1978).

In the case at bar, there was no evidence from which the jury could have inferred that the intent to commit the crime originated in the minds of Agent Boone or McAdoo rather than in the mind of the defendant.

In our opinion defendant received a fair trial, free from prejudicial error.

No error.

Judge VAUGHN concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

I believe the case *sub judice* must be distinguished on the facts from *State v. Boles*, 246 N.C. 83, 97 S.E. 2d 476 (1957) and *State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399, *appeal dismissed*, 402 U.S. 1006, 91 S.Ct. 2199, 29 L. Ed. 2d 428 (1971), relied on by the majority. In *Boles*, defendant's evidence was to the effect that *she was not present* and did not participate in the sale (of intoxicating liquor); and in *Swaney*, defendant's evidence was to the effect that *he knew nothing about the robbery* and did not participate. Here, defendant does not contest his presence while the unlawful transactions were accomplished, but argues that his presence at the scene of the crime — and hence his exposure to a finding of involvement — was due to entrapment. I see no fundamental inconsistency in this evidence such as to deny defendant the right to have the issue of entrapment submitted to the jury.

In my opinion, defendant is entitled to a new trial.

RAYMOND H. HUTCHINSON v. THOMAS HUTCHINSON

No. 8025SC480

(Filed 2 December 1980)

Limitation of Actions § 4.6— sealed contract — 10 year statute of limitations applicable

The parties' contract for the management and division of profits of a business was an instrument within the meaning of G.S. 1-47(2), and the contract was under

seal so that the 10 year statute of limitations applied in plaintiff's action to recover his full share of the profits of the business for the year 1975.

APPEAL by plaintiff from *Grist, Judge.* Judgment entered 7 January 1980 in Superior Court, CALDWELL County. Heard in the Court of Appeals 12 November 1980.

Plaintiff Raymond H. Hutchinson initiated this action by the filing of a complaint in which he alleged that plaintiff and defendant, Thomas Hutchinson, had entered into a contract involving the management and division of profits of a business enterprise. A copy of the contract was attached to the complaint and it was incorporated in the complaint by reference. The concluding paragraph in the contract is as follows:

> IN TESTIMONY WHEREOF, said parties hereto do hereunto set their hands and seals in duplicate originals one of which is retained by each of the parties hereto the day and year first above written.

The contract was signed by plaintiff and defendant. Following each signature the word "SEAL" appeared in parentheses. The contract was dated 29 January 1966 and was not limited as to duration. Plaintiff alleged that defendant had breached the agreement by denying plaintiff his full share of the profits of the business for the year 1975.

Defendant's responsive pleading was a motion, in which he moved that the "matter be dismissed as a matter of law". In his motion, defendant asserted four defenses: the statute of limitations as set forth in G.S. 1-52(1); accord and satisfaction; estoppel; and laches.

No other pleadings or motions appear in the record. On 7 January 1980, the trial court entered judgment for defendant, dismissing the action with prejudice.

Beal & Beal, P.A., by Beverly T. Beal, for the plaintiff appellant.

Tate, Young & Morphis, by E. Murray Tate, Jr., for defendant appellee.

WELLS, Judge.

We first note that the defenses asserted by defendant are of the

nature which are properly asserted in an answer. *See* G.S. 1A-1, Rule 12. We next note that although the trial court apparently treated defendant's motion as a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), the judgment indicates that the trial court considered, in addition to plaintiff's complaint and defendant's motion, a deposition and interrogatories and answers to interrogatories. Under these circumstances, it seems apparent that the trial court treated defendant's motion as a motion for summary judgment. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971).

The judgment, in pertinent part, reads as follows:

> 1. Defendant has sufficiently pled the three year Statute of Limitations;
>
> 2. The Complaint and the contract attached thereto and sued upon show that Plaintiff's right to institute an action for compensation under the contract for the calendar year 1975 arose on January 1, 1976, and right to bring suit was barred on January 2, 1979, in the absence of such action by the Defendant as would estop him from pleading the Statute of Limitations;
>
> . . . .
>
> NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that this action is, and the same is hereby, involuntarily dismissed, with prejudice.

Plaintiff argues that G.S. 1-47(2), the ten year statute of limitations, applies to this action, and that therefore the judgment against him was erroneous and improvidently entered. Defendant concedes that if the three year statute, G.S. 1-52(1) does not apply, the judgment is in error.

The judgment of the trial court was in error. First, we hold that the contract between plaintiff and defendant is an "instrument" as that term is used in G.S. 1-47(2). *See Rose v. Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973). Second, we hold that there is no ambiguity in the wording of the contract as to the intent of the parties that it be under their respective seals, *Oil Corp. v. Wolfe*, 297 N.C. 36, 252 S.E. 2d 809 (1979), and that plaintiff's right to bring his action is governed by the provisions of G.S. 1-47(2), not G.S. 1-52(1).

It is unnecessary for us to reach or determine plaintiff's other assignments of error.

The judgment of the trial court is

Reversed.

Judges VAUGHN and MARTIN (Robert) concur.

STATE OF NORTH CAROLINA v. MICHAEL J. THOMPSON

No. 8014SC760

(Filed 2 December 1980)

1. Robbery § 5.4— common law robbery — refusal to instruct on assault

The trial court in a prosecution for common law robbery did not err in refusing to instruct on the lesser included offense of misdemeanor assault where the State's evidence tended to show that defendant took the victim's money by violent means, and defendant admitted taking the victim's money but denied assaulting him.

2. Criminal Law § 114.2— statement of defendant's evidence — no expression of opinion

The trial judge in a common law robbery case did not express an opinion on defendant's evidence when he stated during his summarization of his evidence that defendant was "flabbergasted" when a third person began hitting the victim, and that on the day following the robbery the victim and his brothers "accosted" defendant but that "strangely nothing came of it," since the court's statements were sufficiently supported by the evidence and not contrary to what defendant contended.

3. Criminal Law § 114.3— instructions — no expression of opinion on defense

The trial judge in a common law robbery case did not express an opinion as to the validity of defendant's defense when he charged on the illegality of collecting a debt by the use of force since defendant's own testimony tended to show that he was attempting to collect a debt owed to him by the victim's brother at the time of the incident in question, and the legal issue thus arose on the evidence.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 11 March 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 12 November 1980.

Defendant was indicted, tried and convicted for the common law robbery of $115 from the person of Eric C. Earl.

At trial, the evidence for the State tended to show that on the night of 23 November 1979 defendant and George "June Bug" Cleveland were riding around drinking with Eric Earl and some other friends in a friend's car. Defendant purchased gasoline for the car and beer for the group and subsequently got into an argument with Earl about paying for the gasoline and beer. Earl gave defendant $2.00 and began walking to his mother's house. Defendant and June Bug followed him, and defendant began feeling in Earl's pockets. Defendant stated, "Give me your money, man, or June Bug is going to hurt you." Defendant and June Bug then began beating Earl. They knocked him to the ground and took his money out of his pocket and left. Earl had been paid that afternoon and had approximately $115 in his pocket. Earl and two of his brothers went to defendant's home the next day and confronted him about the robbery, but defendant said nothing and left.

Defendant testified that after Earl paid him $2.00, defendant remembered that Earl's brother owed him $60 for some stereo speakers. He followed Earl across the street to discuss this debt at which time, to defendant's surprise, June Bug grabbed Earl and began beating him, knocking him to the ground. Defendant was "in shock" and pulled June Bug off of Earl. While lying on the ground Earl pulled $32 from his pocket which defendant picked up. Defendant then left the scene and subsequently gave some of Earl's money to the other people who had been riding around in the car with them. The following day Earl and two of his brothers approached defendant and told him he was wrong to let June Bug jump on Earl. Defendant did not know what to expect so he just left.

Upon the jury's verdict of guilty of common law robbery, defendant was sentenced to a prison term of not less than eight nor more than ten years.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General David S. Crump, for the State.

Pulley, Wainio & Stephens, P.A., by Ronald L. Stephens, for defendant appellant.

WELLS, Judge.

[1] Prior to the trial court's charge to the jury, defendant submitted a written request for a charge on the lesser included offense of misdemeanor assault. The court denied the request and instructed

upon common law robbery only. Defendant assigns error to the court's refusal to charge on misdemeanor assault, arguing that the evidence warranted such an instruction. We do not agree. Common law robbery is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. *State v. Lawrence*, 262 N.C. 162, 163, 136 S.E. 2d 595, 596-97 (1964); *see also State v. Brown*, 300 N.C. 41, 47, 265 S.E. 2d 191, 195 (1980). The crime of common law robbery includes an assault on the person. *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954). However, as stated in *Hicks*, 241 N.C. at 159-60, 84 S.E. 2d at 547:

> The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged.

In the present case State's evidence tended to show the taking of Earl's money by defendant against Earl's will by violent means. State's evidence was not open to the interpretation that defendant committed only the lesser included offense of assault. Defendant specifically denied assaulting Earl, but admitted taking Earl's money. On the basis of this evidence the court did not err by failing to instruct the jury on the lesser included offense of misdemeanor assault.

[2,3] Defendant has also assigned as error the court's summarization of his evidence in its charge to the jury that defendant was "flabbergasted" when June Bug began hitting Earl and that on the day following the alleged robbery Earl and his brothers "accosted" defendant but that "strangely nothing came of it." Defendant contends that in so charging the jury the trial judge indicated to the jury that he gave little if any weight to defendant's evidence. We find the statements objected to by defendant to be sufficiently supported by the evidence and not contrary to what defendant contended. Therefore such statements did not constitute an expression of opinion by the court. *See State v. Joyner*, 297 N.C. 349, 359-62, 255 S.E. 2d 390, 396-98 (1979). Defendant also contends that

the trial court expressed an opinion as to the validity of defendant's defense when it charged on the illegality of collecting a debt by the use of force. Again we find no expression of opinion since the legal issue arose on the evidence. Defendant's own testimony tended to show that he was attempting to collect a debt owed to him by Earl's brother at the time of the robbery of Earl.

In defendant's trial we find

No error.

Judges VAUGHN and MARTIN (Robert) concur.

NORTH CAROLINA NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, PLAINTIFF v. CHARLES F. SHARPE AND WIFE BETTY R. SHARPE, DEFENDANTS

No. 8022SC253

(Filed 2 December 1980)

1. Execution § 9; Homestead and Personal Property Exemptions § 5— execution sale — waiver of allotment of homestead

Defendants waived the right to have a homestead allotted in real property sold under execution where the defendants made no objection to the sale under execution without allotting the homestead until five months after the sale was completed, the property had been sold to third parties in the meantime, and the *feme* defendant was present at the sale and did not request the allotment of a homestead.

2. Execution § 11— judgment in one county — property sold under execution in another county — proper procedure

The procedure employed in an execution sale complied with statutory requirements where the judgment against defendants was rendered in Iredell County and the property sold under execution was located in Alexander County; a transcript of the judgment was docketed in Alexander County and the Clerk of Superior Court of Iredell County issued the execution; and the Sheriff of Alexander County reported the sale to the Clerk of Superior Court of Alexander County, who confirmed the sale and approved the Sheriff's final report. G.S. 1-307; G.S. 1-308; G.S. 1-339.63; G.S. 1-339.67.

APPEAL by defendants from *Walker (Hal H.), Judge.* Order entered 4 December 1979 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 9 September 1980.

This appeal brings to the Court a question in regard to a

homestead exemption. The plaintiff secured a judgment against the defendant which was affirmed on appeal. *Bank v. Sharpe*, 35 N.C. App. 404, 241 S.E. 2d 360 (1978). On 19 January 1979, the Sheriff sold under execution certain real property which had belonged to the defendants. A homestead was not set aside for the defendants. Defendants were represented by an attorney and the *feme* defendant was present at the sale. No objection was made to the Sheriff's failure to allot a homestead. On 23 March 1979, the plaintiff conveyed the property to Joey Albert Williams and wife.

On 27 August 1979, the defendants filed a motion to set aside the sale under the execution. This motion was denied in the superior court by an order filed on 4 December 1979. Defendants appealed.

Pope, McMillan, Gourley and Kutteh, by Robert H. Gourley, for plaintiff appellee.

W. P. Burkhimer for defendant appellants.

WEBB, Judge.

[1] Article X, Section 2 of the Constitution of North Carolina and G.S. 1-369 through G.S. 1-392 exempt certain real property from sale under execution. This constitutional and statutory right may be waived. *See Land Bank v. Bland*, 231 N.C. 26, 56 S.E. 2d 30 (1949); *Cameron v. McDonald*, 216 N.C. 712, 6 S.E. 2d 497 (1940); *Pence v. Price*, 211 N.C. 707, 192 S.E. 99 (1937). The question posed by this appeal is whether the defendants waived the right to have a homestead allotted in the real property sold under execution. The defendants made no objection to the sale under execution without allotting the homestead until five months after the sale was completed. In the meantime, the real property had been sold to the third parties. The *feme* defendant was present at the sale and did not request the allotment of a homestead. We hold these facts constitute a waiver by the defendants of their right to have the homestead allotted.

The defendants contend that *Stokes v. Smith*, 246 N.C. 694, 100 S.E. 2d 85 (1957); *Williams v. Johnson*, 230 N.C. 338, 53 S.E. 2d 277 (1949); and *Dickens v. Long*, 112 N.C. 311, 17 S.E. 150 (1893) hold that defendants did not have to claim a homestead in order to have it allotted, and it was error for the superior court to hold they have waived it. *Dickens* is the only case relied upon by the defendants which deals with a waiver of the right to have a homestead allotted

and that case recognizes that, under certain circumstances, the right may be waived. It is true that the Sheriff is under a duty to allot a homestead before selling real estate under execution without a request for it. Nevertheless, we hold the defendants were under a duty not to acquiesce in the extinguishment of their rights to the extent they did in this case. By doing so they waived the right.

[2] The defendants next assign error to the procedure for the execution sale. The judgment against the defendants was rendered in Iredell County. The property sold under execution was located in Alexander County. A transcript of the Iredell County judgment was docketed in Alexander County and the Clerk of Superior Court of Iredell County then issued the execution. This followed the statutory requirements. *See* G.S. 1-307 and G.S. 1-308. The Sheriff of Alexander County reported the sale to the Clerk of Superior Court of Alexander County who confirmed the sale and approved the Sheriff's final report. We hold that this complies with G.S. 1-339.63 and G.S. 1-339.67. This assignment of error is overruled.

By their last assignment of error, the defendants contend the superior court erred in not setting aside the judgment. Defendants contend this should have been done because the plaintiff's claim should have been asserted as a counterclaim in a prior action between the parties in Caldwell County. A judgment has been entered against the defendants which has been affirmed by this Court. *Bank v. Sharpe, supra.* The defendants may not now attack the judgment on this procedural ground.

We note that Joey Albert Williams and wife were owners of the property at the time the motion to set aside the Sheriff's deed was made. They were necessary parties since their interest in the property would have been affected if the motion had been allowed. In light of our decision, it is not necessary that they be joined as parties at this point.

Affirmed.

Judges VAUGHN and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. ROBERT MORRIS WOODSON

No. 8028SC653

(Filed 2 December 1980)

Automobiles §§ 125.1, 126.6— driving under influence of intoxicants — insufficient allegation of second offense — evidence of prior conviction

A statement of charges for the offense of driving under the influence of alcoholic beverages did not allege a second violation of G.S. 20-138 so as to trigger the second offense provision of G.S. 20-179(a) where it alleged that defendant had previously been convicted of the same offense on a date more than three years prior to the date of the current offense; therefore, defendant was prejudiced by the State's introduction of evidence of his earlier conviction and by numerous references to the earlier conviction throughout the trial.

APPEAL by defendant from *Griffin, Judge.* Judgment entered 4 March 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 12 November 1980.

Defendant was tried on a statement of charges alleging that, on 19 July 1979, he unlawfully operated a motor vehicle while under the influence of alcohol, and that he had previously been convicted of the same offense on 20 April 1976. He was convicted of unlawfully operating a motor vehicle while the amount of alcohol in his blood was 0.10% or more by weight.

Attorney General Edmisten, by Associate Attorney Evelyn M. Coman, for the State.

Long, McClure, Parker, Hunt and Trull, by William A. Parker, for defendant appellant.

VAUGHN, Judge.

Defendant contends that he was prejudiced by the State's introduction of evidence of his earlier conviction and by the numerous references to that conviction throughout the trial.

The general rule is that, in a prosecution for a particular crime, the State cannot offer evidence to show that the defendant has committed another distinct, independent or separate offense even though the other offense is of the same nature as the crime charged. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

One of the many exceptions to the general rule is that evidence of the prior conviction may be introduced if proof of the prior

conviction is an element of the offense charged. Thus, upon a proper charge of a second violation of G.S. 20-138, allegation and proof of the first conviction is necessary where, as here, it is not judicially admitted by the defendant. *State v. White*, 246 N.C. 587, 99 S.E. 2d 772 (1957).

Here, however, the statement of charges upon which defendant was tried does *not* allege a second violation of G.S. 20-138 so as to trigger the second offense provisions of G.S. 20-179(a). That section, as it was rewritten to become effective on 1 March 1979, expressly provides that "[c]onvictions for offenses occurring prior to July 1, 1978, or more than three years prior to the current offense shall not be considered prior offenses for the purpose of subdivisions (2) and (3) above." It appears on the face of the statement of charges that the earlier conviction set out took place on 20 April 1976, a date prior to 1 July 1978 and more than three years prior to the date of the current offense, 19 July 1979. The statement of charges alleging a second offense is, therefore, prejudicial surplusage which should have been stricken.

The repeated references to the earlier conviction in the evidence and in the charge of the court were clearly prejudicial to defendant's right to a fair trial. The fact that defendant was convicted of a violation of G.S. 20-138(b), instead of G.S. 20-138(a), is of no consequence. His plea of not guilty put the State to the task of proving to the jury every element of the offense charged, or every element of any lesser included offense, beyond a reasonable doubt, unaided by the bias naturally created by the attention drawn to the earlier conviction of a similar offense.

New trial.

Judges MARTIN (Robert M.) and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 DECEMBER 1980

BERRY v. BERRY No. 804DC482	Onslow (79CVD1575)	Dismissed
IN RE STROUTH No. 8015DC489	Orange (78J95)	Dismissed
IN RE TEEL No. 803DC521	Pitt (79J114A) (79J114B) (79J114C)	No Error
JOHNSON v. JOHNSON No. 804DC617	Duplin (80CVD77)	Affirmed
PLYMART v. HOME BUILDERS No. 8026SC499	Mecklenburg (78CVS6112)	Affirmed
STATE v. ALLEN No. 8012SC197	Cumberland (79CRS33894)	No Error
STATE v. CLANTON No. 806SC654	Halifax (79CR12974)	No Error
STATE v. COX No. 8029SC625	Henderson (79CRS9918)	No Error
STATE v. HALL No. 8019SC702	Rowan (78CRS10768)	No Error
STATE v. HARRIS No. 8013SC461	Columbus (79CRO8121)	No Error
STATE v. HILL No. 8023SC394	Wilkes (79CRS8122) (79CRS8124)	No Error
STATE v. HUFFMAN No. 8026SC487	Mecklenburg (79CRS37858)	No Error
STATE v. McINTYRE No. 805SC609	New Hanover (79CRS14531) (79CRS14532)	Vacated and Remanded Judgment Arrested
STATE v. McNAIR No. 8020SC586	Richmond (80CR0908) (80CR0910)	No Error
STATE v. MESSER No. 8027SC665	Gaston (79CRS22431)	Dismissed

STATE v. SNIPES No. 8014SC594	Durham (79CRS22321)	No Error
STATE v. TEAL No. 8017SC424	Rockingham (79CR8573)	No Error
STATE v. TURNER No. 805SC673	New Hanover (79CRS15416) (79CRS15417)	No Error
STATE v. WORTH No. 8015SC621	Alamance (79CRS10581)	No Error

APPENDIX

AMENDMENTS TO RULES OF APPELLATE PROCEDURE

AMENDMENTS TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

The first sentence of Rule 23(b) of the Rules of Appellate Procedure, 287 N.C. 671, 733 shall be amended to read as follows (new material appears in italics):

Pending Review by Supreme Court of Court of Appeals Decisions

> Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order or other determination mandated by the Court of Appeals when *a notice of appeal of right or a petition for discretionary review has been or will be timely filed*, or *a petition* for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

Approved by the Court in Conference this 2 day of December, 1980, to become effective 1 January 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

Rule 28 of the North Carolina Rules of Appellate Procedure 287 N.C. at 742 is hereby amended by repealing subsection (d), "Incorporation of Court of Appeals Argument into Supreme Court Brief by Reference."

Rather than re-letter the remaining subsections of Rule 28, the Court has elected to reserve subsection (d) for future use. The following note will be added to the end of the existing material under the Commentary to Rule 28, Subdivision (d):

> "NOTE: The North Carolina Supreme Court, in repealing subsection (d), has eliminated the right to incorporate by reference any argument contained in a brief filed in the Court of Appeals. Not only must a party include in his new brief any question which he wants to preserve as required by Rule 28(b), but now he must also present any argument for that question upon which he intends to rely. Questions not brought forward *and* argued in the new brief will be considered abandoned."

Approved by the Court in Conference this 27th day of January 1981, to become effective 1 July 1981. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

MEYER, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

TOPICS COVERED IN THIS INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d.

ACCOUNTS

§ 2. Accounts Stated

In an action to recover the balance due for recreational vehicle seats manufactured by plaintiff and sold to defendant where plaintiff characterized the balance due as an account stated, the trial court erred in excluding defendant's evidence of a more extensive warehousing and distribution contract entered into by defendant with plaintiff's sales manager who represented that he owned plaintiff corporation. *Industries, Inc. v. Distributing, Inc.*, 172.

ADOPTION

§ 2. Procedure.

The clerk of superior court properly transferred an adoption petition to the civil issue docket of the superior court where issues of fact and law were raised. *Oxendine v. Dept. of Social Services*, 571.

§ 2.1. Consent to Adoption

Trial court in a proceeding instituted by plaintiffs to adopt a child placed with them by the county department of social services must determine whether the consent of the department to plaintiffs' adoption of the child was unreasonably and unjustly withheld. *Oxendine v. Dept. of Social Services*, 571.

APPEAL AND ERROR

§ 6.2. Finality As Bearing On Appeability; Premature Appeals

The trial court's order giving to plaintiffs immediate possession of collateral as described in certain orders of attachment previously issued was an interlocutory order which did not affect a substantial right of defendant, and defendant's appeal is therefore dismissed. *Financial Center v. Sales, Inc. and Acceptance Corp. v. Sales, Inc.*, 187.

Plaintiffs' appeal from the trial court's order denying their discovery motion is dismissed. *Dworsky v. Insurance Co.*, 446.

Defendant may not appeal from an order directing a new trial solely on the issue of damages. *Johnson v. Garwood*, 462.

§ 6.6. Appeals Based on Motions to Dismiss

Defendant's motion to dismiss plaintiffs' claim for treble damages was a Rule 12(b)(6) motion and no appeal lay from a denial thereof. *Dworsky v. Insurance Co.*, 446.

§ 6.9. Appealibility of Preliminary Matters

In an action to recover damages for fraud, a pretrial order denying plaintiffs' motion to amend and resolving issues to be submitted to the jury was interlocutory and not appealable. *Lazenby v. Godwin*, 300.

§ 14. Appeal and Appeal Entries

Plaintiff's appeal from an order denying their motion to amend the judgment did not constitute an appeal from the judgment itself. *Hamlin v. Austin*, 196.

Notice of appeal must be served on the opposing party either before the notice is filed or on the same day the notice is filed. *Shaw v. Hudson*, 457.

ARMY AND NAVY

§ 1. Generally

In a hearing on plaintiff's motion to increase child support, the trial court did not abuse its discretion in denying defendant's motion to stay the proceedings pursuant to the Soldiers and Sailors Civil Relief Act of 1940. *Cromer v. Cromer*, 403.

ARREST AND BAIL

§ 3.5. Warrantless Arrest for Burglary and Related Offenses

An officer had probable cause to make a warrantless arrest of defendant where a burglar alarm system at a grocery store had been activated; one person had been seen running from the grocery store; and when an officer arrived on the scene it was deserted except for defendant who was in a phone booth 40 feet from the store. *S. v. Smith*, 293.

§ 3.6. Warrantless Arrest for Robbery

An officer who stopped defendant's vehicle while it was fleeing from the scene of a robbery had probable cause to believe that defendant had committed a felony. *S. v. Duers*, 282.

§ 11.4. Judgment Against Sureties on Bail Bond

Trial court made sufficient findings to support its conclusion that no cause was shown to justify remission of forfeited appearance bonds in whole or in part. *S. v. Rakina*, 537.

ASSAULT AND BATTERY

§ 2. Defenses in Actions for Civil Assault

In an action to recover for injuries sustained by plaintiff in an assault, the trial court properly instructed on self-defense. *Griffin v. Disco, Inc.*, 77.

§ 3.1. Trial of Civil Assault Case

In an action to recover for injuries sustained by plaintiff in an assault, the trial court did not err in summarizing the evidence and the fact that the jury returned to the courtroom and asked one question with respect to the evidence allegedly improperly summarized did not indicate that the jury was confused on the issue. *Griffin v. Disco, Inc.*, 77.

§ 14.3. Sufficiency of Evidence of Assault With Deadly Weapon Inflicting Serious Bodily Injury

There was no fatal variance between an indictment charging that the date of a felonious assault was 17 April 1979 and evidence that the assault occurred on 17 February 1979. *S. v. Bailey*, 377.

Evidence tending to show that defendant struck his victim repeatedly in the head with a shotgun was sufficient for the jury in a prosecution for assault with a deadly weapon inflicting serious injury. *S. v. Bradsher*, 507.

§ 14.6. Sufficiency of Evidence of Assault on Law Officer

The State's evidence was sufficient to support defendant's convictions of assaults on two officers in the performance of their duties. *S. v. Cooke*, 384.

ASSIGNMENTS

ATTACHMENT

AUTOMOBILES

AUTOMOBILES – Continued

BASTARDS

§ 6. Sufficiency of Evidence of Wilful Failure to Support Illegitimate Child

In a prosecution of defendant for failing to support his illegitimate child, evidence that defendant knew the mother of the child and had had sexual intercourse with her was sufficient to raise an inference that defendant was the father of the child. *S. v. Brown*, 194.

§ 7. Instructions

In a prosecution of defendant for failing to support his illegitimate child, the trial court did not err in not instructing the jury that it had to find that the child was "illegitimate" before it could answer the issue of paternity in the affirmative. *S. v. Brown*, 194.

BROKERS AND FACTORS

§ 6.1. Procuring Cause of Purchase.

Defendant realtors were entitled to recover a six percent real estate commission pursuant to an exclusive listing contract giving defendants the authority to sell plaintiffs' house for a period of 120 days although the house was not actually conveyed within the 120 day period. *Collins v. Realty Co.*, 316.

§ 6.7. Termination of Recurring Commission Payments

The right to share in commissions under an agreement between brokers does not arise until the commissions have been actually received by the broker charged with liability. *Chears v. Young & Associates*, 674

CEMETERIES

§ 1. Regulation

Former G.S. 65-66 did not require plaintiff cemetery companies to place in trust a portion of funds received from the sales to finance companies of conditional sales contracts for burial goods and services. *National Heritage Corp. v. Cemetery Comm.*, 159.

CLERKS OF COURT

§ 3. Adoption Jurisdiction

The clerk of superior court properly transferred an adoption petition to the civil issue docket of the superior court where issues of fact and law were raised. *Oxendine v. Dept. of Social Services*, 571.

CONSPIRACY

§ 6. Sufficiency of Evidence of Criminal Conspiracy

Evidence was sufficient for the jury in a prosecution for conspiring to file a false insurance claim. *S. v. Aleem*, 359.

CONSTITUTIONAL LAW

§ 24.7. Jurisdiction Over Foreign Corporations

The courts of this State had in personam jurisdiction over defendant, an

CONSTITUTIONAL LAW – Continued

Illinois corporation, where defendant agreed to purchase the assets and take over the liabilities of the church pictorial directories division of an N.C. corporation, and the corporation had contracted with plaintiff for the production of certain church directories. *Delprinting Corp. v. C.P.D. Corp.*, 449.

§ 28. Due Process in Criminal Proceedings

The State violated defendant's due process rights by introducing evidence from which the jury could reasonably infer that defendant's refusal to submit to a paraffin test until she had consulted her attorney constituted a "statement" by defendant which was inconsistent with her plea of not guilty. *S. v. Odom*, 278.

§ 30. Discovery; Access to Evidence

Defendant's due process rights were not violated when the trial court denied defense counsel's motion, made at trial prior to cross-examination of a material State's witness, that counsel be allowed to examine any written statements made by the witness and failed to make an in camera inspection of the writings. *S. v. Voncannon*, 637.

§ 40. Right to Counsel Generally

Although a superior court judge had previously found that the defendant was not an indigent, the trial court was required by G.S. 15A-942 to inquire at defendant's arraignment into the question of defendant's indigency at that time, and defendant is entitled to a new trial by reason of the court's failure to make such inquiry. *S. v. Elliott*, 141.

§ 43. Critical Stage of Proceedings

Defendant did not have a right to counsel when a robbery and assault victim identified him while he was standing in her yard a few hours after the crime since defendant had not been arrested at that time. *S. v. Edwards*, 547.

§ 45. Right to Appear Pro Se

The trial court did not err in allowing the indigent defendant to represent himself and in refusing to appoint standby counsel for him. *S. v. Brooks*, 14.

§ 49. Waiver of Counsel

Defendant did not show prejudicial error where the record showed he voluntarily waived his right to counsel without being advised of his right to counsel if he was indigent and without any showing that he was in fact indigent. *S. v. Wall*, 678.

§ 50. Speedy Trail Generally

There was no merit to defendant's contention that the six month delay between issuance of the mandate from the Court of Appeals to retry defendant and the actual retrial was in excess of the 120 day limit imposed on the courts by the Speedy Trail Act, since that Act did not take effect until 1 October 1978 and therefore was not applicable to defendant's case. *S. v. Brooks*, 14.

§ 53. Delay Caused by Defendant

Defendant, who was tried 319 days after he was indicted, was not denied his constitutional right to a speedy trial where most of the delay was caused by his motions for continuances. *S. v. Hartman*, 83.

COURTS – Continued

second motion for summary judgment on the issue of punitive damages where another superior court judge had already denied defendant's first motion on the same issue. *Carr v. Carbon Corp.*, 631.

CRIME AGAINST NATURE

§ 3. Sufficiency of Evidence

The State's evidence was sufficient for the jury in a prosecution for crime against nature with an eleven year old boy. *S. v. McGuire*, 70.

CRIMINAL LAW

§ 7. Entrapment

The trial court did not err in failing to dismiss the case on the ground that the evidence disclosed entrapment as a matter of law, since the evidence indicated that an officer met defendant for the first time when the alleged offense occurred and the officer never told persons from whom he purchased drugs that he would help them find employment if they provided controlled substances for him. *S. v. Hartman*, 83.

The question of entrapment did not arise from defendant's evidence in a prosecution for possession and sale of LSD. *S. v. Neville*, 684.

§ 9.3. Sufficient Evidence of Guilt as Aider and Abettor

State's evidence was sufficient to support defendant's conviction of felonious breaking or entering, armed robbery and felonious assault as an aider and abettor. *S. v. Edwards*, 547.

The evidence in a juvenile hearing was sufficient to prove beyond a reasonable doubt that respondent committed the criminal offense of aiding and abetting an assault with a deadly weapon (his father's car). *In re Rich*, 165.

§ 26.5. Double Jeopardy; Some Act Violating Different Statutes

Defendant was not placed in double jeopardy by his conviction of armed robbery and assault with a deadly weapon arising out of the same conduct. *S. v. Edwards*, 547.

§ 33.2. Relevancy of Evidence to Show Intent

Testimony that defendant participated in a beating of the victim in December and went to the victim's home in January with a shotgun was relevant to prove his intent to kill the victim when he assaulted him with a deadly weapon on 17 February. *S. v. Bailey*, 377.

§ 34.7. Evidence of Other Crimes; Admissibility to Show Motive

Testimony in a homicide case that defendant had made threats against a witness in the victim's presence and that the victim had intervened was relevant on the question of motive. *S. v. Judge*, 290.

§ 57. Evidence Concerning Firearms

The State violated defendant's due process rights by introducing evidence from which the jury could reasonably infer that defendant's refusal to submit to

CRIMINAL LAW – Continued

a paraffin test until she had consulted her attorney constituted a "statement" by defendant which was inconsistent with her plea of not guilty. *S. v. Odom*, 278.

§ 63. Evidence as to Sanity of Defendant

A psychiatrist's testimony that her diagnosis of defendant was based in part on a personality inventory test administered to defendant by a psychologist which indicated that defendant's behavior pattern is often seen in persons who are habitual liars was incompetent hearsay and its admission was prejudicial to defendant. *S. v. Hoyle*, 98.

Trial court did not err in permitting a police officer to testify concerning changes in the mental condition of a robbery and assault victim. *S. v. Bradsher*, 507.

§ 66.5. Right to Counsel at Lineup

Defendant did not have a right to counsel when a robbery and assault victim identified him while he was standing in her yard a few hours after the crime since defendant had not been arrested at that time. *S. v. Edwards*, 547.

§ 66.6. Suggestiveness of Lineup

Evidence that defendant was told by an officer during a lineup to "hold your head up" does not require a finding that the lineup was impermissibly suggestive. *S. v. McGuire*, 70.

§ 66.9. Suggestiveness of Photographic Identification Procedure

The fact that photographs exhibited to a witness were not all the same size and some were in color while others were in black and white did not render the photographic identification improper. *S. v. McGuire*, 70.

§ 66.11. Confrontation at Crime Scene

A robbery and assault victim's in-court identification of defendant was of independent origin and not tainted by a pretrial identification when officers brought defendant into the victim's yard a few hours after the crime. *S. v. Edwards*, 547.

§ 66.15. Independent Origin of In-Court Identification

The trial court did not err in failing to make detailed findings of fact after a voir dire hearing on defendant's motion to suppress the in-court identification of defendant where the evidence showed the in-court identification was of independent origin and not tainted by any out-of-court procedures. *S. v. McGuire*, 70.

§ 66.18. When Voir Dire Is Required

Trial court did not err in failing to hold a voir dire examination of two witnesses concerning their identifications of defendant before they were allowed to testify. *S. v. Jordan*, 561.

Trial court did not err in failing to conduct a voir dire hearing before permitting a robbery and assault victim to testify that she noticed there was a limp in her assailant's walk. *S. v. Edwards*, 547.

CRIMINAL LAW – Continued

§ 67. Evidence of Identity By Voice

The trial court in an armed robbery case did not err in determining that the victim's voice identification of defendant was of independent origin and was admissible. *S. v. Brooks*, 14.

§ 71. Shorthand Statements of Fact

An officer's testimony that the victim's wrist "had marks coming all the way around as if it had been tied" was competent as a shorthand statement of fact. *S. v. McGuire*, 70.

§ 75.3. Confessions; Effect of Confronting Defendant With Statements of Others

There was no merit to defendant's contention that his codefendant was arrested without probable cause, that the codefendant's incriminating statement was illegally obtained, and any evidence obtained by use of that statement, including his own confession, was inadmissible as fruit of an illegal arrest, *S. v. Smith*, 293.

§ 75.9. Volunteered In-Custody Statements

The trial court properly admitted defendant's volunteered statements to an officer that he didn't "know why [he] did it" and that he hated that he "ever came to Raleigh." *S. v. Duers*, 282.

Trial court did not err in admitting into evidence a statement made by defendant on the way to the police station, although the court failed to make specific findings of fact to support its conclusions. *S. v. King*, 499.

§ 75.10. Waiver of Constitutional Rights Before In-Custody Statements

In a prosecution for attempting to obtain merchandise by false pretense by use of a stolen credit card, the trial court properly admitted defendant's statement to an officer that she "had taken the credit cards from [the owner thereof] and that she was going to return them to him in a little while" where defendant had signed a waiver of rights form. *S. v. Rogers*, 337.

§ 76.2. When Voir Dire Hearing on In-Custody Statements is Required

The trial court in an armed robbery case erred in admitting a statement made by defendant when he was arrested that his female companion "knew nothing of this" without conducting a voir dire hearing to determine the voluntariness of the statement, but such error was harmless beyond a reasonable doubt. *S. v. Duers*, 282.

§ 80.1. Foundation for Admission of Books and Records

A computerized report containing information about a certain stolen credit card was properly admitted into evidence. *S. v. Rogers*, 337.

§ 85.1. Character Evidence

A police officer who testified as a character witness for defendant was properly cross-examined for impeachment purposes as to whether he had called an SBI agent several times to report his suspicion that defendant was dealing in drugs. *S. v. Harris*, 452.

CRIMINAL LAW – Continued

§ 86.3. Impeachment of Defendant; Prior Convictions

Trial court in a rape prosecution did not err in disallowing questions to the prosecuting witness on cross-examination relating to specific convictions of crime. *S. v. McLendon*, 459.

Trial court did not abuse its discretion in permitting the prosecutor to ask defendant questions on cross-examination attempting to elicit further details about prior convictions which defendant admitted on direct examination. *S. v. Edwards*, 547.

§ 86.5. Impeachment of Defendant; Specific Acts

Trial court in a robbery case properly permitted the prosecutor to cross-examine defendant for impeachment purposes about defendant's use of drugs and his efforts to forge a prescription for drugs. *S. v. Murphy*, 443.

§ 86.8. Impeachment of State's Witness

The trial court did not err in refusing to play back voir dire testimony as a method of impeaching the witness. *S. v. McGuire*, 70.

§ 91. Speedy Trial Act

In computing the time within which the trial of a criminal case was required to commence pursuant to the Speedy Trial Act, the time between defendant's indictment and a stipulation of readiness for trial by defendant's attorney was properly excluded where the State was waiting during that time for defendant to obtain private counsel. *S. v. Rogers*, 337.

Defendant, who was tried 319 days after he was indicted, was not denied his right to a speedy trial under the Speedy Trial Act where 205 days of the delay were caused by defendant's motions for continuances. *S. v. Hartman*, 83.

Trial court should have granted defendant's motion to dismiss for failure to comply with the Speedy Trial Act where the case was first calendared for trial at a time beyond the 120 day limitation imposed by statute and the State produced no evidence to sustain its burden of going forward with evidence to justify excluding a portion of the period between defendant's indictment and the initial calling of the case for trial. *S. v. Edwards*, 426.

The mere taking of judicial notice of the number of court sessions held in the county of venue between indictment and the first calling of the case for trial was not sufficient to support exclusion of any specific period of delay from computation under the Speedy Trial Act. *Ibid.*

The trial court properly excluded the time of a continuance granted to defendant and eight days during which the withdrawal of counsel and appointment of new counsel occurred from the computation under the Speedy Trial Act. *S. v. Bradsher*, 507.

Where there was a finding of no probable cause on a charge of feloniously receiving stolen property, the period of time within which trial on a new charge of felonious possession of the same stolen property must commence began to run from the date of defendant's indictment on the new charge. *S. v. Boltinhouse*, 665.

§ 91.7. Motion for Continuance on Ground of Absence of Witness

The trial court did not err in denying defendant's motion for a continuance

CRIMINAL LAW – Continued

based on the absence from the trial of an allegedly essential witness. *S. v. Hartman*, 83.

§ 96. Withdrawal of Evidence

Defendant was not prejudiced by the prosecutor's asking of two improper questions concerning a witness's and defendant's involvement in unrelated offenses, since the defendant objected, both objections were sustained, and the jury was told by the court not to consider the questions. *S. v. Jordan*, 561.

§ 99.4. Remarks of Court in Ruling on Objections

The trial court did not express an opinion on the credibility of a witness when he stated, "I won't require him to answer because I don't think — I just won't." *S. v. Judge*, 290.

§ 99.6. Questions or Remarks by Court in Connection With Examination of Witnesses

The trial judge did not express an opinion as to the credibility of a witness where he merely clarified what the witness had already stated. *S. v. Aleem*, 359.

§ 101. Misconduct Affecting Jurors in General

A person who commits a criminal act of embracery is liable in civil damages to one who is damaged thereby, and the trial court properly entered a judgment for plaintiff insurer against defendant attorney for the value of the time its attorneys spent in defending a lawsuit which ended in a mistrial because defendant personally contacted a juror and attempted to influence her verdict in the case. *Employers Insurance v. Hall*, 179.

§ 101.4. Misconduct Affecting Jury Deliberations

The trial court in a forgery prosecution erred in allowing the jury, without defendant's consent, to take into the jury room during deliberations checks which had been introduced into evidence, but defendant failed to show that such error was prejudicial to him. *S. v. Prince*, 145.

§ 102.5. Conduct of Counsel in Cross-Examining Defendant or Other Witnesses

Defendant was not prejudiced when the prosecutor asked defendant on cross-examination, "You figure you can buy your way out of anything, don't you?" *S. v. Bailey*, 377.

The prosecutor's comments during cross-examination as to the truthfulness of defendant's witness were not so grossly improper as to require the trial court to correct them in the absence of defendant's failure to object at trial. *S. v. Jordan*, 561.

§ 102.6. Particular Comments in Jury Argument

Defendant was not prejudiced by the prosecutor's argument that the case was important and had wide-ranging implications and that the jury should use their sixth sense to find the facts. *S. v. Boltinhouse*, 665.

The trial court did not err in refusing to allow a motion for mistrial after the district attorney, in his closing argument to the jury, stated in substance that, as a result of this assault, the victim has "scrambled eggs for brains." *S. v. Bradsher*, 508.

CRIMINAL LAW – Continued

§ 102.9. Comment on Defendant's Character in Jury Argument

The prosecutor's remark in his jury argument that defendants were "lawless people" did not constitute prejudicial error. *S. v. Bailey*, 377.

§ 106.5. Sufficiency of Evidence; Accomplice Testimony

The uncorroborated testimony of an accomplice is sufficient to sustain a conviction. *S. v. Brooks*, 14.

§ 114.2. No Expression of Opinion in Statement of Evidence on Contentions

Trial judge in a common law robbery case did not express an opinion on defendant's evidence when he stated during his summarization of the evidence that defendant was "flabbergasted" when a third person began hitting the victim, and that on the day following the robbery the victim and his brothers "accosted" defendant but that "strangely nothing came of it." *S. v. Thompson*, 690.

§ 114.3. No Expression of Opinion in Other Instructions

Trial judge in a common law robbery case did not express an opinion as to the validity of defendant's defense when he charged on the illegality of collecting a debt by the use of force. *S. v. Thompson*, 690.

§ 117.3. Charge on Credibility of State's Witnesses

The trial court did not err in instructing the jury that defendant was an interested witness without mentioning the interest of a former deputy sheriff who was the State's main witness. *S. v. Shaffner*, 89.

§ 118.1. Disparity in Time or Stress Given to Contentions

There was no merit to defendant's contention that the trial court erred in stating the contentions of the State without stating the contentions of defendant. *S. v. Wade*, 257.

§ 128. Motion for Appropriate Relief

There was no merit to defendant's contention that the trial judge erred in failing to rule upon his motion for appropriate relief, since defendant did receive a ruling on his motion under G.S. 15A-1448(a)(4) which provides that, if no ruling has been made by the trial judge on a motion for appropriate relief within 10 days, the motion is deemed denied. *S. v. Brooks*, 14.

§ 138.7. Sentence; Particular Matters and Evidence Considered

Trial court did not err in admitting a copy of defendant's federal criminal record during the sentencing hearing. *S. v. Edwards*, 547.

§ 161. Necessity for Exceptions and Assignments of Error

Failure of defendant, who represented himself, to note exceptions to rulings of the trial court constituted waiver of the right to assert the alleged errors on appeal. *S. v. Brooks*, 14.

DAMAGES

§ 16.3. Sufficiency of Evidence of Loss of Profits

Evidence that plaintiff had to withdraw bids because of late delivery and defects in machines purchased from defendant would not support a claim for lost profits. *Rannbury-Kobee Corp. v. Machine Co.*, 413.

§ 17.5. Instructions on Loss of Profits

In an action to recover for injuries sustained in an assault, the trial court properly instructed on damages for loss of profits, since plaintiff's business was small; the income produced was largely due to the personal services and attention of plaintiff; and the earnings of the business could therefore afford a reasonable basis in establishing plaintiff's loss of earnings. *Griffin v. Disco, Inc.*, 77.

§ 17.7. Punitive Damages

In an action to recover for injuries sustained in an assault, evidence was sufficient to support the trial court's instructions on punitive damages. *Griffin v. Disco, Inc.*, 77.

DECLARATORY JUDGMENT ACT

§ 4.3. Availability in Insurance Matters

The Governor had standing to seek a declaratory judgment as to the legality of action by the N.C. Reinsurance Facility imposing surcharges on automobile liability insurance coverages. *Hunt v. Reinsurance Facility*, 206.

§ 9. Verdict and Judgment

Where defendant did not object to the procedure of entering a judgment for money in a declaratory judgment proceeding, defendant waived the requirement of G.S. 1-259 that it be served with a petition and notice before the court would have authority to grant further relief. *Raintree Corp. v. City of Charlotte*, 391.

In a declaratory judgment action in which plaintiff sought an interpretation of a contract for sewer services, trial court properly awarded pre-judgment interest. *Ibid.*

DEDICATION

§ 2.2. Sufficiency of Acts of Dedication

A lane which served as a boundary to plaintiff's property was a street dedicated to the public use, and the trial court erred in concluding that defendants had the right to mark the boundary lines of the lane with posts. *Emanuelson v. Gibbs*, 417.

DISORDERLY CONDUCT AND PUBLIC DRUNKENNESS

§ 5. Sufficiency of Evidence

The statute making it unlawful for any person in a public place to be intoxicated and disruptive by "cursing or shouting at or otherwise rudely insulting others" was not violated by defendant's conduct in standing in a

DISORDERLY CONDUCT AND PUBLIC DRUNKENNESS – Continued

motel parking lot in an intoxicated condition, looking up toward the sky, and shouting "God is alive" and "God is in heaven" and other words which sounded like a foreign language. *S. v. Cooke*, 384.

DIVORCE AND ALIMONY

§ 2.1. Pleadings

In an action for divorce based on one year's separation, the trial court abused its discretion in denying the plaintiff's motion to amend her complaint to change the date of the original separation. *Ledford v. Ledford*, 226.

§ 8. Abandonment

Plaintiff's evidence was sufficient for the jury on the issue of defendant's abandonment of plaintiff. *Tan v. Tan*, 516.

§ 13.1. Requirement that Parties Live Separate and Apart

A couple cannot be granted a divorce on the ground of one year's separation if there has been sexual activity between the parties or if there has been such association between the parties as to induce others to regard them as living together. *Ledford v. Ledford*, 226.

§ 13.5. Sufficiency of Evidence of Separation for Statutory Period

In an action for divorce based on a year's separation the trial court erred in entering summary judgment for defendant, since there was disputed testimony as to whether the parties had engaged in sexual intercourse during the period of separation, and since other evidence of their association tended to show only casual and isolated social acts which would not reasonably induce others to regard the parties as living together. *Ledford v. Ledford*, 226.

§ 16.9. Amount and Manner of Payment of Alimony

The trial court erred in ordering defendant to pay permanent alimony to plaintiff in a lump sum of $15,000 with $10,000 to be paid at the time the parties sell their joint residence and the remainder to be paid at the rate of $250 per month. *Payne v. Payne*, 132.

Portion of the court's judgment awarding alimony to plaintiff wife and support for a minor child in her custody was not supported by sufficient findings. *Tan v. Tan*, 516.

§ 19.3. Modification of Alimony Decree; Requirement of Changed Circumstances

In a hearing to determine whether there has been a substantial change of circumstances to warrant a reduction in alimony payments, a conclusion of law that there has been a substantial change of circumstances based only on income is inadequate and in error. *Britt v. Britt*, 462.

§ 19.4. Sufficiency of Showing of Changed Circumstances

In determining whether there had been a substantial change of circumstances to warrant a reduction in alimony payments, the trial court erred in comparing plaintiff's adjusted gross income, as reported on his federal tax return, with defendant's gross cash income. *Britt v. Britt*, 463.

DIVORCE AND ALIMONY – Continued

§ 19.5. Effect of Separation Agreement on Modification of Alimony

A separation agreement which has been adopted by incorporation into a decree of the court is subject to the contempt power of the court and alimony payments so ordered can be modified. *Britt v. Britt*, 463.

§ 21. Enforcement of Alimony Awards or Agreements Generally

The trial court had authority to grant specific performance of the alimony provisions of a separation agreement pending final determination of the merits of an action on the agreement. *Gibson v. Gibson*, 156.

Though an order to garnish defendant's salary was stricken, defendant was not entitled to a refund of money which had already been paid into the clerk's office by defendant's employer for alimony arrearages. *Sturgill v. Sturgill*, 580.

The trial judge was without authority himself to execute an assignment of defendant's wages absent defendant's failure to comply with a judgment within the time specified. *Ibid.*

§ 21.4. Enforcement of Alimony by Garnishment

Garnishment of defendant's wages was proper where the amount garnished was a debt already accrued to defendant's benefit and where defendant was not entitled to the 60 day exemption of G.S. 1-362. *Sturgill v. Sturgill*, 580.

§ 23. Jurisdiction in Child Support Action

Trial court properly exercised personal jurisdiction over defendant in Hawaii in plaintiff's action for increased child support and attorney fees, and properly issued further orders for garnishment and for defendant's arrest. *Cromer v. Cromer*, 403.

§ 24.1. Amount of Child Support

The evidence supported the court's finding that respondent mother was deliberately depressing her income and was failing to fulfill her earning capacity because of her disregard for her responsibility to provide reasonable support for her child by a previous marriage. *In re Register*, 65.

The court was authorized by G.S. 50-13.4(b) to order support of a minor child by both parents where the child was in the custody of her grandparents by court order. *Ibid.*

§ 24.3. Effect of Child Support Order

There was no merit to defendant's contention that his confession of judgment for child support and subsequent entry of judgment were defective and not binding on him. *Cromer v. Cromer*, 403.

§ 24.4. Enforcement of Child Support Order; Contempt

Personal jurisdiction is unnecessary for mere registration of a foreign support order under the Uniform Reciprocal Enforcement of Support Act, and language in the trial court's confirmation order purporting to find personal jurisdiction was superfluous and did not bind defendant in subsequent enforcement proceedings. *Fleming v. Fleming*, 345.

Arizona decrees for alimony and child support were entitled to full faith and credit in determining arrearages, but the trial court erred in determining the amount due. *Ibid.*

DIVORCE AND ALIMONY – Continued

§ 24.5. Modification of Child Support Order

In a hearing on plaintiff's motion to increase child support, the trial court did not abuse its discretion in denying defendant's motion to stay the proceedings pursuant to the Soldiers and Sailors Civil Relief Act of 1940. *Cromer v. Cromer*, 403.

§ 28.1. Attack on Foreign Decree

In plaintiff's action to have a Florida divorce judgment declared invalid, the trial court properly entered summary judgment for defendant where the judgment was valid on its face; defendant's pleadings asserted the validity of the decree and the legitimacy of defendant's domicile at the time of the original action; plaintiff offered no proof of the matter other than her own allegations contained in her pleadings, brief, and affidavit; and plaintiff relied upon the divorce judgment, without raising the question of its validity, in entering a settlement agreement under which she received valuable consideration. *Watson v. Watson*, 58.

§ 29. Validity and Attack on Domestic Decree

Defendant and his first wife were divorced as of 18 December 1978, the date of hearing on the matter, rather than as of 8 February 1979, the date the divorce judgment was actually signed, so that the marriage of plaintiff and defendant on 23 December 1978 was a lawful marriage. *Redfern v. Redfern*, 94.

EASEMENTS

§ 5.3. Easements by Implication; Sufficiency of Evidence

In plaintiff's action to establish its right to a 60 foot roadway easement across defendant's adjoining land, issues were raised by the evidence as to the intent of the parties to recognize the easement and as to whether an easement by implication was reserved to the original grantor. *Communities, Inc. v., Powers, Inc.*, 656.

EMBEZZLEMENT

§ 6. Sufficiency of Evidence

Evidence was insufficient to show embezzlement by a corporation president where money was taken from employees' pay checks for a group insurance policy but the money was not paid to the insurance company. *S. v. Seufert*, 524.

EMINENT DOMAIN

§ 14. Judgment

Where the trial court consolidates two condemnation actions concerning distinct tracts of land, and there is no unity of ownership, the judgment awarding damages and compensation for a taking must apportion the sum between the two distinct tracts. *Highway Comm. v. Cape*, 137.

ESTATES

§ 2. Merger of Estates

An outstanding deed of trust conveying a dominant estate and that estate's appurtenant easement over the servient estate was such an intermediate estate as will defeat application of the doctrine of merger when the legal owner of the servient estate acquires the equitable interest in the dominant estate and its appurtenant easement. *Communities, Inc. v. Powers, Inc.*, 651.

ESTOPPEL

§ 4.3. Equitable Estoppel; Conduct of Party Sought to Be Estopped

In an action to recover for breach of a contract to lease a tractor and trailer from defendant where the agreement provided that it was not binding upon defendant until executed at its general offices in Miami, defendant should equitably be estopped from asserting this requirement. *Pallet Co. v. Truck Rental, Inc.*, 286.

EVIDENCE

§ 32.2. Best Evidence Relating to Writings; Application of Parol Evidence Rule

A provision of a separation agreement in which defendant husband agreed "at the time of divorce decree to execute a document assigning his interest to said household" to plaintiff wife was unambiguous and required defendant to transfer a fee simple estate to the wife, and parol evidence was not admissible to show that the parties intended only an assignment in trust for the benefit of their child. *Vestal v. Vestal*, 263.

§ 33. Hearsay Evidence

A witness's testimony that an employee of defendant showed him a counter and "said that is the one that broke and that [plaintiff] got cut on" was not objectionable hearsay. *Russell v. Sam Solomon Co.*, 126.

§ 50. Testimony by Medical Experts

A psychiatrist's "mental status" examination of respondent for approximately thirty minutes provided sufficient data to support the psychiatrist's expert opinion in an involuntary commitment proceeding. *In re Collins*, 243.

In an action to recover for injuries received by plaintiff's intestate when she fell and broke her hip while a patient at defendant hospital, trial court erred in excluding expert testimony by a nurse regarding the standard of care in situations involving a patient's use of a bedpan. *Page v. Hospital*, 533.

EXECUTION

§ 9. Allotment of Homestead

Defendants waived the right to have a homestead alloted in real property sold under execution. *Bank v. Sharpe*, 693.

§ 11. Conduct of Sale

Proper procedure was employed in an execution sale in one county upon a judgment entered in another county. *Bank v. Sharpe*, 693.

EXTRADITION

§ 1. Generally

The provision of G.S. 15A-723 requiring a demand for extradition to be accompanied by "information supported by affidavit in the state having jurisdiction of the crime" does not require that the "supporting" affidavits be dated prior to or contemporaneous with the information. *In re Armstrong*, 175.

FALSE PRETENSE

§ 3.1. Sufficiency of Evidence

The State's evidence was sufficient for the jury in a prosecution for attempting to obtain merchandise by false pretense by use of a stolen credit card. *S. v. Rogers*, 337.

FORGERY

§ 2. Prosecution

Defendant's convictions for forgery must be reversed where the trial court, in its final mandate to the jury, omitted two essential elements of forgery. *S. v. Prince*, 145.

§ 2.2. Sufficiency of Evidence

The trial court did not err in failing to dismiss one of the indictments for forgery and uttering because the State could not prove the exact date of the crime. *S. v. Prince*, 145.

Evidence that two checks had been forged and that defendant cashed them was sufficient circumstantial evidence for the jury to find that defendant forged the checks, even without eyewitness testimony that defendant wrote the checks and without expert testimony that it was his handwriting on the checks. *Ibid.*

GARNISHMENT

§ 1. Nature of Remedy and Property Subject to Garnishment

Garnishment of defendant's wages was proper where the amount garnished was a debt already accrued to defendant's benefit and where defendant was not entitled to the 60 day exemption of G.S. 1-362. *Sturgill v. Sturgill*, 580.

HOMESTEAD AND PERSONAL PROPERTY EXEMPTIONS

§ 5. Waiver of Homestead Rights

Defendants waived the right to have a homestead alloted in real property sold under execution. *Bank v. Sharpe*, 693.

HOMICIDE

§ 26. Instructions on Second Degree Murder

Trial court's instruction that "the law does not require any specific intent for the defendant to be guilty of the crime of second degree murder or of voluntary manslaughter" was not erroneous. *S. v. King*, 499.

HOMICIDE – CONTINUED

§ 27.1. Instructions on Voluntary Manslaughter

Trial court's instruction on voluntary manslaughter did not limit the jury to finding of absence of malice only if the State failed to prove that defendant acted in the heat of passion or that defendant acted in self-defense. *S. v. King*, 499.

§ 28. Instructions on Self-Defense

Trial court's instruction that defendant could use reasonable force to defend himself if he reasonably believed that a "murderous assault" was being made upon him was not prejudicial error. *S. v. King*, 499.

§ 28.4. Self-Defense; Instructions on Right to Stand Ground

The defense of habitation is not applicable where a person remains in a home after being directed by the owner to leave. *S. v. King*, 499.

HOSPITALS

§ 3.3. Liability for Negligence of Physicians

In a malpractice action to recover damages for injury resulting from an alleged post-operative infection, the trial court properly directed verdict in favor of defendant hospital. *Tripp v. Pate*, 329.

HUNTING

§ 3. Prosecutions

A citation alleging that defendant "did unlawfully and wilfully operate a (motor) vehicle on a (street or highway) ... By hunting deer with dogs in violation of Senate Bill #391" was insufficient to charge defendant with a violation of the criminal laws. *S. v. Wallace*, 475.

HUSBAND AND WIFE

§ 11.2. Construction of Separation Agreement

A provision of a separation agreement in which defendant husband agreed "at the time of divorce decree to execute a document assigning his interest to said household" to plaintiff wife was unambiguous and required defendant to transfer a fee simple to estate to the wife. *Vestal v. Vestal*, 263.

§ 13. Enforcement of Separation Agreements

The trial court had authority to grant specific performance of alimony provisions of a separation agreement pending final determination of the merits of an action on the agreement. *Gibson v. Gibson*, 156.

INDICTMENT AND WARRANT

§ 17.2. Variance as to Time

There was no fatal variance between an indictment charging that the date of a felonious assault was 17 April 1979 and evidence that the assault occurred on 17 February 1979. *S. v. Bailey*, 377.

INFANTS

§ 6. Hearing for Award of Custody

Foster parents had no standing to bring an action for permanent custody of a child temporarily placed with them by the county department of social services. *Oxendine v. Dept. of Social Services*, 571.

§ 11. Jurisdiction Under Juvenile Court Statutes

It was not an abuse of discretion for the juvenile court to transfer a breaking and entering charge against a 15 year old to superior court for trial together with the manditorily transferred charge of the capital offense of first degree murder. *In re Ford*, 680.

§ 18. Juvenile Delinquency Hearing; Sufficiency of Evidence

The evidence in a juvenile hearing was sufficient to prove beyond a reasonable doubt that respondent committed the criminal offense of aiding and abetting an assault with a deadly weapon (his father's car). *In re Rich*, 165.

§ 21. Juvenile Delinquency Proceedings; Appellate Review

A finding of probable cause in a juvenile proceeding was not an appealable final order, and evidentiary rulings of the trial court in conducting the probable cause hearing were not properly before the Court of Appeals for review. *In re Ford*, 680.

INJUNCTIONS

§ 3. Mandatory Injunctions

Trial court erred in entering a preliminary mandatory injunction requiring defendant sanitary district to pay arrearages for past sewage and water services furnished by plaintiff city and to continue paying for such services in the future. *Light and Water Comrs. v. Sanitary District*, 421.

INSANE PERSONS

§ 1.2. Involuntary Commitment; Sufficiency of Evidence

The record in an involuntary commitment proceeding did not support the court's conclusion that respondent was "dangerous to himself" but did support the court's conclusion that respondent was "dangerous to others." *In re Monroe*, 23.

A psychiatrist's "mental status" examination of respondent for some thirty minutes provided sufficient data to support the psychiatrist's expert opinion in an involuntary commitment proceeding. *In re Collins*, 243.

The evidence in an involuntary commitment proceeding supported the trial court's finding that respondent was dangerous both to himself and to others, *Ibid.*

Respondent's unconditional discharge did not moot his appeal from an involuntary commitment proceeding. *Ibid.*

The evidence in an involuntary commitment proceeding supported the court's finding that respondent was dangerous to himself. *In re Frick*, 273.

INSURANCE – Continued

§ 79.1. Automobile Liability Insurance Rates

The Governor had standing to seek a declaratory judgment as to the legality of action by the N.C. Reinsurance Facility imposing surcharges on automobile liability insurance coverages. *Hunt v. Reinsurance Facility,* 206.

Surcharges on automobile liability insurance coverages ceded to the N.C. Reinsurance Facility to recoup past Facility losses and on all automobile liability coverages to recoup anticipated losses on ceded "clean risks" constituted rates which were subject to statutory filing and review requirements. *Ibid.*

§ 112.1. Automobile Liability Insurance; Fraudulent Claims

Evidence was sufficient for the jury in a prosecution for filing a false insurance claim. *S. v. Aleem,* 359.

§ 127. Fire Insurance; Provisions Against Additional Insurance

A clause in defendant's standard fire insurance policy which prohibited other insurance coverage on any item covered by its policy could be given effect in a binder when no policy was ever issued and even though the binder was deemed to include all of the provisions of G.S. 58-176. *Insurance Co. v. Insurance Co.,* 32.

§ 128. Fire Insurance; Waiver of Conditions

In an action to recover the proceeds of a fire insurance policy which excluded coverage on buildings which were vacant or unoccupied beyond 60 days, plaintiff's evidence properly raised issues as to whether defendant insurer had constructive knowledge that the dwelling was unoccupied and as to whether defendant waived the exclusionary provision. *Supply Co. v. Insurance Co.,* 616.

§ 135. Fire Insurance; Subrogation

Insured, who repudiated defendant's policy and obtained a policy through plaintiff, violated the other insurance clause of defendant's policy and had no coverage through defendant so that plaintiff could not recover on a right of subrogation based on its full payment to the insured. *Insurance Co. v. Insurance Co.,* 32.

§ 136. Actions on Fire Insurance Policies

A company employed by defendant insurer to make a fire inspection and report on a dwelling on which plaintiff sought coverage was, for that purpose, acting as agent of defendant insurer so that knowledge of the conditions of the property gained by the company as a result of its investigation was imputable to defendant insurer. *Supply Co. v. Insurance Co.,* 616.

INTEREST

§. Items Drawing Interest

In a declaratory judgment action in which plaintiff sought an interpretation of a contract for sewer services, trial court properly awarded pre-judgment interest. *Raintree Corp. v. City of Charlotte,* 391.

INTOXICATING LIQUOR

§ 2.8. Licenses and Permits; Sufficiency of Evidence of Violations

Evidence that employees of a wine wholesaler restocked the shelves in petitioner wine permittee's store was insufficient to support a finding that petitioner violated a retail wine regulation. *Food Town Stores v. Board of Alcoholic Control*, 149.

§ 7. Sale of Intoxicating Liquor

The State's evidence was sufficient for the jury on the issue of defendant's guilt of unauthorized sale of intoxicating liquor in violation of G.S. 18A-3. *S. v. Shaffner*, 89.

JOINT VENTURES

§ 1. Generally

Summary judgment was properly entered for defendant in an action to recover damages for defendant's alleged breach of his fidiciary duty to plaintiffs in a joint venture formed for the purpose of acquiring the assets of a corporation. *Oliver v. Roberts*, 311.

JUDGMENTS

§ 11. Nature and Essentials of Judgments by Confession

There was no merit to defendant's contention that his confession of judgment for child support and subsequent entry of judgment were defective and not binding on him. *Cromer v. Cromer*, 403.

§ 39. Conclusiveness of Judgments of Courts of Other States

In plaintiff's action to have a Florida divorce judgment declared invalid, the trial court properly entered summary judgment for defendant where the judgment was valid on its face; defendant's pleadings asserted the validity of the decree and the legitimacy of defendant's domicile at the time of the original action; plaintiff offered no proof of the matter other than her own allegations contained in her pleadings, brief, and affidavit; and plaintiff relied upon the divorce judgment, without raising the question of its validity, in entering a settlement agreement under which she received valuable consideration. *Watson v. Watson*, 58.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for the kidnapping of an eleven year old boy. *S. v. McGuire*, 70.

§ 1.3. Instructions

Defendant was not prejudiced by a portion of the charge in which the court stated that one element of kidnapping a person under the age of 16 was "that the victim did not consent" where the court in other portions of the charge instructed the jury that the State must prove that the victim's "parents did not consent to his confinement or restraint." *S. v. McGuire*, 70.

LANDLORD AND TENANT

§ 18. Forfeiture for Nonpayment of Rent

Defendants waived their right to declare a lease in default because the rent for one month was not timely paid when they took plaintiff's checks for that month and for succeeding months and converted them into "official bank checks" payable to defendants. *City Limits, Inc. v. Sandman*, 107.

LARCENY

§ 7.4. Sufficiency of Evidence; Possession of Recently Stolen Property

State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of felonious larceny of a tractor under the doctrine of possession of recently stolen property. *S. v. Voncannon*, 637.

LIMITATION OF ACTIONS

§ 4.6. Accrual of Cause of Action for Breach of Particular Contracts

The parties' contract for the management and division of profits of a business was an instrument within the meaning of G.S. 1-47(2), and the contract was under seal so that the 10 year statute of limitations applied in plaintiff's action to recover his full share of the profits for a certain year. *Hutchinson v. Hutchinson*, 687.

MASTER AND SERVANT

§ 68. Workers' Compensation; Occupational Diseases

The evidence was insufficient to support a determination by the Industrial Commission that plaintiff contracted byssinosis as a result of her exposure to cotton dust in her employment as a weaver with defendant. *Hansel v. Sherman Textiles*, 1.

The Industrial Commission's determination that plaintiff textile worker's lung disease was not caused by cotton dust and lint and that plaintiff thus did not suffer from a compensable disease peculiar to those working in cotton mills was supported by medical testimony. *Brown v. Stevens & Co.*, 118.

Plaintiff, who filed a claim under the Workers' Compensation Act for an alleged occupational disease resulting from exposure to cotton dust, was not entitled to an additional panel physical examination under G.S. 97-27(b). *Clark v. Burlington Industries*, 269.

Evidence was sufficient to support Industrial Commission's finding that plaintiff's pulmonary disease was not compensable under the Workers' Compensation Act. *Ibid.*

Where an employee is exposed in his work place to environmental irritants which in fact hasten the onset of a disabling condition which did not previously exist, such aggravation is tantamount to causation for purposes of G.S. 97-53(13), and the resulting disability is an "occupational disease" thereunder. *Walston v. Burlington Industries*, 301.

§ 77.1. Workers' Compensation; Modification of Award on Grounds of Change of Condition

A claimant who is suffering from a continuing inability to work caused by

MASTER AND TENANT – Continued

the same injury and symptoms which formed the basis of the original award for permanent partial disability did not experience a change of condition which entitles him to compensation for total disability because the psychological basis for plaintiff's disability was not discovered until after the original award. *Edwards v. Smith & Sons*, 191.

§ 96.5. Workers' Compensation; Sufficiency of Findings of Industrial Commission

In an action to recover disability benefits for an occupational disease allegedly contracted by plaintiff as a result of his exposure to cotton dust, evidence was sufficient to support the Industrial Commission's finding that plaintiff suffered from pulmonary emphysema and chronic bronchitis. *Walston v. Burlington Industries*, 301.

§ 108. Right to Unemployment Compensation Generally

The Employment Security Commission's conclusion that claimant quit her job without good cause attributable to her employer and thus was not entitled to unemployment compensation was supported by findings that claimant quit her employment because a co-worker used profane language in her presence and because the co-worker at another time threw a cup of water while engaging in "horseplay" and part of it struck claimant, since such findings do not show that claimant was not provided a safe place to work. *In re Hodges*, 189.

§ 114. Occupational Safety and Health Act in General

The evidence supported a determination by the Safety and Review Board that respondent was guilty of a "serious" and "repeated" OSHA violation in failing to slope to adequate angle of repose or provide adequate shoring for a sewer line trench. *Brooks, Comr. of Labor v. Grading Co.*, 352.

MUNICIPAL CORPORATIONS

§ 22.2. Validity of Municipal Contracts

Trial court could find by competent evidence that a contract for sewer services entered into by the parties' predecessors did not allow for a "tapping privilege fee" to be assessed by defendant against plaintiff. *Raintree Corp. v. City of Charlotte*, 391.

§ 28. Enforcement of Assessment of Lien for Public Improvements

Plaintiff could not enforce a lien for an assessment against a lot where plaintiff had previously brought an action to enforce a lien based on the identical assessment, and the previous action was terminated by plaintiff's taking a voluntary dismissal with prejudice. *Guilford County v. Boyan*, 430.

§ 30.21. Procedure for Enactment of Zoning Ordinance; Hearing

Petitioner waived his right to insist upon sworn testimony in a hearing before a county zoning board of adjustment. *Burton v. Zoning Board of Adjustment*, 439.

§ 31. Zoning Ordinances; Judicial Review in General

There is no merit to petitioner's contention that the superior court erred in

MUNICIPAL CORPORATIONS – Continued

finding that an order of a county zoning board of adjustment was supported by the evidence on the ground that the court did not have a complete record before it. *Burton v. Zoning Board of Adjustment*, 439.

§ 31.1. Judicial Review of Zoning Ordinance; Standing to Appeal or Sue

Where it did not appear in the record that petitioner was the owner of property affected by a ruling of defendant board, petitioner was not an aggrieved party entitled to judicial review, and proceedings in the superior court were therefore nullities. *Pigford v. Bd. of Adjustment*, 181.

NEGLIGENCE

§ 2. Negligence Arising from Performance of a Contract

A sufficient legal basis existed to support plaintiff stockholders' allegations of an individual loss, separate and distinct from any damage suffered by the corporation, where plaintiffs alleged that defendants negligently misrepresented the feasibility of mining certain tracts of land for the purpose of inducing the stockholders to invest. *Howell v. Fisher*, 488.

§ 31. Effect of Doctrine of Res Ipsa Loquitur on Sufficiency of Evidence

The doctrine of res ipsa loquitur applied to provide an inference of negligence by defendant in an action to recover for injuries received by plaintiff when a glass display shelf in defendant's store shattered. *Russell v. Sam Solomon Co.*, 126.

§ 57.10. Sufficiency of Evidence in Actions by Invitees

In an action to recover damages for burns sustained by plaintiff's decedent when she brushed her hand across the surface of a stove displayed in a store owned and operated by defendant, evidence presented a question for the jury as to defendant's negligence and as to plaintiff's decedent's contributory negligence. *Hunt v. Montgomery Ward and Co.*, 642.

§ 58.1. Instructions in Actions by Invitees

In an action to recover damages for burns sustained by plaintiff's decedent when she brushed her hand across a stove displayed in a store owned by defendant, trial court failed to declare and explain the law arising on the evidence. *Hunt v. Montgomery Ward and Co.*, 642.

PARENT AND CHILD

§ 7. Parental Duty to Support Child

The evidence supported the court's finding that respondent mother was deliberately depressing her income and was failing to fulfill her earning capacity because of her disregard for her responsibility to provide reasonable support for her child by a previous marriage. *In re Register*, 65.

The court was authorized by G.S. 50-13.4(b) to order support of a minor child by both parents where the child was in the custody of her grandparents by court order. *Ibid.*

PARTITION

§ 7.1. Report of Commissioners

The report of the commissioners in a partition proceeding is a "similar paper" under Rule 5(a) which must be served upon each of the parties. *Macon v. Edinger*, 624.

The failure to give respondents actual notice of the entry of the report of the commissioners was a "mistake" under both G.S. 46-19 and Rule 60(b), and respondents are entitled to have the clerk's confirmation order set aside pursuant to G.S. 46-19 if they had not received actual notice of the report. *Ibid.*

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 15.2. Malpractice Action; Who May Testify as Expert

In an action to recover for injuries received by plaintiff's intestate when she fell and broke her hip while a patient at defendant hospital, trial court erred in excluding expert testimony by a nurse regarding the standard of care in situations involving a patient's use of a bedpan. *Page v. Hospital*, 533.

§ 16.1. Sufficiency of Evidence of Malpractice

In a malpractice action to recover damages for injury resulting from an alleged post-operative infection, the trial court properly directed verdict for defendant doctor. *Tripp v. Pate*, 329.

In a medical malpractice action to recover for the death of plaintiff's intestate from tetanus in conjunction with other injuries, the evidence on motion for summary judgment failed to show that a doctor-patient relationship ever existed between defendant and plaintiff's intestate, and summary judgment was properly entered for defendant. *Easter v. Hospital*, 398.

PRINCIPAL AND AGENT

§ 5. Scope of Authority

An action to recover the balance due for recreational vehicle seats manufactured by plaintiff and sold to defendant is remanded for a determination of whether the sales manager had authority to bind plaintiff in a warehousing and distribution contract. *Industries, Inc. v. Distributing, Inc.*, 172.

§ 8. Knowledge of Agent as Knowledge of Principal

A company employed by defendant insurer to make a fire inspection and report on a dwelling on which plaintiff sought coverage was, for that purpose, acting as agent of defendant insurer so that knowledge of the conditions of the property gained by the company as a result of its investigation was imputable to defendant insurer. *Supply Co. v. Insurance Co.*, 616.

PROCESS

§ 14.2. Service of Process on Foreign Corporation; Minimum Contacts

The courts of this State had in personam jurisdiction over defendant, an Illinois corporation, where defendant agreed to purchase the assets and take over the liabilities of the church pictorial directories division of an N.C. corporation, and the corporation had contracted with plaintiff for the production of certain church directories. *Delprinting Corp. v. C.P.D. Corp.*, 449.

RAPE

§ 4.3. Evidence of Character and Reputation of Prosecutrix

Trial court in a rape prosecution did not err in refusing to allow the investigating officer to answer on cross-examination a question relating to the character and reputation of the prosecuting witness. *S. v. McLendon*, 459.

§ 6. Instructions

The trial court's instructions in a rape prosecution were proper. *S. v. Wade*, 257.

§ 6.1. Instructions on Lesser Degrees of Crime

In a prosecution of defendant for the first degree rape of two people, the trial court did not err in submitting the offense of assault with intent to commit rape to the jury, since there was evidence of the lesser included offense, and there was no reasonable possibility that a verdict of not guilty would have been returned had the judge failed to instruct on the lesser included offense. *S. v. Wade*, 257.

RECEIVING STOLEN GOODS

§ 5.1. Sufficiency of Evidence

State's evidence in a prosecution for felonious possession of stolen property was sufficient for the jury to find that defendant possessed the stolen items "for a dishonest purpose of resale." *S. v. Boltinhouse*, 665.

RELIGIOUS SOCIETIES AND CORPORATIONS

§ 3.1. Schisms and Controversy as to Right to Use and Control Church Property

Trial court should have entered a directed verdict for defendants in an action seeking to have one plaintiff declared the ruling elder of a church and to restrain defendants from interfering with religious services at the church. *Walters v. Braswell*, 589.

ROBBERY

§ 3.2. Competency of Evidence; Physical Objects and Documentary Evidence

In a prosecution of defendant for common law robbery, trial court did not err in admitting into evidence a rifle purportedly taken during the crimes by defendant. *S. v. Bradsher*, 507.

Trial court in a common law robbery case did not err in admitting into evidence documents purportedly taken from the victim's residence and found 33 days later in an automobile used by defendant and his companions on the night of the incident in question. *Ibid.*

§ 4.2. Common Law Robbery; Sufficiency of Evidence

The State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of common law robbery where the victim identified defendant as one of the four men who chased him, struck him in the head, and took his money, although the victim did not know which of the four struck him in the head or which one actually took his money. *S. v. Murphy*, 443.

ROBBERY – Continued

Evidence tending to show that defendant struck his victim repeatedly in the head with a shotgun was sufficient to raise the inference that defendant took personal property belonging to the victim by force or putting in fear. *S. v. Bradsher*, 507.

§ 4.3. Armed Robbery; Sufficiency of Evidence

The State's evidence was sufficient to identify defendant as the perpetrator of an armed robbery of a theater box office. *S. v. Duers*, 282.

State's evidence in an armed robbery case was sufficient to show that property was taken by force from the victim with the use of a firearm. *S. v. Edwards*, 547.

§ 4.5. Cases Involving Aiders and Abettors in Which Evidence Was Sufficient

State's evidence was sufficient to support defendant's conviction of armed robbery as an aider and abettor. *S. v. Edwards*, 547.

§ 5.4. Instructions on Lesser Included Offenses

In a prosecution for armed robbery the trial court erred in failing to instruct the jury on the lesser included offense of felonious larceny since defendant's testimony that he did not possess a knife, but merely walked out with the money when the victim turned his back to defendant, would have negated the element of violence or intimidation required to elevate the crime of felonious larceny to that of common law robbery or armed robbery. *S. v. Chapman*, 103.

Trial court in a prosecution for common law robbery did not err in refusing to instruct on the lesser included offense of misdemeanor assault. *S. v. Thompson*, 690.

RULES OF CIVIL PROCEDURE

§ 5. Service of Pleadings and Other Papers

The report of the commissioners in a partition proceeding is a "similar paper" under Rule 5(a) which must be served upon each of the parties. *Macon v. Edinger*, 624.

§ 15. Amended Pleadings Generally

In an action for divorce based on one year's separation, the trial court abused its discretion in denying the plaintiff's motion to amend her complaint to change the date of the original separation. *Ledford v. Ledford*, 226.

§ 15.1. Discretion of Court to Grant Amendment of Pleadings

Trial court did not err in allowing defendant's motion to amend his answer after the case was calendared for trial. *Watson v. Watson*, 58.

§ 42. Consolidation

A superior court judge had no authority to order the consolidation for trial in the superior court of plaintiffs' district court action for permanent child custody and plaintiffs' superior court action for adoption of the child where the judge was not presiding at the trial of this matter when he entered his preliminary order of consolidation. *Oxendine v. Dept. of Social Services*, 571.

RULES OF CIVIL PROCEDURE – Continued

§ 55. Default

The clerk is not required to make an affirmative finding that defendant is not a minor and is under no legal disability in order to enter a default or a default judgment. *General Foods Corp. v. Morris*, 541.

§ 59. Amendment of Judgments

A motion to amend a judgment pursuant to rule 59(e) is addressed to the sound discretion of the trial court. *Hamlin v. Austin*, 196.

§ 60.2. Grounds for Relief from Judgment or Order

The failure to give respondents actual notice of the entry of the report of the commissioners in a partition proceeding was a "mistake" under both G.S. 46-19 and Rule 60(b), and respondents are entitled to have the clerk's confirmation order set aside pursuant to G.S. 46-19 if they had not received actual notice of the report. *Macon v. Edinger*, 624.

§ 70. Judgment for Specific Acts

The trial judge was without authority himself to execute an assignment of defendant's wages absent defendant's failure to comply with a judgment within the time specified. *Sturgill v. Sturgill*, 580.

SEARCHES AND SEIZURES

§ 8. Seizure Incident to Warrantless Arrest

Marijuana found on defendant's person was lawfully seized pursuant to a search incident to a defendant's lawful arrest. *S. v. Cooke*, 384.

§ 24. Application for Warrant; Sufficiency of Showing Probable Cause; Information from Informers

An officer's affidavit to obtain a search warrant based upon information from a confidential informant met the minimum standard for setting forth the circumstances from which the officer concluded that the informant was reliable and furnished a reasonable basis for the issuing magistrate to conclude that the informant observed narcotics in defendant's apartment so recently that reasonable cause existed to believe that narcotics could be found in defendant's apartment at the time of the issuance of the warrant. *S. v. Williams*, 184.

§ 34. Plain View Rule; Search of Vehicle

Where an officer stopped defendant's vehicle while defendant was fleeing from the scene of an armed robbery, defendant had no reasonable expectation of privacy in a white plastic bag in plain view in the vehicle which contained money obtained in the robbery. *S. v. Duers*, 282.

§ 37. Scope of Search Incident to Arrest; Vehicles

An officer who stopped defendant's vehicle while it was fleeing from the scene of a robbery had probable cause to believe that defendant had committed a felony, and the officer's search of the vehicle was lawful as an incident of defendant's arrest. *S. v. Duers*, 282.

STATE

§ 10.2. Tort Claims Act; Appeal and Reviews of Proceedings; Remand

The Industrial Commission failed to make sufficient findings of fact as to negligence and proximate cause in a tort claim action to recover for injuries to plaintiff's ankle while he was participating in a summer program for gifted children at Western Carolina University. *Martinez v. Western Carolina University*, 234.

§ 12. State Employees

North Carolina A & T University properly dismissed a secretarial employee for absenteeism, habitual tardiness and falsification of time sheets, and the employee's dismissal was not unfair because the University failed to prove that her absences were not for valid reasons, that her absences hindered the operation of the secretarial pool, or that the University was unaware of her whereabouts, or because her supervisors denied her "flex time." *A & T University v. Kimber*, 46.

TAXATION

§ 25.4. Ad Valorem Taxes; Valuation and Assessment

Even if respondent county violated statutory requirements in the reappraisal of petitioner's mineral rights from $3.00 to $50.00 per acre, the evidence supported a determination by the State Board of Equalization and Review that the assessed valuation did not exceed the true value of the mineral rights. *In re Land and Mineral Co.*, 529.

A finding by the State Board of Equalization and Review that a county's revaluation of petitioner's mineral rights from $2 per acre to $50 per acre was not in excess of the true value of the rights was not supported by substantial evidence. *In re Land and Mineral Co.*, 608.

TORTS

§ 1. Nature and Elements of Torts

A person who commits a criminal act of embracery is liable in civil damages to one who is damaged thereby, and the trial court properly entered a judgment for plaintiff insurer against defendant attorney for the value of the time its attorneys spent in defending a lawsuit which ended in a mistrial because defendant personally contacted a juror and attempted to influence her verdict in the case. *Employers Insurance v. Hall*, 179.

§ 7. Release from Liability

G.S. 1-540.2 does not affect the rule that a plaintiff may not maintain an action for personal injuries while relying on a complete release given by defendant to defeat defendant's counterclaim for property damages. *Leach v. Robertson*, 455.

TRIAL

§ 3. Motions for Continuance

The trial judge did not abuse his discretion in denying plaintiff's motion for continuance made on the ground that her attorney had been unable to prepare adequately for trial due to a schedule conflict. *Tripp v. Pate*, 329.

§ 8. Consolidation

A superior court judge had no authority to order the consolidation for trial in the superior court of plaintiffs' district court action for permanent child custody and plaintiffs' superior court action for adoption of the child where the judge was not presiding at the trial of this matter when he entered his preliminary order of consolidation. *Oxendine v. Dept. of Social Services*, 571.

§ 10.3. Expression of Opinion; Remarks Respecting Expert Witness

The trial court's declaration in the presence of the jury that defendant's president and chief witness was "an expert in the field of machine design" constituted an expression of opinion on the credibility of the witness in violation of G.S. 1A-1, Rule 51(a). *Rannbury-Kobee Corp. v. Machine Co.*, 413.

§ 13. Allowing Jury to Take Exhibits into Room

The trial court erred in allowing the jury to take plaintiff's exhibit into the jury room during deliberations where defendants did not consent to this procedure, and their clear indication of lack of consent sufficiently stated their objection to the trial court. *Doby v. Fowler*, 162.

The trial court erred in permitting the jury, over plaintiffs' objections, to take into the jury room during its deliberations exhibits which had been admitted into evidence and an exhibit which had not been so admitted. *Collins v. Realty Co.*, 316.

UNIFORM COMMERCIAL CODE

§ 37.7. Investment Securities; Purchases

Evidence on motion for summary judgment was insufficient to show a writing signed by defendant showing that the parties had entered into a binding contract for the sale of investment securities within the purview of G.S. 25-8-319. *Oakley v. Little*, 650.

VENDOR AND PURCHASER

§ 5. Specific Performance

Where defendant contracted to convey land but his wife refused to join in the conveyance, plaintiff was entitled to specific performance on the contract with an abatement in the purchase price for the value of the wife's interest. *Taylor v. Bailey*, 216.

VENUE

§ 9. Hearing of Motions

The trial court was not required to rule on defendant's motion for change of venue prior to granting plaintiffs' motions for possession of collateral. *Financial Center v. Sales, Inc. and Acceptance Corp. v. Sales, Inc.* 187.

WORD AND PHRASE INDEX

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