NORTH CAROLINA COURT OF APPEALS REPORTS

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53 N.C. App.

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OF
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CASES REPORTED WITHOUT PUBLISHED OPINION

GENERAL STATUTES CITED AND CONSTRUED

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CASES

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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. ANDREW MORTON CALDWELL

STATE OF NORTH CAROLINA v. KEITH NEIL MADDOX

No. 8014SC1216

(Filed 7 July 1981)

1. **Searches and Seizures § 24— affidavit for search warrant—confidential information received by another officer**

An officer's affidavit based on information received from another officer who in turn received his information from a confidential informant was sufficient on its face to support the issuance of a warrant to search one defendant's person, dwelling, and automobile for cocaine.

2. **Searches and Seizures § 20— affidavit for search warrant—magistrate's determination of insufficiency—presentation of second affidavit to another magistrate**

Where a magistrate determined that an afidavit to obtain a search warrant for narcotics was insufficient to establish probable cause for issuance of the warrant, the State was not estopped from presenting to another magistrate a second affidavit which contained additional information not appearing in the original affidavit relating primarily to the reliability of an unnamed confidential informant, his past record for truthfulness, and his knowledge of illegal drugs, and issuance of the warrant by the second magistrate did not overrule the first magistrate's ruling on the original affidavit.

3. **Searches and Seizures § 20— search warrant—inconsistencies between first and second affidavits—absence of prejudice**

Defendants were not prejudiced by alleged inconsistencies between facts set out in an officer's original affidavit which was found insufficient to establish probable cause for issuance of a search warrant and the officer's sec-

ond affidavit upon which the search warrant was based where sufficient facts would remain to support a finding of probable cause for issuance of the search warrant even if the alleged discrepancies were deleted from the second affidavit, and where defendants had a hearing at which they could have established the falsity of information in the affidavit.

4. **Searches and Seizures § 20— destruction of original affidavit for search warrant—warrant based on second affidavit—absence of prejudice**

Defendants were not prejudiced by the State's destruction of an officer's original affidavit for a search warrant which was found insufficient to establish probable cause where the warrant was based on a second affidavit submitted by the officer, and where defendants were able substantially to reconstruct the first affidavit at the suppression hearing based on testimony by officers who drafted the affidavit. G.S. 132-3.

5. **Constitutional Law § 31— suppression hearing—identity of confidential informant**

The trial court did not err in failing to require the State to disclose the identity of a confidential informant during a hearing on a motion to suppress seized evidence where the search was based on a warrant and the informant did not actively participate in the crimes charged. G.S. 15A-978(b)(1).

6. **Searches and Seizures § 44— suppression hearing—erroneous finding of fact—harmless error**

Although the evidence at a hearing on a motion to suppress evidence obtained pursuant to a search warrant issued on 10 January did not support the trial court's finding that a confidential informant had acquired his information on 9 January, such finding constituted harmless error since allegations in the affidavit to obtain the warrant that the informant had observed a large quantity of cocaine in the dwelling to be searched within five days of 10 January were sufficient to support a conclusion by the magistrate that the information supplied by the informant had not gone stale.

APPEAL by defendants from *Godwin* and *Battle, Judges.* Orders entered 5 May 1980 and 16 June 1980, respectively. Heard in the Court of Appeals 28 April 1981.

On the morning of 9 January 1980, Officer David Groves of the Hillsborough Police Department contacted Durham Vice Squad Officer J. F. Albert with information from a confidential informant that cocaine had been observed at a residence near Durham's Jordan High School, and that the residence was occupied by a person named Andy. The officers talked again that night and some surveillance was conducted on the premises at 4713 Hope Valley Road. On 10 January 1980, Groves and Albert prepared an affidavit for the purpose of obtaining a warrant to search the premises at 4713 Hope Valley Road. The affidavit filled

up one normal size fourteen line page and was not signed by Mr. Groves. Albert and Groves presented the application for a search warrant to Durham County Magistrate Angel Green. Magistrate Green questioned the officers about the information contained in the application and was not satisfied that a sufficient showing had been made to establish probable cause for the issuance of a warrant. The magistrate refused to issue the warrant.

The next day Albert took the affidavit which had been rejected by Magistrate Green the previous evening to Durham's Police Legal Advisor, Reece Trimmer. Following a discussion of the events which had occurred, Trimmer, with the assistance of Albert, prepared a new application for a warrant to search the premises, which affidavit contained additional language and information which did not appear in the initial application. Upon completion of the second affidavit, the original affidavit was apparently destroyed. Albert obtained approval from the District Attorney and at approximately 5:00 or 5:30 p.m. on 10 January 1980, presented the new application for a search warrant to Durham County Magistrate Sarah Spell. After questioning Officer Albert about the information contained in the affidavit, Magistrate Spell found probable cause and issued a warrant for the search of the premises described therein. The warrant was executed and a search of the premises was conducted at approximately 9:00 p.m. on 10 January 1980, as a result of which marijuana and cocaine were confiscated and the defendants were arrested.

The defendants were indicted for possession and manufacture of various controlled substances. On 5 May 1980, defendants' motions to suppress evidence obtained pursuant to the search warrant were heard before Judge Godwin. Defendants' motions were denied. On 16 June 1980, Judge Battle entered orders denying the remainder of defendant's pretrial motions, including an amended motion to suppress. Defendants entered conditional guilty pleas, judgments were entered, and defendants appeal from the denial of their motions to suppress as permitted under G.S. 15A-979(b).

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

Cheshire & Manning by Joseph B. Cheshire, V, for defendant appellant Caldwell; and Hassell & Hudson by Charles R. Hassell, Jr. and R. James Lore for defendant appellant Maddox.

CLARK, Judge.

[1] The affidavit upon which the warrant was issued reads as follows:

"APPLICATION FOR SEARCH WARRANT

I (Insert name and address; or, if a law officer, insert name, rank and agency) Investigator J. F. Albert, Durham Police Department, being duly sworn, hereby request that the court issue a warrant to search the (*person*) & (*place*) (*vehicles*) described in this application and to find and seize the items described in this application. There is probable cause to believe that certain property, to wit: Cocaine, a Schedule II controlled substance, and mailed envelopes, receipt mailing labels, licenses, warranty papers and similar documents showing ownership and possession of premises, scales, cutting material, (*constitutes evidence of*) (constitutes evidence of the identity of a person participating in) a crime, to wit: Possession of a Schedule II x controlled substance being cocaine with intent to sell and distribute, a violation of G.S. 90-95 and the property is located (*in the place*) & (*in the vehicle*) (*on the person*) described as follows: (Unmistakably describe the building, premises, vehicle or person—or combination—to be searched.) A one story red brick dwelling structure located at 4713 Hope Valley Road, Durham, N. C. This house has white trim and a carport on the left as you face it. Vehicle is 1972 Oldsmobile four door, tan, NC license SSM—613, and person is Andrew Morton Caldwell, white male age 29.

The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: I am an investigator assigned to the Vice and Narcotics Division of the Durham Police Department; I have received special training in drug identification and drug trafficking as well as extensive training in law enforcement; I have been a law enforcement officer for more than nine years, and have had numerous occasions to investigate the sale of illegal drugs. I make this affidavit based upon my personal knowledge and based upon information I have received from others, including other law enforcement officers all of whom I have known and worked with over time. I as recently contacted by

Officer David A. Groves of the Hillsborough N. C. Police Department who is an officer I have worked with and personally know to be a careful and responsible officer. Officer Groves told me that he, Off. Groves, had a person who acted as a confidential informer for him on numerous occasions in the past, including the recent past. Officer Groves further sta-- that this confidential informer was known to Officer Groves to be truthful and accurate in his information; Officer Groves further advised me that this confidential informer has given him information in the recent past past leading to arrests and convictions, the most recent information from this informer having been given in the past sixty days and did lead to an arrest and was accurate information. Officer Groves also stated that this same info--- is knowledgable in illegal drug use and in the sale of drugs and narcotics and this informer can recognize drugs and narcotics by the type and shape of drug packaging normally used in this area by drug dealers. Officer Groves further stated to me that this same informer came to him at a time during this past seven days and told Officer Groves that he, this informer, was personally inside the dwelling above described at 4713 Hope Valley Road, Durham, N. C. where he talked to a white male who introduced himself as Andy Caldwell. This informer told Officer Groves that while he was inside this same house that Andy Caldwell told him that he had cocaine to sell, and further showed to this informer a stack of plastic baggies containing varying quantities of white powder. This informer told Officer Groves that Andy Caldwell stated to this informer that he was selling an ounce of cocaine for $1,750, and $500 for a quarter ounce, and $80 for a gram of cocaine. This informer stated that he was inside this house and was shown these plastic baggies of white powder sometime within the past five days from this date. This informer was questioned by Officer Groves as to the total amount of cocaine in this house and the informer replied that 'there was a whole xxxxxxx bunch of coke' in there. This informer also said Andy's car was a tan Olds four door with license ssm—613, and gave Officer xxx Groves a description of the house. I have personally corroborated that a 1974 Oldsmobile 4 door license SSM-613 was parked at 4713 Hope Valley Road and this vehicle is registered to Andrew Morton Caldwell of 4713

Hope Valley Road. Based upon my training and experience as an officer, I know that persons dealing in large quantities of cocaine will package cocaine in xxx plastic baggies of gram and quarter ounce size since this is a street sale quantity. This description by the informer is entirely consistent with known patterns of drug dealers in hard drugs like cocaine. I believe that a quantity of cocaine this large would probably still be located on this premises, and that this automobile is probably used by Caldwell in his transportation and delivery of cocaine, and may contain illegal drugs.

s/ J. F. ALBERT Investigator
Signature of Applicant

Sworn to and subscribed before me
this 10th day of JANUARY, 1980.

s/ SARAH H. SPELL
Assistant Deputy Clerk of Superior Court
Magistrate/~~District/Superior Court Judge~~"

Although not complained of by defendants, we note that this affidavit is not of the usual kind in that the affiant did not receive his information from the confidential informant, but from a named informant (Officer Groves) who in turn received his information from an unnamed informant. The affidavit, since it sets out facts upon which the magistrate could determine the reliability of both the unnamed informant and the named informant would appear to satisfy fully the reliability requirements of *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964) and *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969); moreover, it is well-established that where the named informant is a police officer, his reliability will be presumed. *See State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971) (affiant may rely upon information of other officers obtained in the performance of their duties), *cert. denied*, 414 U.S. 874, 38 L.Ed. 2d 114, 94 S.Ct. 157 (1973); *see also State v. Williams*, 49 N.C. App. 184, 270 S.E. 2d 604 (1980) (approving warrant wherein affiant received his information from an officer who had learned it from a confidential source). We therefore hold that this affidavit is sufficient on its face to support the issuance of a search warrant and that it complies with all the legal requirements for a valid showing of prob-

able cause. We note that defendants have nowhere objected to the sufficiency of this application/affidavit on its face, but have assailed rather, the procedure followed by Officer Albert in obtaining the warrant and the factual basis for some of the information.

[2] Defendants argue on the sole authority of *United States v. Davis*, 346 F. Supp. 435 (S.D. Ill. 1972), that the State should be equitably estopped from taking an affidavit containing substantially the same information as the first to a second magistrate once the first affidavit had been determined insufficient to establish probable cause. Defendants assert that the State was simply judge-shopping and argue that "[t]o permit one judicial officer to overrule another of equal rank in this manner is to render the judicial action of an official of the General Court of Justice a meaningless act." We fail to see how *United States v. Davis, supra*, applies to the facts of the case *sub judice*. In *Davis* it was the *identical* affidavit that had already been rejected that was presented to a second magistrate. Here the affidavit was not identical to the first. The testimony at the hearing revealed that Mr. Trimmer was better versed in drafting applications for search warrants and that although he drafted the second affidavit based upon the first, he added to it certain information that Groves had previously related to Albert, but which had not appeared in the first affidavit. This information appears to have gone primarily to the reliability of the unnamed informant, his record for truthfulness in the past, and his knowledge of illegal drugs. These additional matters resulted in a substantially more complete affidavit being presented to Magistrate Spell than the one presented to Magistrate Green. The two magistrates did not rule on identical affidavits or on identical information; therefore, Magistrate Spell cannot fairly be said to have "overruled" Magistrate Green's ruling on the first affidavit. A further ground for distinguishing *United States v. Davis, supra*, is that the *Davis* court held that the affidavit in that case failed to establish probable cause. We have held that the affidavit before Magistrate Spell was sufficient to support a finding of probable cause. We must reject defendants' argument on the grounds that the *Davis* case upon which they rely is factually distinguishable from the case *sub judice*.

[3] Defendants next point to several alleged inconsistencies between the facts set out in the first affidavit and those in the second. They argue that this is some evidence that the affidavits contained false statements made knowingly and intentionally, or with reckless disregard for their truth. *See Franks v. Delaware*, 438 U.S. 154, 57 L.Ed. 2d 667, 98 S.Ct. 2674 (1978). We have examined the discrepancies alleged by defendant and find them to be insignificant, but even if all the so-called discrepancies were deleted from the affidavit, sufficient facts would remain to support Magistrate Spell's finding of probable cause. The *Franks* holding is limited to cases where the allegedly false statement is necessary to a finding of probable cause. *Id.* Such not being the case, defendants cannot claim prejudice from the inclusion of the statements in the warrant; besides which, *Franks* requires only that a hearing be held at which defendants may establish the falsity of information in the affidavit. Defendants had such a hearing and thus got all they could ever be entitled to under *Franks*. *See 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).

[4] Defendants argue that by destroying the first affidavit, the State violated G.S. 132-3 requiring the preservation of public documents. We see no reason to address this argument since defendants fail to show how the destruction of the first affidavit in any way prejudiced them, in light of the fact that the search warrant was based on the second affidavit. Their argument that the first affidavit might have contained evidence favorable to their defense or have provided material for impeachment of the second affidavit is not persuasive. Defendants were able to substantially reconstruct the first affidavit at the suppression hearing based on the testimony of Groves and Albert, who drafted the affidavit; Trimmer and Officer O. G. Mannon, who read the document; and Magistrate Green who refused to issue a warrant on the basis of the first affidavit. Defendants clearly got the information contained in the first document before the court and we hold that any potential for prejudice resulting from the destruction of the original affidavit was thereby offset.

[5] We reject defendants' argument that the identity of the confidential informant should have been revealed. Neither G.S. 15A-978 nor the case of *Roviaro v. United States*, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623 (1957), cited in defendants' brief require

the disclosure of the identity of an unnamed informant where the search was based on a warrant, *see* G.S. 15A-978(b)(1), and the informant did not actively participate in the offense, *see State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973); *State v. Ketchie*, 286 N.C. 387, 211 S.E. 2d 207 (1975); *State v. Parks*, 28 N.C. App. 20, 220 S.E. 2d 382 (1975), *cert. denied*, 289 N.C. 301, 222 S.E. 2d 701 (1976); *State v. Orr*, 28 N.C. App. 317, 220 S.E. 2d 848 (1976).

Defendants argue that the original affidavit presented to Magistrate Green was insufficient to establish probable cause. This argument is irrelevant. The affidavit presented to Magistrate Spell was sufficient and it was upon this second affidavit that the warrant issued. We have already held that this warrant contains sufficient facts to establish probable cause even absent those facts which defendants claim were false or exaggerated.

[6] Defendants argue finally that the findings of fact of Judge Godwin were not supported by the evidence. We have carefully reviewed the record and find ample support in the testimony before the judge on *voir dire* for each finding of fact to which defendants have excepted save one. In the order of 5 May 1980, Judge Godwin found that the confidential informant had acquired his information on 9 January 1980. Neither Albert's affidavit nor any testimony at the suppression hearing supported this finding. The only evidence of the time when the informant gathered his information is found in the affidavit itself which indicates the informant learned of the drugs within five days prior to 10 January 1980 and that Albert believed "that a quantity of cocaine this large would probably still be located on this premises." The Magistrate apparently reached the same conclusion. We hold that this error by the trial judge was harmless in light of the fact that the facts actually alleged, although different than those found by the judge, were sufficient to support a conclusion by Magistrate Spell that the information supplied by the informant had not gone "stale."

We find no error in the denial of defendants' motions to suppress.

No error.

Judges VAUGHN and WELLS concur.

WESLEY WARREN PEEDE, PLAINTIFF v. GENERAL MOTORS CORPORATION, ERVIE MATTHEWS BARBOUR AND EDWARD E. BARBOUR, DEFENDANTS AND THIRD-PARTY PLAINTIFFS; LINWOOD RAY PEEDE, THIRD-PARTY DEFENDANT

No. 8010SC738

(Filed 7 July 1981)

Cancellation and Rescission of Instruments § 10.3; Torts § 7.2— automobile accident—release of one tortfeasor—mutual mistake

In an action to recover for injuries sustained in an automobile accident, the trial court erred in entering summary judgment for defendants where the materials offered by plaintiff in opposition to defendants' motions for summary judgment raised a genuine issue of material fact as to whether plaintiff and an insurance adjuster intended to release only plaintiff's brother, who was driving the car in which plaintiff was a passenger, and the company which insured plaintiff's brother and thus made a mutual mistake of fact in executing a release which, by its terms, released all joint tortfeasors.

APPEAL by plaintiff from *Herring, Judge.* Order entered 22 April 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 2 June 1981.

This is a civil action wherein plaintiff Wesley Warren Peede seeks to recover damages resulting from injuries he suffered in an accident involving an automobile manufactured by defendant General Motors Corporation (hereinafter "GMC") in which plaintiff was a passenger, and an automobile owned by defendant Edward E. Barbour and operated by defendant Ervie Matthews Barbour. In a complaint filed 3 June 1979, plaintiff alleged, among other things, the following: On or about 16 June 1976 plaintiff was a passenger in the right rear seat of a 1973 Chevrolet Caprice manufactured by defendant GMC when the vehicle was negligently struck in the rear by a 1971 Ford automobile driven by defendant Ervie Barbour; upon impact, the trunk lid of the Caprice separated from the body of the car, came through the rear windshield, and struck plaintiff in the head, causing severe injuries, including "loss of function of a large part of the brain" and "loss of one eye"; defendant GMC was negligent in the design, manufacture, and assembly of the hinges fastening the lid of the trunk to the body of the 1973 Chevrolet Caprice, and such negligence was a proximate cause of the injuries suffered by plaintiff; defendant GMC breached certain "implied and/or express warranties" with

respect to the 1973 Chevrolet Caprice in which plaintiff was a passenger, and plaintiff's injuries were the "direct and proximate result" of such breach; defendant Ervie Barbour was negligent in the operation of the vehicle she was driving, and such negligence was a proximate cause of plaintiff's injuries; and the vehicle driven by defendant Ervie Barbour was owned by defendant Edward E. Barbour and was being driven with the consent and authorization of defendant Edward Barbour "for the purpose for which the same was maintained and kept" by defendant Edward Barbour.

Defendant GMC answered, admitting it designed and manufactured the 1973 Chevrolet Caprice referred to in the complaint, and that it made certain express warranties in relation to the sale of such automobiles, but denying the other material allegations directed to it in the complaint. Defendant GMC further averred, among other things, as follows: No privity of contract existed between it and plaintiff; the negligence of the driver of the car in which plaintiff was riding, Linwood Ray Peede, plaintiff's brother, along with the negligence of defendant Ervie Barbour, were the sole and proximate causes of the collision and resulting injuries to plaintiff; and plaintiff assumed the risk of the collision and was contributorily negligent. Defendant GMC also pled in bar of plaintiff's claim a "settlement agreement" entered into by plaintiff and his brother Linwood Peede for the sum of $25,000 releasing Linwood Peede "and all other tort feasors" from any liability arising out of the accident.

Defendants Ervie and Edward Barbour also answered, denying the material allegations of the complaint directed to them, except for the allegation that Ervie Barbour was using the vehicle owned by Edward Barbour with Edward Barbour's permission and that Edward Barbour kept and maintained the vehicle for the purpose for which Ervie Barbour was using it. These defendants also pled in bar of plaintiff's claim the "settlement agreement" between plaintiff and Linwood Peede as described above.

On 10 August 1979, defendant GMC filed a motion for judgment on the pleadings, or in the alternative, for summary judgment on the grounds that plaintiff, in consideration for the sum of $25,000, executed a "written release of all claims against Linwood R. Peede and all other tort feasors, including General Motors Cor-

poration, arising out of" the accident in question. In support of its motion, defendant GMC offered the deposition testimony of plaintiff and the release document which in pertinent part provides:

> The undersigned, first party [plaintiff], being of lawful age, in consideration of twenty-five thousand & no/100 dollars ($25,000.00) does hereby forever release, acquit and discharge Linwood R. Peede, second party, and all other tort feasors, from any and all rights of action, claims and demands whatsoever arising out of any act or things done or omitted to be done by second party up to the date of this instrument, including but not limited to rights of action, claims and demands for any and all injury to mind, body, or property, whether now known or not or which may hereafter develop by reason of an occurrence at or near Angier, N.C. on or about 6-16-76. . . .
>
> . . .
>
> FIRST PARTY [plaintiff] HAS CAREFULLY READ AND UNDERSTANDS THIS RELEASE AND SIGNS IT FREELY AND WITHOUT RESERVATION.
>
> CAUTION! READ BEFORE SIGNING
>
> s/ W. W. Peede

On 23 August 1979, plaintiff moved for an order allowing him to reply to defendant GMC's plea in bar relating to the release, and also moved for summary judgment on the grounds that there was a mutual mistake in leaving in the release the words "all other tort feasors" when the "true intent of the parties was that no person or party be released other than Linwood R. Peede and Unigard Indemnity Company." In support of the motions, plaintiff offered his own affidavit and the affidavit of J. Frank Carter, an adjuster with Unigard Indemnity Company, the automobile liability insurer for Linwood Peede.

The matter came on for hearing on plaintiff's motion for summary judgment, defendant GMC's motion for summary judgment, and on a motion for summary judgment made by defendants Barbour. In addition to the affidavits, the record before the court included the depositions of plaintiff, plaintiff's wife Jo Ann Peede, and J. Frank Carter, the release document, and several requests

for admission with answers. From an order allowing defendants' motions for summary judgment, denying plaintiff's motion for summary judgment, and dismissing plaintiff's action, plaintiff appealed.

Blanchard, Tucker, Twiggs, Denson & Earls, by Charles F. Blanchard and Douglas B. Abrams; and Hilary D. Daugherty, for the plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter, by Stephen P. Millikin and Douglas W. Ey, Jr., for defendant appellee General Motors Corporation.

Ragsdale & Liggett, by George R. Ragsdale, for defendant appellees Ervie and Edward Barbour.

HEDRICK, Judge.

The sole question presented by this appeal is whether the court erred in entering summary judgment in favor of defendants. Plaintiff contends that a genuine issue of material fact exists as to whether the release was executed under circumstances amounting to mutual mistake. We agree.

In his depositions, plaintiff testified with regard to the release as follows:

> It was my understanding that the limits of my brother's insurance policy were being paid and was releasing my brother.
>
> I am familiar with the standard release form, but one state is different from another state. I use a standard form in my work, but not like that.
>
> . . .
>
> I remember the man from my brother's insurance company coming by. I had never seen him before. When he came by, he identified himself as an insurance adjuster. I knew that he was an insurance adjuster and that he represented my brother's insurance company, Unigard.
>
> Mr. Carter told me my brother's limits were $25,000, and that he had these papers for me to sign. I said what are they. He said it is a release which releases your brother only. I

said, are you telling me the truth. He said, yes, that is all it is. I said, I can't read this; I couldn't even see it. He said it is just for your brother. I signed and released my brother.

. . .

He did not leave a copy of the release with me.

. . .

I did not have any difficulty writing my name. I could not see well enough with one eye to write my name. I can write like that without seeing at all. . . .

I did not ask Mr. Carter to read this release to me before I signed it. He did not offer to read it to me. My wife has never seen it before. She was in and out at the time. . . . I did tell him that I could not read it. He said it is just a release that releases your brother only and that is it. I accepted the $25,000 and cashed the check. . . .

. . .

I asked him if this releases anyone other than my brother. He said no, this is a release for your brother only. It was as simple as that. I said, are you telling me the truth, and he said yes. I said, I can't read this. There is no way I can read it, and I can't understand it if I did read it. He said, it releases your brother only. That was it, and I signed it for him.

Plaintiff's wife, Jo Ann Peede, testified upon deposition as follows:

I am sure Warren could have read the release but there was no way; he hadn't been reading the newspapers or anything. He hadn't been able to just sit down and read something. . . .

. . .

He [Carter] stated that it released Ray [Linwood Ray Peede] only and his insurance company, that he didn't have any authorization from anyone else, that he wasn't representing anyone else, that it was just Ray.

There was no discussion about anyone else being responsible or at fault. Neither the Barbours nor General Motors was mentioned. . . .

The insurance adjuster, J. Frank Carter, testified upon deposition as follows:

As senior adjuster with Unigard, I had occasion to investigate an accident involving Mr. Wesley Warren Peede which occurred June 16, 1976. Unigard insured Linwood Ray Peede who is Wesley's brother.

. . .

I told him that I had authority to write him a check for $25,000, and take a release releasing Ray Peede and Unigard Insurance Group for this amount. Mr. Peede seemed to understand that was the limits of the policy and he accepted the settlement offer.

I had a form release for Mr. Peede to sign. The release was filled out prior to my going there. . . .

. . .

While I was at the house, Mr. Peede said he didn't have any vision in his left eye because he didn't have an eye. He had a little blurred vision in his right eye. . . .

. . .

At the time of the settlement of the claim, I was solely representing Unigard and Linwood Ray Peede.

At the time of the execution of the release, I told Mr. Peede and made it perfectly clear to Mr. Peede and his wife that this was releasing only Unigard and Linwood Ray Peede. That was my intent, and as far as I know, that was Mr. Peede's intent.

. . .

I am sure that I told Mr. Peede that this would release his brother and Unigard Indemnity Company if he accepted the $25,000 and signed the release. My only intent was to release his brother and Unigard Insurance Group. . . . It was my concern that day to pay the full Unigard coverage and get a release of Unigard and Unigard's insured. . . .

In addition, plaintiff's own affidavit contains the following:

> [H]is [plaintiff's] signing of the release would release only his brother, Linwood Ray Peede and Unigard Indemnity Co.; that it was further his understanding that the release did not release any other person or company.
>
> . . .
>
> That at the time of signing the release, plaintiff . . . was unable to read the release which he signed and relied wholly on Mr. Carter's explanation to him as to what he was signing.
>
> That at the time of the signing it was in fact his intent and [he] believed that it was the intent of Mr. Carter that he was releasing only his brother Linwood Ray Peede; and that the fact the words "all other tort feasors" in the fifth line of the release were not stricken was a mistake.

Furthermore, the affidavit of J. Frank Carter contains the following:

> At the time of the execution, I made it clear to Mr. W. W. Peede that this was releasing only his brother and that this was the intent of both Mr. W. W. Peede and myself when the release was executed.
>
> The words "all other" tort feasors in the fifth line was mistakenly left in and included in the release.

In *Cunningham v. Brown*, 51 N.C. App. 264, 276 S.E. 2d 718 (1981), after an accident in which a vehicle driven by the defendant collided with a motorcycle ridden by the plaintiffs, the plaintiff-wife gave a release to plaintiff-husband's automobile liability insurer which contained the following language:

> release and forever discharge LANCE CUNNINGHAM [plaintiff-husband] and any other person, firm, or corporation charged or chargeable with responsibility or liability . . . from any and all claims . . . loss or damages of any kind already sustained or that [she] may hereafter sustain in consequence of [the accident].

The defendant sought and obtained summary judgment in her favor on the basis of the above-quoted language. This Court, after stating that nothing else appearing, the quoted language would release all other entities involved in the accident, said that the

release could nevertheless be avoided upon a showing that its execution resulted from mutual mistake of fact, citing *Cheek v. R. R.*, 214 N.C. 152, 198 S.E. 626 (1938). This Court then stated:

> The facts alleged in plaintiff-wife's affidavit would permit a finding that she and the adjuster agreed and intended to release only plaintiff-husband. The document signed contained language contrary to this mutual agreement and intention in that by its terms it released other joint tortfeasors as well as plaintiff-husband. It therefore failed to achieve the result which could be found to have been agreed to and intended by both parties. . . . Thus, the failure to accomplish the result intended by both parties here could be found to constitute a mutual mistake of fact which would permit reformation of the document. [footnote omitted]

Id. at 273-74, 276 S.E. 2d at 726. This Court held that the plaintiff-wife's affidavit raised genuine issues of fact as to whether the release was executed under circumstances amounting to mutual mistake, and that the trial court erred in entering summary judgment for the defendant.

We hold that the present case is controlled by *Cunningham v. Brown, supra.* The materials offered by plaintiff in opposition to defendants' motions for summary judgment clearly raise a genuine issue of material fact as to whether plaintiff and Carter, the adjuster for Unigard, intended to release only Linwood Peede and Unigard Indemnity Company and thus made a mutual mistake of fact in executing a release that by its terms released all joint tort-feasors.

We note, in addition, that plaintiff had sued defendant GMC for breach of warranty as well as in tort. Defendant GMC moved for summary judgment on the ground that the provisions of the release absolved them from liability to plaintiff; the provisions of the release, however, would *not* apply to plaintiff's claim under breach of warranty.

We therefore conclude that the trial court erred in entering summary judgment in favor of defendants. The order granting defendants' motions for summary judgment, denying plaintiff's motion for summary judgment, and dismissing plaintiff's action is

reversed, and the cause remanded to the trial court for further proceedings consistent with this Opinion.

Reversed and remanded.

Judges MARTIN (Harry C.) and WELLS concur.

NELLE L. MARKHAM, PLAINTIFF v. REBECCA F. MARKHAM, EXECUTRIX OF THE ESTATE OF HAROLD T. MARKHAM, DECEASED, DEFENDANT, AND REBECCA F. MARKHAM, DEFENDANT

No. 8020SC860

(Filed 7 July 1981)

1. Divorce and Alimony § 16— alimony—termination upon death

The evidence supported the trial court's finding that payments of $100 per week for 521 weeks which a divorce judgment required decedent to make to plaintiff constituted alimony and not a property settlement, and plaintiff's right to receive the payments terminated upon decedent's death.

2. Fraudulent Conveyances § 3.4— insufficient evidence of fraudulent transfer

The evidence supported the trial court's determination that decedent's assignment of his interest in two notes and a deed of trust to his second wife was lawful and not fraudulent as to his creditors, including his first wife, where the evidence tended to show that at the time of the assignment decedent was indebted to his former wife for alimony arrearage in an amount of $700 to $800; decedent had income in the year of assignment from the sale of land; decedent thought his first wife had no further interest in the notes after their divorce; prior to the assignment, decedent had suffered a stroke and was no longer able to work; decedent's medical and other expenses exceeded his income and were paid by his second wife; and the notes were assigned to decedent's second wife because of money she had loaned to him and because of all the expenses incurred by reason of his illness.

3. Bills and Notes § 7— retention of interest in notes upon divorce

The evidence supported findings by the trial court that decedent's former wife retained her one-half interest in two notes at the time of her divorce from decedent and that decedent thus did not assign the entirety of the notes to his second wife.

APPEAL by plaintiff and defendants from *Reid, Judge.* Judgment entered 14 March 1980, Superior Court, MOORE County. Heard in the Court of Appeals 30 March 1981.

This action was instituted to recover allegedly due but unpaid alimony from the estate of Harold T. Markham; to have Rebecca F. Markham, individually, pay into the estate of Harold T. Markham $19,562.90 plus interest representing one-half interest in two notes given to plaintiff and Harold T. Markham in payment for the sale of property owned by them as tenants by the entirety and assigned by Harold T. Markham to Rebecca F. Markham; to have Rebecca F. Markham deliver to the estate of Harold T. Markham the interest of plaintiff in the two notes; to recover from the estate the sum of $19,562.90 plus interest. Defendant both individually and as Executrix, denied the pertinent allegations of the complaint.

A receiver was appointed by the court to receive payments of principal and interest on the two notes and to place funds received by him in a saving account pending order or judgment of the court. Subsequently, the court entered an order authorizing the receiver to receive payment in full of one of the notes and direct the trustee to cancel the deed of trust of record.

After trial of the matter before the court without a jury, the court made the following findings of fact and conclusions of law:

1. That the payments awarded in the divorce decree providing inter alia that plaintiff (Harold Markham) paid to defendant (Nelle Markham) the sum of One Hundred Dollars ($100.00) per week for a period of 521 weeks was a provision for the maintenance and support of Nelle L. Markham.

2. That Harold Markham paid Nelle Markham $2,100.00 on said payments before his death, and at his death was 162 weeks in arrears on his weekly support payments.

3. That the settlement agreed upon between Nelle L. and Harold T. Markham made no provision for, nor any reference to, the Foxfire or the McSwain notes.

4. That Nelle Markham did not in the agreement with Harold Markham assign, convey or otherwise transfer her interest in and to the Foxfire or McSwain notes to Harold Markham.

5. That by his conduct and disposition and after the divorce entered on November 20, 1972, with regard to the Foxfire

and McSwain notes, it is manifest that Harold Markham was motivated by the belief that the failure of Nelle Markham to make demand for the Foxfire or McSwain notes, or any interest therein, had amounted to a relinquishment by Nelle Markham of a claim to her interest in the Foxfire and McSwain notes in consideration of the other conveyances made to her by Harold Markham at the time of the entry of the divorce judgment.

6. That Harold T. Markham was motivated by the belief (albeit erroneous) that he was the owner of all right, title, and interest in both the Foxfire and McSwain notes, and that his assignment of his interest in same to Rebecca Markham was not motivated by any intent to defraud Nelle Markham.

7. That Harold Markham suffered a crippling stroke on December 28, 1972, and was unable thereafter to pursue any gainful employment. That after December 28, 1972, his expenses were far in excess of his income. That his assignment of his interest in the Foxfire and McSwain notes to his wife, Rebecca Markham, were in consideration of his financial dependence upon his wife, Rebecca Markham, and in repayment of prior loans made to him by Rebecca Markham. That such assignment to Rebecca Markham was not for the purpose of defrauding his creditors in general, and Nelle Markham in particular.

8. That upon and after the divorce of Nelle L. Markham and Harold T. Markham, Nelle L. Markham had and retained a one-half undivided interest in the Foxfire and McSwain notes and deeds of trust as a tenant in common with Harold T. Markham.

Upon the foregoing Findings of Fact the Court concludes as a matter of law:

1. That said payments of $100.00 per week set out in the divorce judgment as payments for the support and maintenance of Nelle L. Markham as such ceased as a matter of law upon the death of Harold T. Markham, pursuant to the provisions of G.S. 50-16.9(b).

2. That on May 6, 1976, Harold T. Markham was indebted to Nelle L. Markham for the sum of $16,200.00 for payments due

under the provisions of the divorce decree, together with interest thereon at the rate of six percent per annum.

3. The ownership interest of Harold T. Markham and Nelle L. Markham in the Foxfire and McSwain notes and deeds of trust were unchanged and not modified by their 1972 property settlement and divorce as to their ownership as tenants in common.

4. That prior to their divorce in 1972 Nelle L. Markham and Harold T. Markham each had an undivided one-half interest in the Foxfire and McSwain notes and deeds of trust.

5. That upon and after the divorce of Nelle L. and Harold T. Markham in 1972 Nelle L. Markham had and retained a one-half undivided interest in the Foxfire and McSwain notes and deeds of trust as a tenant in common with Harold T. Markham.

6. On and after November 20, 1972, Nelle L. Markham was and is entitled to have and receive one-half of any proceeds, including principal and interest, of the said Foxfire and McSwain notes and deeds of trust which were received by Harold T. Markham and his Estate, together with interest thereon.

7. That Nelle L. Markham is entitled to have and receive one-half of any proceeds, including principal and interest, of said Foxfire and McSwain notes and deeds of trust which have been received and held by the Receiver in this action plus one-half of all accumulated interest received and retained by the Receiver.

8. That Nelle L. Markham is entitled to have and receive one-half of any proceeds, including principal and interest, of said Foxfire and McSwain notes and deeds of trust which will be received and held by the Receiver in this action plus one-half of the accumulated interest in said notes.

9. That the effect of the assignment of June 17, 1973, by Harold T. Markham to Rebecca F. Markham was a conveyance only of Harold T. Markham of one-half undivided interest in and to the Foxfire and McSwain notes.

10. That Rebecca F. Markham is entitled to have and receive one-half of any proceeds, including principal and interest, of said Foxfire and McSwain notes and deeds of trust which have been held by the Receiver in this action, together with one-half of all accumulated interest thereon since November 20, 1972.

From the judgment entered all parties appealed.

Joseph D. Eifort for plaintiff appellant and plaintiff appellee.

Pollock, Fullenwider, Cunningham and Pittman, by Bruce T. Cunningham, Jr., for defendant appellant and defendant appellee.

MORRIS, Chief Judge.

Plaintiff's Appeal

All questions raised by this appeal are properly answered by a determination of whether the facts found by the court are supported by competent evidence and a determination of whether the facts so found are sufficient to support the conclusions of law made. Plaintiff does not contend that there were errors of law made, and she does not seek a new trial.

The court, sitting as the trier of facts, makes findings of fact which have the force and effect of a jury verdict, and its judgment will not be disturbed on appeal if there is any evidence to support its findings of fact and those findings support the judgment, even though the evidence might sustain findings to the contrary. *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976); *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975).

[1] Plaintiff first assigns as error the court's finding of fact No. 1, that the payments of $100 per week for 521 weeks was alimony, contending that the evidence requires a finding that it was a property settlement. We do not agree. We think the evidence, viewed as a whole, compels this finding. Plaintiff's counsel, on 27 September 1972, wrote counsel for her husband, who, at that time had filed an action for absolute divorce based on separation for one year. For plaintiff, her counsel suggested that she was "prepared to file an answer for the purpose of bringing about a property settlement between the Plaintiff and Defendant *and also providing for her support.*" (Emphasis ours.) The letter proceeded

to set out the requirements of plaintiff with respect to conveyances of real property and household furnishings and then said: "Pay to her the sum of $100.00 per week for the next 10 years *for her support and maintenance.*" Answer was filed admitting the allegations of the complaint, and judgment was entered reciting as a part of the judgment "[t]hat the plaintiff, as a part of the agreed property settlement between the plaintiff and defendant, shall pay to the defendant for her sole support and maintenance the sum of One Hundred ($100.00) Dollars per week for a period of five hundred twenty-one (521) weeks, with the first payment of One Hundred ($100.00) Dollars due and payable on the 27th day of November, 1972, and a like weekly payment of One Hundred ($100.00) Dollars on the 1st day of each week thereafter for a total of five hundred twenty-one (521) weeks." This was referred to as the executory portion of said settlement. There was evidence that plaintiff, in her deposition testimony, referred to the payments as alimony, and Harold Markham took a deduction for $1,800 on his 1973 income tax return for "alimony". We believe that while the court might have found that the parties intended the payments to be property settlement, there is sufficient evidence to support the finding that they were alimony. Plaintiff properly concedes that if the payments are alimony, they terminate at the death of Harold Markham.

Next plaintiff contends that there was no sufficient evidence that Harold Markham had paid $2100 in alimony to plaintiff prior to his death. Plaintiff contends that the evidence supports no more than $1900. There was evidence of fifteen checks for $100 each from Harold Markham to plaintiff. There was also evidence that Harold deposited $400 into plaintiff's bank account. Plaintiff does not question this. However, plaintiff does question the evidence with respect to the remaining $300. The evidence with respect to this is that "defendant's Exhibit No. 5 is a check for $300.00 dated 20 February 1973, from Harold's nephew, George Markham, made out to Mrs. Nelle Markham." There is no evidence that the check was in payment of the alimony. Defendant's evidence, as disclosed by defendant's exhibit 3, for which defendant Rebecca Markham testified, was that of 20 February 1973, the alimony payments were current and remained current through 5 March 1973. Mrs. Rebecca Markham testified that she had "documents showing that the total received by Nelle L.

Markham for alimony was $2100.00 during the years 1972 and 1973." She did not specify what the documents were. We do not believe the evidence supports a finding of payments of $2100. The plaintiff does not question the $400 deposited into Nelle Markham's account in November 1973. Finding of fact No. 2 is modified to the extent that the payments were $1900 and he was 165 weeks in arrears.

[2] Next plaintiff urges that there is insufficient evidence to support the finding that Harold T. Markham lawfully assigned his interest in the two notes and deed of trust to Rebecca F. Markham. Again we disagree. There is evidence that the notes were assigned in June 1973. Plaintiff and Harold Markham were divorced in November 1972 and Harold Markham suffered a crippling stroke in December 1972, after which he was not able to work. At the time of the assignment he was indebted to Nelle Markham for alimony arrearage in an undisclosed amount which, according to the evidence for defendant, could not have exceeded $700 or $800. There is evidence that Harold Markham that year, in addition to the income from the notes, had income from the sale of land in Randolph County. There is also evidence that he thought his first wife had no further interest in the notes after the divorce, he having told the maker of one of the notes that he received them in the divorce settlement. There is evidence that he was not able to work, that his medical and other expenses were considerably more than his income, that his second wife paid most of his expenses, and that the notes were assigned to her because of money she had previously loaned to him and because of all the expenses incurred by reason of his illness. Plaintiff, in her brief, correctly sets out the elements of a fraudulent transfer of property. We simply do not agree that the evidence here requires the application of those elements, or any of them. We agree that the evidence supports the finding of fact. We are also of the opinion that there is sufficient evidence to support findings of fact Nos. 5, 6 and 7 to all of which plaintiff assigns error.

The conclusions of law based on the findings to which plaintiff excepts are supported by the findings, including conclusion of law No. 9, with the exception that conclusion of law No. 2 must be modified to show the indebtednes of Harold Markham to Nelle Markham on 6 May 1975 as $16,500 rather than $16,200. No. 1 in the decretal part of the judgment must also be so modified.

Defendant's Appeal

[3] Defendant, by her five assignments of error contends that the court should have found (1) that Nelle Markham had relinquished one-half of the proceeds from the two notes when she proposed a settlement which included no demand for the notes or any interest therein, and (2) that Harold Markham assigned to Rebecca the entirety of the two notes. The second question is necessarily answered by the first.

Defendant does not seek a new trial. As is true with plaintiff's appeal defendant contends the evidence was insufficient to support the findings which it assigns as error.

There is no evidence that Nelle Markham relinquished her interest in the notes (there is no dispute with respect to the conclusion of law No. 4 to the effect that prior to the divorce Nelle and Harold Markham each owned an one-half interest in the notes) except that Harold Markham thought she had and so told the maker of one of the notes. There is evidence that the notes were not included in the property settlement. There was evidence that other property was not included. There was also evidence that no agreement with respect to the division of property was ever executed, and that Harold Markham did not comply with the terms of the letter of plaintiff's attorney. The evidence is undisputed that Nelle Markham did not discuss the notes with her attorney and that she first became aware of her entitlement to a portion of the proceeds after the death of Harold Markham. There is evidence that she did not know how payment for the property was to be made, did not know the sales price for them, and did not see the notes and deeds of trust at the settlement in 1969. She did not realize during the divorce and afterwards that she was supposed to get one-half of the proceeds of the notes. It is quite clear that there is no evidence which would support a transfer of her interest in the notes to Harold Markham. On the contrary, the evidence does, we think, support the finding that at the time of the divorce she retained her one-half interest in the notes.

Holding, as we do—that the court's findings and conclusions that any agreement between Nelle and Harold Markham did not refer to the notes, that Nelle did not relinquish her interest or transfer her interest to Harold and that the ownership was not

modified by the property settlement—it follows that Harold Markham did not assign to Rebecca the entirety of the two notes.

The judgment of the trial court is modified in accordance with this opinion and affirmed.

Modified and affirmed.

Judges MARTIN (Harry C.) and HILL concur.

WAKE COUNTY, EX REL. HELEN MANNING v. JAMES GREEN

No. 8110DC14

(Filed 7 July 1981)

1. **Parent and Child § 1.1—presumption of legitimacy of child—rebuttal**

In a civil paternity action a plaintiff is not required to show that the husband could not have had access to the wife, but that he did not have access, and where the spouses are living apart, the presumption of legitimacy will be rebutted unless there is a fair and reasonable basis in light of experience and reason to find that they have engaged in sexual relations.

2. **Parent and Child § 1.2— legitimacy of child—nonaccess—parents' testimony admissible**

In a civil paternity action a husband and wife may testify concerning nonaccess to each other, since the testimony of a spouse on the matter of nonaccess is clearly the best evidence of that fact.

3. **Parent and Child § 1.2— presumption of legitimacy rebutted—issue of paternity raised**

Where plaintiff testified that she had not seen her husband in five years and that she had had sexual relations only with defendant during the time period in which conception occurred, a child support investigator with the Wake County Department of Social Services testified that she had investigated in both N.C. and in the plaintiff's husband's home state of N.J. and was unable to locate him, and there was no evidence that plaintiff's husband had ever been in N.C., the presumption of legitimacy was clearly rebutted and a determination of paternity should be made from all of the facts and circumstances in the case.

APPEAL by plaintiff Wake County from *Bullock, Judge*. Judgment entered 14 October 1980 in District Court, WAKE County. Heard in the Court of Appeals 2 June 1981.

This action was instituted upon the complaint of the Wake County Child Support Enforcement Agency on behalf of the plaintiff Helen Manning pursuant to Article 9 of G.S. Chapter 110 and Article 3 of G.S. Chapter 49. The complaint alleges that the defendant, James Green, is the father of the minor child, Arry Jene Manning, and seeks a civil adjudication of paternity and an order of child support for Arry Manning. Plaintiff Helen Manning is receiving Aid to Families with Dependent Children (AFDC) funds from the Wake County Department of Social Services for the support and maintenance of the child and by operation of law Wake County is the assignee of Helen Manning's right to establish paternity and a child support obligation.

At trial Helen Manning testified that she was the mother of Arry Jene Manning who was born a full-term baby on 28 February 1978. She met the defendant in September or October of 1976 and began to have a sexual relationship with him in December of 1976 or January of 1977. During the entire period that the child could have been conceived, they had sexual relations once or twice a week. The trial court sustained defendant's objection but allowed plaintiff to testify for the record that she did not have sexual intercourse with anyone other than the defendant from 15 March 1977 to 15 July 1977. Plaintiff further testified that she had married Henderson Johnson on 13 June 1965, at which time they were both residents of Paterson, New Jersey. They separated in December of 1969 and in January of 1975 Ms. Manning was served with a complaint for divorce, which she never answered. She moved to North Carolina in December of 1975 and has had no contact with her estranged husband since that time. She did not know where he was or how to locate him at the time the child was conceived in the spring of 1977.

Mary Troutman, Wake County Child Support Investigator, testified that she had attempted to locate Mr. Johnson in order to obtain information of his whereabouts during the time when Arry Manning was conceived. She checked all available public records from Wake County and North Carolina, including motor vehicle and voter registration, tax listings, telephone and city directories, and the post office, and found no evidence of his residence in this county or state. She attempted to locate Mr. Johnson in New Jersey through the law firm in Paterson that drafted his divorce

complaint and through official sources such as the post office and the telephone company. She was unable to use the Parent Locator System because she could not determine his social security number. She was unable to locate him through any of the sources available to her. She further testified that defendant Green had admitted to her that he might be Arry Manning's father. The defendant had requested a blood test to determine paternity. The court admitted into evidence the results of an extended factor red cell and HLA blood test, showing a 97.6% statistical likelihood of defendant's paternity of Arry Manning.

Defendant James Green presented no evidence, resting his defense solely on the presumption of legitimacy.

The trial court found that the evidence tendered by plaintiff tending to show nonaccess of her husband was excluded as violative of Lord Mansfield's Rule, and that while all the evidence tended to show there was no access in fact, the plaintiffs did not prove that such access was impossible. The court therefore concluded as a matter of law that although the plaintiffs carried their burden of proof, they did not prove that access between Henderson Johnson and Helen Manning was impossible during the time the child could have been conceived, and consequently, the court was precluded from considering all of the plaintiffs' evidence and finding the defendant to be the natural and biological father of Arry Jene Manning. Plaintiff Wake County appeals.

Assistant Wake County Attorneys Shelley T. Eason and John C. Cooke for plaintiff appellant.

Earle R. Purser and Becky I. Matthews for defendant appellee.

ARNOLD, Judge.

Plaintiffs contend that the trial court erred in concluding that the presumption of legitimacy required plaintiffs to prove that access between Helen Manning and her estranged husband was impossible at the time the child was conceived.

The presumption of legitimacy is an ancient English common law doctrine which, in its original form, conclusively presumed

that a child born of a married woman was legitimate unless the husband was shown to be impotent or not within the four seas of England. This rule has given way to a less harsh rule which provides that access or nonaccess of the husband is a fact to be established by proper proof. *Ray v. Ray,* 219 N.C. 217, 13 S.E. 2d 224 (1941). In addition to evidence of impotency and nonaccess, evidence of blood grouping tests results and racial differences may be admitted to rebut the presumption. *Wright v. Wright,* 281 N.C. 159, 188 S.E. 2d 317 (1972); 1 Stansbury's N.C. Evidence § 246 (Brandis rev. 1973).

In the case *sub judice* plaintiffs are relying on evidence of nonaccess. Our analysis of the North Carolina cases on point reveals a certain amount of confusion as to the quantum of evidence necessary to render the presumption permissive. Various standards for measuring the sufficiency of rebuttal evidence have been employed by the courts of this state. Many of the cases state the rule as follows: ". . . the presumption can be rebutted only by facts and circumstances which show that the husband could not have been the father, as that he was impotent or *could not* have had access to his wife." (Emphasis added) *Wright v. Wright, supra; Eubanks v. Eubanks,* 273 N.C. 189, 159 S.E. 2d 562 (1968); *State v. McDowell,* 101 N.C. 734, 7 S.E. 785 (1888).

Other North Carolina cases state that nonaccess is sufficiently shown to render the presumption permissive if the evidence shows that the husband could not have been the father because he was impotent or *did not* have access to the mother at the time the child was conceived. *State v. Bowman,* 230 N.C. 203, 52 S.E. 2d 345 (1949); *Ray v. Ray, supra.* These cases have generally involved fact situations where the husband did not live in the same county or state as the wife.

The distinction between these two standards has not been expressly recognized in the case law, and the courts that have cited the stricter "could not have had access" standard actually have not required a showing of impossibility. The fact that the wife is notoriously living in adultery has long been recognized as a "potent circumstance" tending to show nonaccess, even though the husband resided in the same community and had the opportunity of access. *Ray v. Ray, supra; Ewell v. Ewell,* 163 N.C. 233, 79 S.E. 509 (1913). Absence of the husband from the place

where the wife was also has been recognized as proof that the husband is not the father. *State v. Pettaway,* 10 N.C. 623 (1825).

In the most recent North Carolina Supreme Court decision dealing with the presumption of legitimacy, *State v. White,* 300 N.C. 494, 268 S.E. 2d 481 (1980), the child was conceived while defendant and her mother lived together as husband and wife. *White* held that to require a defendant-husband to offer evidence of the physical impossibility of his fatherhood in order to rebut the presumption of paternity places upon him a burden of production so stringent that, in effect, it unconstitutionally shifts the burden of persuasion to him on that issue. The court found that due process precluded requiring the defendant to do more than offer evidence (1) that he could not be the father because, for example, he did not in fact have sexual relations with his wife at a time when conception could have occurred; or (2) that even if defendant could be the father, some other man also could be the father because that other man had sexual relations with the mother at a time when conception could have occurred.

[1] While the same due process considerations may not apply in civil proceedings, we believe that an examination of the presumption and the quantum of evidence necessary to rebut it is necessary in this case. As previously discussed, proving literal impossibility of access never has been required, and any such statement of the rule in terms which mislead judges and jurors should not be adhered to any longer. Considering the available modes of modern transportation, if a plaintiff is required to negate every possibility of access, the presumption, in effect, reverts to being a conclusive one. We do not go so far as to hold that evidence that another man, as well as the husband, had sexual relations with the mother is sufficient by itself to rebut the presumption in a civil action. A plaintiff is not required, however, to show that the husband *could not* have had access, but that he *did not* have access. Where, as in this case, the spouses are living apart, the presumption will be rebutted unless there is a fair and reasonable basis in light of experience and reason to find that they have engaged in sexual relations.

Related to the issue of the quantum of evidence necessary to rebut the presumption of legitimacy is the question of whether

the testimony of plaintiff Helen Manning concerning the exclusivity of her sexual relations with defendant during the period when conception occurred should have been excluded.

The trial court excluded this evidence as violative of the established rule in North Carolina that neither a husband nor a wife can bastardize a child by testifying to the nonaccess of the husband at the time the child was conceived. *Eubanks v. Eubanks, supra; Ray v. Ray, supra; State v. Pettaway, supra.* This rule, which originated in dictum by Lord Mansfield in a 1777 ejectment case, has come under serious attack in recent years. Many state courts have critically examined the rule and the results flowing from its operation and have either repudiated earlier decisions adopting it, or have declined to adopt it. Annot., 49 A.L.R. 3d 212, §§ 2 and 12 (1973); e.g., *Coffman v. Coffman,* 121 Ariz. 522, 591 P. 2d 1010 (1979); *Davis v. Davis,* 521 S.W. 2d 603 (Tex. 1975); *Commonwealth ex rel. Savruk v. Derby,* 235 Pa. S. 560, 344 A. 2d 624 (1975).

[2] A rule that excludes the best evidence of a fact in issue should not be adhered to unless it has been examined and found to be necessary and justified. The testimony of a spouse on the matter of nonaccess is clearly the best evidence of that fact. Because the rule has outlived the policy reasons initially advanced to support it, and finding none of the other justifications commonly offered for excluding this evidence persuasive, we are inclined to abandon it and hold that a husband and wife may testify concerning nonaccess to each other.

Lord Mansfield's rule originated in an era when a child's legal and property rights were dependent upon his status as a legitimate offspring. In recent years, however, the United States Supreme Court has ameliorated much of the stigma and disability that historically has attached to the status of illegitimacy. Thus, allowing the parent to bastardize the child by direct testimony as to nonaccess no longer has the deletorious effect once feared by our courts.

The rule has never prevented proof of nonaccess of the husband during the time conception occurred. The exclusion has applied only to testimony by the spouses themselves. Third parties have been allowed to so testify, *State v. Wade,* 264 N.C. 144, 141 S.E. 2d 34 (1965); and the wife has been allowed to testify as to il-

licit relations in actions directly involving the parentage of the child. *Ray v. Ray, supra.* Furthermore, discarding the rule would be consistent with the modern trend towards discarding or modifying outmoded competency rules.

In several instances the rule has already been undermined. North Carolina has adopted the Uniform Reciprocal Enforcement of Support Act, G.S. 52A-1 *et seq.*, § 18 of which provides: "Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable to proceedings under this Chapter. Husband and wife are competent witnesses to testify to any relevant matter, including marriage and parentage." This provision appears to have abolished the rule in proceedings pursuant to the Act. A second instance is the implicit rejection of the rule as to criminal nonsupport actions by the North Carolina Supreme Court in *State v. White, supra.* Moreover, the General Assembly has recently taken the progressive step of abrogating the rule in all civil and criminal proceedings in which paternity is at issue. G.S. 8-57.2 (effective 1 October 1981).

[3] We conclude that there is no justification for a rule which excludes the best evidence of access or nonaccess and therefore tends to absolve the rightful father of his duty of support. The unfairness of the rule can easily be seen in the case *sub judice.* The plaintiff testified for the record that she had not seen her husband in five years and that she had had sexual relations only with the defendant during the time period in which conception occurred. Mary Troutman, a child support investigator with the Wake County Department of Social Services, testified that she had investigated in both North Carolina and in the plaintiff's husband's home state of New Jersey and was unable to locate him. There was no evidence that plaintiff's husband had ever been in North Carolina. These facts are clearly sufficient to rebut the presumption of legitimacy and allow a determination of paternity from all the facts and circumstances in the case.

Accordingly, the judgment is vacated and the case remanded for a determination of paternity and child support in accordance with this option.

Vacated and remanded.

Judge VAUGHN concurs.

Judge BECTON concurs in the result.

C. S. ATKINS AND WIFE, MAGALENE ATKINS, AND JAMES W. HOOTS AND WIFE, LOIS HOOTS, PLAINTIFFS v. WILLIAM F. BEASLEY AND WIFE, VIRGINIA BEASLEY, ALVIN R. REID AND WIFE, JANIE D. REID, B. A. SLATE AND R. L. JOHNSON, DEFENDANTS

No. 8021SC700

(Filed 7 July 1981)

1. **Appeal and Error § 6.2— partial summary judgment ordering specific performance—right of appeal**

The trial court's grant of partial summary judgment ordering specific performance of a contract by defendants affected a substantial right of defendants which will work an injury to them if not corrected before an appeal from a final judgment and is immediately appealable.

2. **Specific Performance § 1— specific performance of contract—error in granting summary judgment**

The trial court erred in entering partial summary judgment ordering three defendants to perform specifically a contract which required the three defendants to bear the expense of installing drain tile through subdivision lot 12B owned by the other two defendants if anyone owning lots 9, 10, or 12B of the subdivision "should ever complain or demand that tile be installed on or through Lot 12B . . . so that they can get proper drainage, if needed" where the evidence showed that the owners of lots 9 and 10 had demanded that tile be installed through lot 12B so that they could get proper drainage for their property, but a genuine issue of disputed fact existed as to whether there was a need for the drainage tiles.

APPEAL by defendants Alvin R. Reid and wife, Janie D. Reid, William F. Beasley and wife, Virginia Beasley, and B. A. Slate from *McConnell, Judge.* Judgment entered 27 March 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 9 February 1981.

Plaintiffs filed suit seeking, among other things, specific performance of an agreement [hereinafter "the agreement"] between the defendant, William F. Beasley and the defendants Reid and Slate. The agreement, dated 16 October 1969, provides in pertinent part that if any person owning lots 9, 10 and 12B of Holiday

Heights subdivision "should ever complain or demand that tile be installed on or through Lot 12B of same development so that they can get proper drainage, if needed, that Alvin R. Reid and wife, Janie D. Reid and B. A. Slate shall bear the expense and that there shall be no expense to the said William F. Beasley."

In October, 1969, plaintiffs Hoots purchased a house on lot 9 of Holiday Heights. In January 1975, plaintiffs Atkins purchased a house on Lot 10 of Holiday Heights. Plaintiffs allege in their complaint that on 3 July 1978 a substantial rainfall caused flooding which damaged their property. Water problems and flooding had created a problem on many occasions both before and after 3 July 1978.

Subsequently, plaintiffs gave formal notice and demand to the defendants that they wanted the drainge problem corrected. Defendants refused to replace the drain on Beasleys' land and plaintiffs instituted this suit for specific performance as third-party beneficiaries of the 16 October 1969 agreement.

In addition to their request for specific performance of the agreement, in their complaint plaintiffs sought the following remedies based on their claims against the defendants:

(1) a mandatory injunction ordering defendants Beasley to improve the drainage system carrying water from plaintiffs' property due to their unlawful damming of surface waters flowing from plaintiffs' property;

(2) a court order requiring defendant Johnson to redesign and pay for all costs of improving the drainage system on plaintiffs' property;

(3) recovery by plaintiffs Atkins of damages in the amount of $19,061.34 from defendant Johnson for his negligent failure to correct that portion of the drainage system located on a right-of-way owned by the State of North Carolina, acting individually and as an agent of the State.

(4) recovery by plaintiffs Hoots of damages in the amount of $15,992.37 from defendant Johnson for his negligent failure to correct that portion of the drainage system located on a right-of-way owned by the State of North Carolina, acting individually and as an agent of the State.

(5) recovery of attorneys' fees and costs.

On 30 May 1979 defendant Johnson filed a motion to dismiss on grounds which included sovereign immunity. The record does not disclose whether that motion was ruled upon by the trial court.

On 1 June 1979 defendants Beasley filed a motion to dismiss plaintiffs' claim against defendant Virginia Beasley since she was not a party to the agreement, an answer to the complaint, and a crossclaim against defendants Reid and Slate for recovery of $10,000.00 in damages for breach of contract.

On 14 June 1979 defendants Reid answered the complaint and crossclaimed against defendant Slate for one-half of any amounts they were required to pay under the agreement. They answered defendants Beasley's crossclaim with allegations denying any breach of the agreement.

On 5 July 1979 defendant Slate filed an answer to plaintiffs' complaint and crossclaimed against defendants Reid for two-thirds of any amounts he was required to pay under the agreement. He answered defendants Beasley's crossclaim by admitting the agreement and denying the remaining allegations. He answered defendants Reid's crossclaim by alleging that he should be required to bear only one-third of any expenses incurred pursuant to the agreement.

Defendants Reid replied to defendant Slate's crossclaim by moving that it be dismissed.

After other procedural steps were taken which are not pertinent to this appeal, plaintiffs moved for summary judgment in their favor against defendants Beasley, Reid and Slate for specific performance of the agreement. On 27 March 1980 the trial court entered a partial summary judgment ordering defendants Alvin R. Reid and Slate to replace the existing concrete pipe with 48″ concrete pipe and to do and perform all acts necesssary to provide proper drainage.

Defendants Beasley, Reid and Slate appealed.

Craige, Brawley, Liipfert & Ross, by C. Thomas Ross and Terrie A. Davis, for the plaintiffs-appellees.

Badgett, Calaway, Phillips, Davis, Stephens, Peed & Brown by Chester C. Davis, for the defendant-appellant B. A. Slate.

Womble, Carlyle, Sandridge, & Rice, by Allan R. Gitter and James M. Stanley, Jr., for the defendants-appellants Alvin R. and Janie D. Reid.

William Z. Wood, Jr., for the defendants-appellants William F. and Virginia Beasley.

MARTIN (Robert M.), Judge.

[1] The threshold question which we must consider, although not argued by the parties in their briefs, is whether an appeal lies from Judge McConnell's entry of partial summary judgment in plaintiffs' favor. If this is a fragmentary, and therefore premature, appeal, we must dismiss the appeal *ex mero motu. Bailey v. Gooding,* 301 N.C. 205, 270 S.E. 2d 431 (1980).

A party has a right to appeal a judgment of a trial court under N.C. Gen. Stat. §§ 1-277 and 7A-27 if the judgment is (1) a final order, or (2) an interlocutory order affecting some substantial right claimed by the appellant which will work an injury to him if not corrected before an appeal from a final judgment. *Bailey v. Gooding, supra; Industries, Inc. v. Insurance Co.,* 296 N.C. 486, 251 S.E. 2d 443 (1979); *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377 (1950). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Bailey v. Gooding, supra* at 209, 270 S.E. 2d at 433, quoting *Veazey v. Durham, supra* at 361-2, 57 S.E. 2d at 381. Clearly the judgment in question is not a final judgment, as plaintiffs' claims against defendant Johnson and defendants' various crossclaims remain to be tried.

The question remains whether the partial summary judgment in question affects some substantial right claimed by defendants which will work an injury to them if not corrected before an appeal from a final judgment. *Bailey v. Gooding, supra; Industries, Inc. v. Insurance Co., supra; Veazey v. Durham, supra.* Our research has failed to disclose any opinion rendered by the appellate courts of this State deciding the question of whether the

grant of a partial summary judgment ordering defendants to specifically perform a contract is immediately appealable. We are aware of three cases, however, which we feel are analogous to the present case. In *Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E. 2d 667 (1977), the Supreme Court, reversing this Court, held that the grant of a partial summary judgment for a monetary sum against the defendant affected a substantial right of the defendant and would work an injury to it if not corrected before an appeal from a final judgment; therefore the judgment was appealable under the "substantial right" exception provided in N.C. Gen. Stat. § 1A-1, Rule 54(b) through N.C. Gen. Stat. §§ 1.277 and 7A-27(d). In *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240, *appeal dismissed*, 301 N.C. 92 (1980) this Court also held, citing *Investments, supra*, that the trial court's entry of a partial summary judgment for a monetary sum against the defendant affected a substantial right of the defendant and was therefore immediately appealable under N.C. Gen. Stat. §§ 1-277 and 7A-27. In the case of *English v. Realty Corp.*, 41 N.C. App. 1, 254 S.E. 2d 223, *rev. denied*, 297 N.C. 609, 257 S.E. 2d 217 (1979), this Court held that the grant of a partial summary judgment for plaintiffs on the issue of liability which included a mandatory injunction ordering defendant to remove a roadway affected a substantial right of the defendant and was immediately appealable. Based on these cases, we conclude that the grant of the partial summary judgment in the present case, ordering defendants Beasley, Alvin R. Reid and Slate to specifically perform the agreement affects a substantial right of these defendants and, if it is improper, will work an injury to them if not corrected before an appeal from a final judgment. We therefore hold that pursuant to N.C. Gen. Stat. §§ 1-277 and 7A-27, these defendants had the right to appeal immediately the grant of said judgment and, as they have complied with the requirements of the Rules of Appellate Procedure in all respects, their appeal is properly before this Court. We note, however, that the partial summary judgment does not order defendant Janie D. Reid to do anything and, therefore, she is not an aggrieved party and has no right to appeal the judgment in question. *Coburn v. Timber Corporation*, 260 N.C. 173, 132 S.E. 2d 340 (1963).

[2] We next turn to the question of whether the trial court erred in granting plaintiffs' motion for partial summary judgment.

N.C. Gen. Stat. § 1A-1, Rule 56 is not limited in its application to any particular type or types of action. *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972). Summary judgment may be granted for any type of claim, *Conner Co. v. Spanish Inns*, 294 N.C. 661, 242 S.E. 2d 785 (1978), including a claim for specific performance of a contract. *See Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). When a party moves for summary judgment, "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). This procedure is available to both plaintiff and defendant. *McNair v. Boyette, supra.*

The first question which confronts us in deciding whether the trial court was correct in granting plaintiffs' motion for summary judgment is whether plaintiffs showed there was no genuine issue as to any material fact. The burden of establishing the lack of any triable issue of fact is on the party moving for summary judgment. *North Carolina National Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976). When the party moving for summary judgment supports his motion as provided in Rule 56, the party opposing the motion

> 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. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e); *Kidd v. Early, supra.*

We note that the following facts are not in issue: (1) On or about 16 October 1969 defendants William F. Beasley, Alvin R. and Janie D. Reid and B. A. Slate executed an agreement which required defendants Reid and defendant Slate to bear the expense of installing drain tile on or through Lot 12B, owned by defendants Beasley, if anyone owning Lots 9, 10, and 12B of Holiday Heights Subdivision "should ever complain or demand that tile be installed on or through Lot 12B . . . so that they can get proper drainage, if needed. . . ." The agreement also provided

that "there shall be no expense to the said William F. Beasley" and that defendant William F. Beasley agreed to allow defendants "Alvin R. Reid and B. A. Slate [to] install the tile, if ever needed, providing that they sow his yard and repair in good condition;" (2) plaintiffs are the present owners of Lots 9 and 10 of Holiday Heights Subdivision; and (3) plaintiffs had complained and demanded that tile be installed on or through Lots 12B so that they can get proper drainage for their property.

There is a genuine issue of disputed fact, however, as to whether there is a need for the drainage tile. Defendant Slate's verified answer denied the alleged need for drainage tile. The response of defendants Reid to the motion for summary judgment denied the need alleged, and the response of defendant Slate also raised the question of whether there is a need for the installation of the drainage tile. The plaintiffs' complaint alleged that an agent of the State had repeatedly stated that plaintiffs' drainage was adequate but that the catch basin, located on the State right-of-way was the cause of plaintiffs' problems. This is clearly a material question of fact as the agreement provides that the drainage "tile shall be installed on or through Lot 12B of same development so that they can get proper drainage, *if needed.* . . ." (Emphasis added.) For these reasons, summary judgment was not proper in this case and the partial summary judgment must be reversed.

Defendant Janie D. Reid also assigns as error the trial court's denial of her motion for summary judgment. She moved for summary judgment in her favor on the grounds that the agreement was unenforceable as to her due to lack of consideration. Generally, denial of a motion for summary judgment is not immediately appealable. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). We fail to see how denial of Mrs. Reid's motion affects a substantial right. We therefore dismiss her appeal from that order because it is a fragmentary, and therefore premature, appeal. N.C. Gen. Stat. §§ 1-277 and 7A-27. *See Hill v. Smith*, 38 N.C. App. 625, 248 S.E. 2d 455 (1978).

The result of our decision is as follows: (1) defendant Janie D. Reid's appeal of the 27 March 1980 partial summary judgment is dismissed because she was not an aggrieved party to that judgment; (2) the order granting plaintiffs' motion for partial sum-

mary judgment is reversed because a genuine issue of material fact exists as to whether there is a need for the drainage tile; and (3) defendant Janie D. Reid's appeal of the 15 October 1979 order denying her motion for summary judgment is dismissed because it is a premature appeal.

Appeal dismissed in part and reversed in part.

Chief Judge MORRIS and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. THERESA SUGGS BASS

No. 8114SC148

(Filed 7 July 1981)

1. **Criminal Law § 142.4— restitution as condition of probation—amount required improper**

Where defendant was convicted of misdemeanor welfare fraud but acquitted of food stamp fraud, the trial court erred in entering a condition of probation requiring defendant to make restitution of $1147 for overpayments she allegedly received for aid to families with dependent children and for food stamps, since the provisions requiring defendant to pay $1147 included $606 in food stamps allegedly received by defendant; the jury found that the State had failed to prove beyond a reasonable doubt that defendant unlawfully received the alleged $606 in food stamps; and defendant thus could not be required to repay the $606.

2. **Criminal Law § 142.3— misdemeanor welfare fraud—restitution as condition of probation—amount proper**

Where defendant was convicted of misdemeanor welfare fraud, there was no merit to her contention that a condition of her probation requiring her to repay $541 for benefit of the AFDC program was unlawful, since defendant offered no evidence challenging the accuracy of the State's evidence that defendant unlawfully received $541 in AFDC funds.

3. **Attorneys at Law § 7.2— indigent defendant—restitution for court appointed attorney proper**

There was no merit to the indigent defendant's contention that, because she was tried on two charges and acquitted on one, she could not be required to pay counsel fees for services rendered on a charge for which she had not been convicted, since the face of the judgment showed that restitution was ordered only for counsel fees in the case in which defendant was convicted; furthermore, defendant made no objection at trial concerning the order for counsel fees.

4. Social Security and Public Welfare § 1— welfare fraud—sufficiency of evidence

In a prosecution of defendant for felonious welfare fraud and felonious food stamp fraud, evidence was sufficient to be submitted to the jury, and there was no merit to defendant's argument that cases interpreting G.S. 14-100, *obtaining property by false pretenses*, were applicable to a charge under G.S. 108-48, welfare fraud.

5. Criminal Law § 111— written jury instructions proper

The trial court did not err in reducing a part of its jury instructions to writing and in allowing the jury to take the instructions into the jury room during its deliberations.

APPEAL by defendant from *DeRamus, Judge.* Judgment entered 16 October 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 4 June 1981.

Defendant was tried at the 13 October 1980 session of superior court on charges of felonious welfare fraud and felonious food stamp fraud. The welfare fraud charge was based upon N.C. G.S. 108-48. The state's evidence showed that defendant failed to disclose that she was employed at Duke University Medical Center and she thereby obtained welfare payments and food stamps which she was not entitled to receive. The jury acquitted defendant of the food stamp charge and convicted her of the misdemeanor of violating N.C.G.S. 108-48.

Attorney General Edmisten, by Associate Attorney Blackwell M. Brogden, Jr., for the State.

Haywood, Denny & Miller, by Charles H. Hobgood, for defendant appellant.

MARTIN (Harry C.), Judge.

[1] The trial judge sentenced defendant to imprisonment for not less than one year nor more than two years. One week was to be served in custody, and the remainder was suspended and defendant was placed upon supervised probation. One of the conditions of the probation required defendant to make restitution of $1147 for the overpayments she allegedly received for aid to families with dependent children and for food stamps. Defendant objects to this condition of the judgment, and we agree that it is erroneous. Defendant was found not guilty on the food stamp charge, the jury finding that the state had failed to prove beyond

a reasonable doubt that defendant unlawfully received the alleged $606 of food stamps.

Provisions in probationary judgments requiring restitution are constitutionally permissible. *State v. Caudle*, 276 N.C. 550, 173 S.E. 2d 778 (1970); *State v. Green*, 29 N.C. App. 574, 225 S.E. 2d 170, *disc. rev. denied*, 290 N.C. 665 (1976). However, the provision must be related to the criminal act for which defendant was convicted, else the provision may run afoul of the constitutional provision prohibiting imprisonment for debt. N.C. Const. art. I, § 28 (1970). As stated in *Caudle, supra*, at 555, 173 S.E. 2d at 781:

> To suspend a sentence of imprisonment for a criminal act, however just the sentence may be *per se*, on condition that the defendant pay obligations unrelated to such criminal act, however justly owing, is a use of the criminal process to enforce the payment of a civil obligation and lends itself to the oppressive action which the provision of the Constitution was designed to forbid.

The provision requiring defendant to pay $1147 included the $606 in food stamps allegedly received by defendant. That sum is unrelated to the AFDC welfare charge. Two separate indictments were returned. The cases were only consolidated for purposes of trial. Defendant cannot be required to repay the $606.

[2] Defendant also contends that the provision requiring her to repay $541 for benefit of the AFDC program is unlawful because the jury only found her guilty of misdemeanor welfare fraud. The only difference between felonious and misdemeanor welfare fraud is the amount in question. Defendant claims that she cannot be required to repay more than $400 as a condition of the judgment. We do not agree. At the time defendant committed the acts in question, between October 1978 and April 1979, the amount required to constitute a felony was only $200. The statute was amended effective 1 October 1979 and, in part, 1 January 1980. On the question of her guilt or innocence, defendant was given the benefit of the greater requirement, as her trial occurred in October 1980, after the effective date of the amendment.

In determining appropriate conditions of a suspended sentence, however, it is not necessary that there be evidence to satisfy the sentencing judge beyond a reasonable doubt of the cor-

rectness of these conditions. It is sufficient that the conditions be supported by the evidence. N.C. Gen. Stat. 15A-1343(b)(6), (d), 1979 Supp. The terms of a probationary judgment are largely matters of judicial discretion. The defendant offered no evidence challenging the accuracy of the state's evidence that defendant unlawfully received $541 in AFDC funds. Nor did she attack the credibility of the state's witnesses by cross-examination. Defendant's defense was based upon lack of knowledge and intent on her part to defraud the state; she did not defend on the amount involved. Under the evidence in the record, the court was not required to submit the misdemeanor charge, as all the evidence showed an overpayment of $541. Certainly, the $141 excess above the $400 misdemeanor limit is related to the criminal act for which defendant was convicted within the holding of *Caudle, supra.* It is appropriate under N.C.G.S. 15A-1343(b)(6), (d), 1979 Supplement, that restitution be ordered as a condition of probation. We find no error in the court's condition that defendant pay the $541 as a part of the judgment.

[3] Defendant further argues that the condition of the probation judgment requiring her to pay $500 to the state as restitution for fees paid to her court appointed counsel is unlawful. She states that because she was tried on two charges and acquitted on one, she cannot be required to pay counsel fees for services rendered on a charge for which she has not been convicted, citing N.C.G.S. 7A-455. Setting aside the problem of the philosophical soundness of a rule that may require an indigent defendant to pay counsel fees for legal services if he is convicted, but does not allow such payment if acquitted (it would appear that logic would require defendant to pay for the services which are successful), we find defendant's argument to be without merit. The pertinent portion of the probation judgment is: "The defendant shall also make restitution to the State of North Carolina for court appointed attorney's fees awarded in *this case* in the amount of Five Hundred Dollars." (Emphasis added.) The face of the judgment shows that restitution was ordered only for counsel fees in the AFDC fraud case. Judgments regular on the face of the record are presumed to be valid. *Shaver v. Shaver*, 248 N.C. 113, 102 S.E. 2d 791 (1958). Furthermore, defendant made no objection at the trial concerning the order for counsel fees. The assignment of error is overruled.

[4] Next, defendant contends the court should have allowed her motions to dismiss. She argues that cases interpreting N.C.G.S. 14-100, obtaining property by false pretenses, are applicable to a charge under N.C.G.S. 108-48. While we are not required to resolve this question in all its possible ramifications, it is clear that all of the elements of N.C.G.S. 14-100 are not required to sustain a charge under N.C.G.S. 108-48. This latter statute was passed to define and punish a particular, specific crime. Under its terms, the agency making the payments does not have to be deceived, as required in N.C.G.S. 14-100. An employee of the agency providing the funds, or the provider of the funds, can be guilty of violating N.C.G.S. 108-48. The elements of the offense proscribed by N.C.G.S. 108-48, 1979 Supplement, are:

> (1) defendant was a recipient or provider of public assistance;
>
> (2) defendant made a statement or representation, or failed to disclose a fact;
>
> (3) the statement or representation was false, or the undisclosed fact was material to defendant's, or another person's, eligibility for public assistance;
>
> (4) defendant made the statement or representation, or failed to disclose the fact willfully and knowingly, and with the intent to deceive;
>
> (5) as a result of making such statement or representation, or failing to disclose such fact, defendant or another obtained or attempted to obtain or continued to receive public assistance.

See N.C.P.I.—Crim. 274.10. The evidence in this case fully supports each of the required elements. The assignment is without merit.

[5] Defendant contends the court erred in reducing a part of its jury instructions to writing and allowing the jury to take them into the jury room during their deliberations. Defendant's principal argument is that by so doing the court commented upon the evidence. The record, however, does not contain what evidence, if any, was included in the written jury instructions. The written in-

structions in the record do not contain any summary of the evidence or statement of the contentions of the parties. The record does contain the following at two places as a part of the written instructions: "(Evidence Summary)." We cannot assume from this quotation that the original written instructions actually contained a summary of the evidence, or any part thereof. We are bound by the record before us. *Griffin v. Barnes*, 242 N.C. 306, 87 S.E. 2d 560 (1955); *Mabe v. Dillon*, 46 N.C. App. 340, 264 S.E. 2d 796 (1980). We find no comment upon the evidence by the trial court from the written jury instructions.

Moreover, the trial court has the inherent authority to submit its instructions on the law to the jury in writing. *See* 20 Am. Jur. 2d Courts §§ 78, 79 (1965). Courts have inherent power to do everything necessary to carry out the purposes of their creation. *Knox County Council v. State ex rel. McCormick*, 217 Ind. 493, 29 N.E. 2d 405 (1940). Here, the legislature has not proscribed the trial judge's action of which defendant complains. Indeed, any legislative action attempting to limit the manner in which a trial judge instructs the jury might well offend the constitutional scheme of separation of powers. *See* Levin and Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. Pa. L. Rev. 1 (1958). As Montesquieu noted, "There is no liberty if the judiciary power be not separated from the legislative and executive." While it is true that N.C.G.S. 1-182, *requiring* jury instructions to be put in writing upon request of counsel, was repealed, this in no way affected the authority of the trial court to reduce its instructions to writing and transmit them to the jury. Further, defendant did not object to the action of the court at the time it occurred. Defendant's failure to so object waives any alleged error. *See Emanuel v. Clewis*, 272 N.C. 505, 158 S.E. 2d 587 (1968); 1 Stansbury's N.C. Evidence § 27 (Brandis rev. 1973). N.C.G.S. 15A-1233(b), relied upon by defendant, applies to exhibits and writings received as evidence, not jury instructions, and is not applicable to the question before the Court. We find no merit in this assignment of error.

We have carefully reviewed defendant's objections to the court's instructions to the jury and find no prejudicial error. Again, defendant improperly attempts to apply the standards of

N.C.G.S. 14-100 to this charge brought under N.C.G.S. 108-48. Contrary to defendant's argument, we find the court properly gave the jury the option of returning a verdict of not guilty on the misdemeanor charge. *State v. Hines*, 36 N.C. App. 33, 243 S.E. 2d 782, *disc. rev. denied*, 295 N.C. 262 (1978), relied upon by defendant, does not require the court to instruct the jury that the resulting economic harm to the victim is not the essence of the crime. *Hines* holds that such economic result is irrelevant to the purposes of N.C.G.S. 14-100. Arguably, refusal to give the requested instruction was favorable to defendant.

Defendant received a fair trial, and we will not disturb the verdict. For the error in the judgment noted above, the cause is remanded to the Superior Court of Durham County for an order amending paragraph 3 of the special conditions of probation, to require defendant to make restitution of $541 in lieu of $1147. Otherwise, we find no error.

Remanded for amendment to judgment.

Judges HEDRICK and WELLS concur in the result.

LINDA L. HOWARD, GUARDIAN AD LITEM FOR EULA B. CAULEY v. JAMES D. PIVER AND ONSLOW HOSPITAL AUTHORITY

No. 804SC979

(Filed 7 July 1981)

1. Physicians, Surgeons and Allied Professions § 15.2— departing from standard of care—similar locality rule—competency of medical witness

In a medical malpractice action based on the alleged negligence of defendant physician in discontinuing anti-seizure medication which an epileptic patient had taken for 30 years to control her seizures, the trial court erred in excluding testimony by plaintiff's medical expert that defendant's discontinuance of the anti-seizure medication did not conform with the standard of care for physicians and surgeons in Jacksonville, N.C. and other similar communities on the ground that the witness was not competent to testify about the standard of care in Jacksonville or other similar communities where the witness testified that he was an instructor on the staff at N.C. Memorial Hospital and a faculty member at the U.N.C. School of Medicine, that he had patients referred to him from all hospitals within North Carolina, and that he

was familiar with the standard of care for physicians and surgeons in Jacksonville, N.C. and other similar communities.

2. **Hospitals § 3.2— action against hospital—insufficient evidence of negligence**

In an action to recover for personal injuries received by an epileptic patient when she suffered seizures after her physician had discontinued her use of anti-seizure medicine, plaintiff's evidence was insufficient for the jury on the issue of defendant hospital's negligence since the hospital did not breach its duty of care when its nurses did not verbally report all of the patient's complaints to her physician, and even if there had been such a breach of duty, there was no evidence that such breach proximately resulted in harm to the plaintiff.

APPEAL by plaintiff from *Strickland, Judge.* Judgments entered 17 and 18 October 1979 in Superior Court, ONSLOW County. Heard in the Court of Appeals 10 April 1981.

This is a medical malpractice action brought by the plaintiff Linda L. Howard, the daughter and guardian ad litem for Eula B. Cauley, against the defendants to recover damages for personal injuries. The injuries were the result of the defendants' alleged negligence in removing Mrs. Cauley, an epileptic patient, from certain anti-seizure medication and in failing to administer anti-seizure medication and therapy while Mrs. Cauley was hospitalized. Answers denying negligence were filed on behalf of the defendants, Dr. James D. Piver and the Onslow Hospital Authority (Hospital). The trial court directed a verdict for the Hospital at the close of plaintiff's evidence and, at the close of all the evidence, granted Dr. Piver's motion for a directed verdict.

In July 1976, Mrs. Cauley was a chronically ill 71-year-old woman with a long history of medical problems. She was first diagnosed as being an epileptic in the early 1940's, and has taken Dilantin and Phenobarbitol, which are anti-seizure medications, since a hospitalization at that time. Occasionally, even though she was taking her anti-seizure medication, Mrs. Cauley would have light seizures called petite mal seizures, and would black out.[1]

On 12 July 1976 Mrs. Cauley went to the office of Dr. James D. Piver and complained of vomiting and a pain in her rib area.[2]

1. Linda Howard testified that from 1973 to 1976 her mother, Mrs. Cauley, would have light seizures "[p]robably once a month or so."

2. Mrs. Cauley had fractured her ribs on 4 July 1976 as a result of a fall during a petite-mal seizure. She was admitted to the hospital by Dr. Batcheller, the

During Dr. Piver's examination of Mrs. Cauley, Linda Howard told Dr. Piver that Mrs. Cauley needed to have her drugs "re-evaluated." At that time, Mrs. Cauley was taking Dilantin, Phenobarbitol, Librium, Composine, Empirin, Codeine, aspirin and Vibramycin. Following his examination of Mrs. Cauley, Dr. Piver listed as his "impression" the following: (1) peptic ulcer; (2) mild paralytic ileus; and (3) over ingestion of drugs. Dr. Piver indicated to Linda Howard that he would put Mrs. Cauley back into the hospital, run tests on her to determine what was wrong, and further indicated that he would take Mrs. Cauley off all her medication. Linda Howard testified that she told Dr. Piver of Mrs. Cauley's history of epilepsy and of her need to be kept on the anti-seizure medication. Mrs. Cauley was admitted to the hospital on 12 July 1976. According to Dr. Piver, he removed her from all her medication, including her anti-seizure medication, to re-establish drug levels.

On 13 July 1976, at approximately 5:00 a.m., a nurse at the Hospital telephoned Dr. Piver to tell him that Mrs. Cauley was restless and that she was complaining of pain and coughing. Dr. Piver ordered an injection of 130-mg of phenobarbitol. At 5:25 a.m. on 13 July 1976, when Mrs. Cauley complained "I feel like I'm going to have one of those unconscious spells," the nurse gave her the injection of phenobarbitol which Dr. Piver had previously ordered.

On the morning of 14 July 1976 Mrs. Cauley experienced a series of six grande mal seizures. Three or four of those grande mal seizures were classified as severe. As a result of the seizures, Mrs. Cauley broke both of her shoulders because, in the opinion of one physician, the muscle ligaments in her shoulders contracted so tightly that they broke the humerus. Mrs. Cauley was transferred to the intensive care unit on the afternoon of 14 July 1976 where she was administered Dilantin and Phenobarbitol. She remained in the intensive care unit until 17 July 1976 when she

medical partner of Dr. Piver. Dr. Batcheller continued her Dilantin and Phenobarbitol during this admission and, in addition, placed her on inhalation therapy, antibiotics and codeine. During this hospitalization, the nurses' notes reflect nausea and vomiting by Mrs. Cauley. Dr. Batcheller discharged Mrs. Cauley on 8 July 1976 and made an appointment for her to see him in his office on 12 July 1976. The plaintiff, Linda Howard, took Mrs. Cauley to Dr. Batcheller's office and she was seen by Dr. Piver.

was evacuated by helicopter to Duke Hospital. After her discharge from Duke Hospital, Mrs. Cauley was sent to a nursing home[3]; prior to her admission on 12 July 1976 Mrs. Cauley lived with her husband in their home in Jacksonville.

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

Marshall, Williams, Gorham & Brawley, by Daniel Lee Brawley, for defendant appellee Piver.

Harris, Cheshire, Leager & Southern, by W. C. Harris, Jr., for defendant appellee Onslow Hospital Authority.

BECTON, Judge.

[1] The trial court's refusal to allow opinion testimony by plaintiff's expert witness, Dr. Paul T. Frantz, is the principal and pivotal issue in this case.[4] Its resolution is dispositive of the directed verdict granted in favor of Dr. Piver.

Plaintiff sought, through the opinion testimony of Dr. Frantz, to establish that Dr. Piver was negligent. Dr. Frantz testified[5] first that he was familiar with the standard of care for physicians and surgeons in Jacksonville, North Carolina and other similar communities and, second, that Dr. Piver's discontinuation of the Dilantin and Phenobarbitol did not conform with the said standard of care. The trial court excluded this testimony[6] and concluded as a matter of law that Dr. Frantz was not a competent witness to testify about the standards of care in Jacksonville or

3. Dr. Paul Frantz testified that the series of grande mal seizures suffered by Mrs. Cauley contributed in a cause and effect relationship to pulmonary pneumonia, respiratory insufficiency, and congestive heart failure subsequently suffered by Mrs. Cauley.

4. At oral argument plaintiff abandoned her argument that the court, by excluding questions relating to a tonsillectomy, foiled her attempt to impeach Dr. Piver.

For reasons set forth in part IV, *infra*, we conclude that plaintiff has failed to make out a prima facie case against the Hospital.

5. The testimony of Dr. Frantz was taken by deposition prior to trial and was offered and objected to at the time of trial.

6. On cross examination, Dr. Frantz testified that he had never been in Onslow Memorial Hospital or in Jacksonville; that he did not know any doctors in Jacksonville and that he had never practiced medicine in any hospital in North Carolina other than North Carolina Memorial Hospital in Chapel Hill.

other similar communities. We disagree with the trial court's conclusion.

Dr. Frantz' competency as an expert medical witness in this case and his familiarity with the standards of practice for general medicine and surgery in communities such as Jacksonville were sufficiently established to submit this case to the jury. Dr. Frantz was licensed to practice medicine in North Carolina in 1971. By 1978 Dr. Frantz was not only an instructor on the staff at North Carolina Memorial Hospital, but was also a faculty member at the University of North Carolina School of Medicine.[7] He testified:

> I have patients who are referred to me from all hospitals within North Carolina for cardiac surgery or for removal of lung cancers, and so forth . . .
>
> [Moreover], hospital records are sent to us for review and so, although I have not practiced in other hospitals within the State of North Carolina, I am familiar with different hospitals' record keeping systems in having reviewed them as patients are referred to me.

The horse-and-buggy days are gone.[8] The old "locality rule"—which rigidly required the medical expert to be familiar with the locality where the alleged improper practice occurred—has been rejected by our courts. *Wiggins v. Piver*[9], *276 N.C. 134, 171 S.E. 2d 393 (1970); Dickens v. Everhart,* 284 N.C. 95, 199 S.E. 2d 440 (1973); *Page v. Hospital,* 49 N.C. App. 533, 272 S.E. 2d 8 (1980). Now, it is well established that a physician's standard of

7. He received his undergraduate degree at the University of the South in Sewanee, Tennessee; he received his medical degree at Georgetown University in 1971. Following graduation, he completed the requirements for the National Board of Medical Examiners entitling him to be licensed in the State of North Carolina. He served one year of internship and four years of surgical residency at the University of North Carolina. He was certified by the American Board of Surgery in 1978 and was certified by the American Board of Thoracic Surgery in 1979. He specializes in cardio-thoracic surgery.

8. We note that North Carolina Memorial Hospital in Chapel Hill is approximately 150 miles from Jacksonville; that advice from physicians and specialists at teaching centers is only a telephone call away; that medical conferences, seminars, and conventions take place on a state-wide basis regularly; and that control of epileptic patients with anti-seizure medication has been known at least since 1940 when Mrs. Cauley was first treated with anti-seizure medication.

9. Dr. Piver was also the defendant in *Wiggins v. Piver.*

care must be in accordance with the standards of practice among other physicians with similar training and experience in the same or similar communities at the time the cause of action arises. *See Wiggins v. Piver; Dickens v. Everhart.* Indeed, the *Wiggins'* "same or similar community" rule was restated in *Dickens*[10], and was subsequently codified in G.S. 90-21.12.[11]

The reasoning of the court in *Wiggins* is applicable here. "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, Sanford, Lexington, Reidsville, Elkin, Mt. Airy, or any other similar community in North Carolina." 276 N.C. at 138, 171 S.E. 2d at 395-96. The treatment of epilepsy with anti-seizure medication is a long-established practice. Plaintiff's underlying thesis in this case is that Dr. Piver should not have discontinued her medication which she had taken for thirty years to control her seizures, and that the discontinuation of her seizure medication would predictably precipitate seizures. Reason does not appear in this case, considering the nature of the medical question involved, why a different standard should apply to the discontinuation of anti-seizure medication in Jacksonville, in Kinston, in Goldsboro, or even in Chapel Hill.

Wiggins is also instructive because of its suggestion that, even under the old "locality rule," courts considered the nature of the medical question involved in ruling on the competency of a medical witness to testify. *See also Page v. Hospital.* If the medical procedure was simple and routine, there was less adherence to the "locality rule." If the medical procedure was

10. "[A]n expert witness, otherwise qualified, may state his opinion as to whether the treatment and care given by the defendant to the particular patient came up to the standard prevailing in similar communities, with which the witness is familiar, even though the witness be not actually acquainted with actual medical practices in the particular community in which the service was rendered at the time it was performed." 284 N.C. at 101, 199 S.E. 2d at 443.

11. G.S. 90-21.12 provides: "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."

sophisticated and specialized, there was more adherence to the "locality rule."

The case we consider now does not involve eye surgery, a heart transplant, or a similarly complicated medical procedure. We are considering a medical practice—the discontinuation of anti-seizure medication, *not the treatment of an epileptic patient undergoing seizures*—which doctors all over the state deal with on a regular basis. A decision to treat patients like Mrs. Cauley is frequently made by doctors practicing general medicine and surgery, and not necessarily by neurologists or other specialists. This is evidenced by the fact that Dr. Piver, as a doctor practicing general medicine and surgery, decided to treat Mrs. Cauley himself. When there are no variations in the standards for the handling of a particular medical problem from one community to another, a medical expert familiar with the standard and with the defendant's deviation from the standard is allowed to testify even though he has not been in the particular community. *Rucker v. Hospital*, 285 N.C. 519, 206 S.E. 2d 196 (1974); *Page v. Hospital*.

Thompson v. Lockert, 34 N.C. App. 1, 237 S.E. 2d 259, *disc. rev. denied*, 293 N.C. 593, 239 S.E. 2d 264 (1977) on which Dr. Piver relies, is distinguishable. In *Thompson* the plaintiff sought to show, through a New York doctor, that a Salisbury, North Carolina orthopaedic surgeon negligently performed a laminectomy-distectomy even though the New York doctor, apparently, was never asked if he were familiar with the standards of care in Salisbury or in similar communities. In this case, Dr. Frantz testified that he was familiar with the standard of practice in areas similar to Jacksonville. His testimony was not, as a matter of law, incompetent, and the jury should have been allowed to consider his opinions.

II

Although we reverse for the reasons set forth above, we summarily address other evidentiary disputes that are likely to occur at the retrial. Dr. Frantz testified (1) that Dr. Piver's discontinuation of Mrs. Cauley's Dilantin and Phenobarbitol on 12 July 1976 was not in keeping with the standards of medical care for physicians and surgeons in Jacksonville or other similar communities; (2) that abrupt removal of an epileptic patient from seizure medication creates a serious risk of causing the patient to

go into status epilepticus which is a known cause of death and which carries "grave consequences in a lady [Mrs. Cauley's] age;" (3) "that the abrupt withdrawal of her Dilantin and Phenobarbitol precipitated, a number of hours later after the blood levels of Dilantin had dropped below the threshhold range, her . . . recurrent repeated seizures . . ."; and (4) that Mrs. Cauley appeared to be "under controlled or. . . , the blood levels, of her [anti-seizure] medication were too low and that an adjustment by raising them was more appropriate certainly than by removing them altogether."

The trial court's decision to exclude the testimony set out above appears to be grounded on the court's erroneous adherence to the "locality" as opposed to the "similar community" rule. It was improper for the court, on that basis, to exclude Dr. Frantz' testimony.

III

Similarly, the court's decision to grant Dr. Piver's motion for a directed verdict was controlled by its earlier decision that Dr. Frantz could not testify that he was familiar with the standard of care in Jacksonville or other similar communities. If Dr. Frantz' testimony had been admitted, plaintiff could have withstood a motion for directed verdict.

IV

[2] The Hospital did not breach its duty of care when its nurses did not verbally report all of Mrs. Cauley's complaints to Dr. Piver. Even if there had been such a breach of duty, there is no evidence that that breach proximately resulted in harm to the plaintiff. Since there was no evidence from which the trier of fact could conclude that the hospital was liable, the trial court properly granted the Hospital's motion for directed verdict at the close of plaintiff's evidence.

Accordingly, as to defendant Onslow Hospital Authority, we affirm. As to defendant James D. Piver, we reverse and remand for a new trial not inconsistent with this opinion.

Judge MARTIN (Robert M.) and Judge WHICHARD concur.

THOMAS L. STRONG AND THE TRAVELERS INDEMNITY COMPANY v. A. P. JOHNSON

No. 8020DC1197

(Filed 7 July 1981)

Sales § 6.4— warranty in sale of house by builder-vendor—right of subsequent owner to sue

The right to sue for breach of implied warranty that a house has been completed in an efficient and workmanlike manner and that it is suitable for habitation is extended to those who inherit a dwelling from the initial purchaser.

APPEAL by plaintiffs from *Huffman, Judge.* Judgment entered 25 September 1980 in District Court, MOORE County. Heard in the Court of Appeals 28 May 1981.

On or about 8 March 1974, defendant Johnson entered into a building contract with Helen E. Strong to construct a dwelling for her on an unimproved lot in Southern Pines, North Carolina. Johnson and his wife conveyed the lot to Helen Strong by deed filed 25 March 1974. Johnson completed the dwelling in late July or early August 1974. Helen Strong died on 21 December 1977 and, by her will, left the property to her brother, plaintiff Thomas L. Strong. Strong rented the property to Mr. and Mrs. John Lea, who occupied the residence on 24 December 1978. On that date a fire broke out behind the fireplace. Strong contends the fire was caused by defective construction of the fireplace.

Plaintiff Travelers Indemnity Company provided fire insurance coverage on the house and was subrogated against defendant for sums expended due to the fire. Both plaintiffs allege a breach of an implied warranty of fitness for a dwelling.

Defendant filed a motion for summary judgment on the grounds that plaintiff Strong did not contract initially with defendant for the construction of the house. Upon hearing this motion, the trial judge entered findings of fact and concluded:

> [T]here is no genuine issue as to any material fact concerning the grounds for this motion; the Plaintiffs are not the initial vendees of the property which is the subject matter of this suit, and have no standing to maintain this action and are not the real parties in interest as required by North Carolina

General Statute Section 1-57; and the Defendant is entitled to a judgment dismissing the Plaintiffs' Complaint as a matter of law.

From the granting of summary judgment in favor of defendant, plaintiffs appeal.

Bruce T. Cunningham, Jr. for plaintiff appellants.

J. Stephen Gaydica III for defendant appellee.

MARTIN (Harry C.), Judge.

By their appeal, plaintiffs urge this Court to extend the right to sue for breach of implied warranty, as established in *Hartley v. Ballou*, 286 N.C. 51, 209 S.E. 2d 776 (1974), to those who inherit a dwelling from the initial purchaser. This is a question of first impression in North Carolina, and we are aware of no cases from other jurisdictions which address this precise issue.

In *Hartley*, our Supreme Court relaxed the doctrine of *caveat emptor* with respect to defects in new dwellings of which the purchaser was unaware and could not discover by reasonable inspection. It compared the situation to the sale of goods, controlled by the Uniform Commercial Code, in N.C.G.S. 25-2-316(3)(b). The Court concluded:

> [I]n every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling then under construction, the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and that this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee.

286 N.C. at 62, 209 S.E. 2d at 783.

Although the Court held that, at the time of the execution of the contract of sale, the defendant builder-vendor impliedly warranted to the plaintiff that the basement of his newly constructed

dwelling was sufficiently waterproofed, in accordance with the prevailing standards of workmanlike quality, it found that the plaintiff became aware of the defect and accepted the defendant's efforts to remedy the problem. For that factual reason, the Supreme Court reversed the Court of Appeals, stating that this Court acted under a misapprehension of the applicable law as to the nature of the implied warranty. Nevertheless, the language of Judge Morris (now Chief Judge) in *Hartley v. Ballou*, 20 N.C. App. 493, 498, 201 S.E. 2d 712, 715, *rev'd on other grounds*, 286 N.C. 51 (1974), provides us with an excellent summary of the policy reasons for recognizing an implied warranty:

> [L]ooking at the situation in a practical way, we are of the opinion that most potential homeowners lack the competency to do their own inspections. Even if he were skilled, there is little he could uncover, because most litigation is over defects which are found in the home's foundation. This can only be checked effectively at a time when none of the building proper has been constructed. It would seem to us, therefore, that the purchaser of a completed house is relying much more heavily on the superior skill and knowledge of the builder than is the purchaser of a house under construction.

See also Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E. 2d 792 (1970).

In *Lyon v. Ward*, 28 N.C. App. 446, 450, 221 S.E. 2d 727, 729 (1976), this Court interpreted *Hartley* "to stand for the proposition that a builder-vendor impliedly warrants to the initial purchaser that a house and all its fixtures will provide the service or protection for which it was intended under normal use and conditions." Judge Hedrick noted the inequities of the doctrine of *caveat emptor*, in that it does a disservice, not only to the ordinary prudent purchaser, but to the housing industry as well, by encouraging poor quality work and unscrupulous operations.

In *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E. 2d 102 (1975), the Supreme Court referred to the theory of implied warranty as a "well-reasoned exception" to the *caveat emptor* doctrine, and extended it to a situation

> where a grantor conveys land subject to restrictive covenants that limit its use to the construction of a single-family dwelling, and, due to subsequent disclosures, both

> unknown to and not reasonably discoverable by the grantee before or at the time of conveyance, the property cannot be used by the grantee, or by any subsequent grantees through mesne conveyances, for the specific purpose to which its use is limited by the restrictive convenants . . ..

Id. at 435, 215 S.E. 2d at 111.

Chief Justice Sharp, in *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E. 2d 557 (1976), further explained that the implied warranty

> arises by operation of law, not by specific factual agreement between the parties. Without question, however, a builder-vendor and a purchaser could enter into a binding agreement that such implied warranty would not apply to their particular transaction.
>
> . . . .
>
> . . . The implied warranty of workmanlike quality of construction does not exist by reason of a representation or inducement made by the builder-vendor, nor does it exist by reason of a representation or inducement made by the builder's sales agent, the real estate broker. Instead, it exists *by operation of law.*

Id. at 202, 225 S.E. 2d at 567-68 (emphasis in original). In *Griffin*, the Court allowed the purchaser of a new home, which accumulated water under the house, to proceed against a builder-vendor who was not one of the parties to the purchase contract.

At the present time, the right of an action under an implied warranty theory in North Carolina has been limited to the sale of a new residential dwelling to a consumer-vendee. *Stanford v. Owens*, 46 N.C. App. 388, 265 S.E. 2d 617, *disc. rev. denied*, 301 N.C. 95 (1980). *See also Jones v. Clark*, 36 N.C. App. 327, 244 S.E. 2d 183 (1978); *Industries Inc. v. Construction Co.*, 29 N.C. App. 270, 224 S.E. 2d 266, *disc. rev. denied*, 290 N.C. 551 (1976). No recovery has been granted to a plaintiff other than the initial purchaser. In light of the above-stated policies and decisions, however, we see no reason why an implied warranty should not extend to one who inherits a new home from the original vendee. Defendant's arguments to the contrary are based on the lack of

precedent, the long statute of limitations under N.C.G.S. 1-15(b) (repealed effective 1 October 1979, replaced in effect by N.C.G.S. 1-52(16) effective 1 October 1979), and the potential monetary and administrative burdens to builders and developers. We are not persuaded.

Had the original vendee, Helen Strong, died after the contract to purchase had been executed, but before the deed or possession of the property was transferred to her, plaintiff Strong would have been entitled to the residence as devisee under her will. *See* 3 Strong's N.C. Index 3d Conversion in Equity § 1 (1976). It would be unjust to deny an action on an implied warranty under that circumstance. Similarly, if this cause of action had arisen before Helen Strong's death, her representatives would have been authorized to bring the suit. N.C. Gen. Stat. 1-22, 1979 Supp., and 28A-18-1.

We find the factual situation in *Paschal v. Autry,* 256 N.C. 166, 123 S.E. 2d 569 (1962), to be analogous to that in the case sub judice. In *Paschal,* the plaintiffs' evidence tended to show that the defendants had cut timber from land before and after the death of the owner. In determining who had standing to sue, the Court held that if the action for damages accrued, in whole or in part, during the decedent's lifetime, "the action for damages survives to his executors, and must be brought by his executors rather than by his heirs or devisees. However, if such an injury to the realty was committed after his death, the right of action belongs to his heirs or devisees." *Id.* at 172, 123 S.E. 2d at 573. *See also Wood v. Wood,* 23 N.C. App. 352, 208 S.E. 2d 705 (1974). Here, although the alleged injury, the defect, took place before Helen Strong died, no cause of action arose until it was, or should have been, discovered, or within ten years of the last act of defendant. *See Earls v. Link, Inc.,* 38 N.C. App. 204, 247 S.E. 2d 617 (1978); N.C. Gen. Stat. 1-52(16).

To deny plaintiff Strong a right of action against the builder-vendor would deny him any remedy. Our state's constitution provides that "every 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.

We hold that a person who inherits a dwelling may seek recourse for defects which his predecessor would have been

entitled to pursue. By this decision we do not intimate any opinion as to whether an implied warranty should be extended to purchasers of the property subsequent to the initial vendee, although the courts of a few jurisdictions have begun inroads in that direction. *See* Annot., 25 A.L.R. 3d 383 § 6 (1969 and 1980 Supp.). Furthermore, as none of the factual issues of this case are before us on this appeal, we refrain from comment upon their merits.

Reversed.

Judges HEDRICK and WELLS concur.

ALPHA WARD v. SUNSET BEACH AND TWIN LAKES, INC.

No. 8013DC757

(Filed 7 July 1981)

1. **Dedication § 4; Easements § 11— erosion of land—no abandonment of easement in dedicated street**

There was no abandonment of an easement in a dedicated street when the land on which the street was located was eroded and submerged by waters of an inlet. Even if there was a legal abandonment of the dedicated street, abutting property owners retained as easement over the abandoned street to the extent necessary to allow reasonable ingress and egress.

2. **Easements § 8.4; Waters and Watercourses § 6.2— reclamation of submerged lands—ownership of lots—right to easement in former street**

Where land in a beach development, including two lots owned by plaintiff and an abutting street which had been dedicated to public use by recorded plat, was eroded and submerged by the waters of an inlet, and such land was subsequently reclaimed by defendant by the deposit of dredged sand and other fill material thereon, plaintiff once again became the fee simple owner of the two lots and was entitled to her easement in the abutting street as it existed at the time plaintiff first purchased her two lots for the purpose of access to her lots.

APPEAL by plaintiff from *Wood, Judge.* Judgment entered 19 March 1980 in District Court, BRUNSWICK County. Heard in the Court of Appeals 3 March 1981.

Plaintiff brought this action seeking a judgment declaring her to be the owner of two lots in the Sunset Beach Development in accordance with a recorded 1955 map. Plaintiff also sought a

declaration that her two lots extend from the Atlantic Ocean to the existing Main Street, or in the alternative, that she has an easement of ingress and egress by the closest route from her two lots to the existing Main Street. Answering the Complaint, the defendant alleged that the portion of Sunset Beach, in which plaintiff's lots were located, was completely washed away during the fall of 1960; that defendant has reclaimed this land and has built a new Main Street which is compatible with the reclaimed property; that since plaintiff has made no claims for her land in twenty years, she is estopped to do so now; and in the alternative, that if the court should find plaintiff was the owner of the two lots and entitled to a right-of-way, the plaintiff should reimburse defendant for its reclamation expenses and pay the defendant the market price for any land designated as a right-of-way.

The uncontested facts are as follows. On 5 December 1955, M. C. Gore and his wife conveyed lots 3 and 4, Block 25, Sunset Beach Development to plaintiff and her husband, now deceased. The defendant herein is the successor in title to the unsold portion of Sunset Beach formerly owned by Gore and his wife. In the recorded 1955 map, wherein lots 3 and 4 are platted, all streets and roadways, including the then existing Main Street, were dedicated to the public use. Further, the findings of fact to which no exceptions were made reveal:

> 3. That from 1955 through 1967 Tubbs Inlet, which was located generally to the east of Sunset Beach and lay between Sunset Beach and Ocean Isle Beach, began shifting in a westward direction and completely submerged and eroded the entire eastern end of Sunset Beach Development as it then existed and in particular lots 3 and 4 of Block 25 and all other property of said Development to a point near 11th Street as designated on the 1955 Map. That not less than 1400 continuous feet of land was submerged so that there was no land that was above water level at low tide.
>
> 4. That in 1968, M. C. Gore obtained a permit to reconstruct the eastern end of the island and thereafter proceeded to close Tubbs Inlet by dredging sand and other fill material from the waterway behind the island and depositing that fill into said inlet. That Tubbs Inlet was completely closed on February 14, 1970.

5. That on or about April 3, 1970 a smaller inlet was opened near the original location of Tubbs Inlet in 1955. This inlet is now known as Tubbs Inlet and it was opened by explosives.

6. That after Tubbs Inlet was closed by M. C. Gore and after opening the new inlet in 1970, the eastern portion of Sunset Beach, including the property in the area of Block 25 was not in the same configuration or shape as it was before the shifting of the inlet began in 1955. That before the inlet began shifting, Sunset Beach was approximately 2500 feet wide in that general area and it is now only approximately 1200 feet wide.

7. That in filling in Tubbs Inlet, M. C. Gore filled in the area that had been deeded to George Ward and wife, Alpha Ward, said lots having become covered by the waters of Tubbs Inlet after 1955. . . .

8. That the 1955 Map shows that lots 3 and 4 of Block 25 are located on a street designated therein as Main Street; that said Main Street ran from the entrance highway of the development (known as the Causeway Road) to and by lots 3 and 4 of Block 25 and abutted said lots.

. . .

12. In 1976 the defendant . . . caused the eastern end of Sunset Beach Development to be re-surveyed and re-mapped . . . . That according to that map, from approximately 11th Street eastward to Tubbs Inlet, Main Street was relocated a small distance north of the former Main Street as designated on the 1955 Map.

13. That the lots that were conveyed to George Ward and wife, Alpha Ward . . . are not shown on the defendant's new map (the 1976 Map) but these lots are physically present on the earth and are overlaid by portions of land designated as lots 22, 23, 24 and 25, Block 15R on the 1976 Map. The defendant is the present owner of the portions of lots 22, 23, 24 and 25, Block 15R on the 1976 Map which do not overlap lots 3 and 4 on the 1955 Map. The defendant's property lies between the property of the plaintiff and the road which is identified as Main Street on the 1976 Map.

14. That the plaintiff, Alpha Ward, owns superior title to lots 3 and 4, Block 25 as shown on the 1955 Map and those lots have been located on the ground and their location is not contested by the parties to this action.

Upon these and other facts, the trial court decreed that plaintiff was entitled to possess the lots in question but then ordered that plaintiff was neither "entitled to the enforcement of the previously existing dedicated easement to her lots which is designated as Main Street" on the 1955 Map, "nor is she entitled to an easement by necessity to her lots across the lands of the defendant" from Main Street as it now exists. The trial court also denied "defendant's Counterclaim for damages, reimbursement or other compensation from the plaintiff."

Ray H. Walton and William F. Fairley, for plaintiff appellant.

Grover A. Gore, for defendant appellee.

BECTON, Judge.

Plaintiff has assigned error to the trial court's order denying "enforcement of the previously existing dedicated easement to her lots." She has also assigned error to the following two findings of fact:

9. That Main Street as shown on the 1955 Map has been abandoned but if it could be relocated it would run between the present line of sand dunes on the south side of the island and the Atlantic Ocean and upon the beach strand. It would also run into the inlet and the Inland Waterway on the north portion of the island.

10. Main Street as shown on the 1955 Map would be impossible to reconstruct or maintain.

[1] Plaintiff asserts that the record fails to show any evidence of abandonment of Main Street as shown on the 1955 Map (Old Main Street), and we agree. Gore testified that Old Main Street was never withdrawn from dedication. Once an easement is established by dedication, it can only be abandoned by an intention to relinquish the interest accompanied by "acts and conduct positive, unequivocal, and inconsistent with [one's] claim of title." *Banks v. Banks*, 77 N.C. 186, 187 (1877). Furthermore, a mere lapse of time

or other delay in asserting one's claim to an easement unaccompanied by such acts and conduct clearly inconsistent with one's rights does not constitute a waiver or abandonment. *Id.; Miller v. Teer,* 220 N.C. 605, 18 S.E. 2d 173 (1942). Simply put, there was no easement, indeed no Main Street, to use during the period of time the eastern portion of Sunset Beach was submerged, and consequently, no abandonment of the easement.[1]

[2] Defendant argues that the easement was, in effect, abandoned when the land was washed away, and that thereafter, when defendant reclaimed the land, defendant had no duty to reconstruct Old Main Street. We agree that defendant had neither a duty to reclaim the land nor a duty to rebuild Old Main Street. However, once the portion of Sunset Beach, which included plaintiff's lots 3 and 4, was reclaimed, plaintiff once again became fee simple owner of those lots and was entitled to the easement as it existed at the time plaintiff first acquired the two lots. While not directly on point, the principle in *State v. Johnson,* 278 N.C. 126, 179 S.E. 2d 371 (1971), that accretion and erosion do not change boundaries unless the body of water is a boundary line, is instructive. The court in *Johnson* stated: "[A] 'traveling inlet' does not uproot and supplant a boundary line as it passes over it unless such inlet in fact was the boundary when it started its journey." *Id.* at 148, 179 S.E. 2d at 385. Plaintiff in the case *sub judice* contends that since the effects of natural accretion and erosion did not affect the fee simple title to appellant's property in *Johnson,* then neither should the erosion and subsequent reclamation affect the property interest plaintiff has in the easement. We agree.

We are guided by an 1897 Illinois Supreme Court decision which appears to be directly on point with our holding. *City of*

1. Even assuming there has been an abandonment, we adopt the principle that when there has been a legal abandonment of a dedicated street, abutting property owners retain easement over the abandoned street to the extent necessary to allow reasonable ingress and egress. *See Potter v. Citation Coal Corp.,* 445 S.W. 2d 128 (Ky. 1969). This principle is consistent with G.S. 136-96 which provides that when a road or street is not used within fifteen years after dedication *and* when a declaration of withdrawal is recorded, the road is deemed abandoned. An exception in this statute, however, provides that this provision shall not apply "where the continued use of any strip of land dedicated for street or highway purposes shall be necessary to afford convenient ingress or egress to any lot or parcel of land sold and conveyed by the dedicator of such street or highway." *See Andrews v. Country Club Hills,* 18 N.C. App. 6, 195 S.E. 2d 584 (1973).

Chicago v. Ward, 169 Ill. 392, 48 N.E. 927 (1897). In *Ward*, the plaintiffs, property owners sought to enjoin the defendant City from erecting buildings on "reclaimed" land adjacent to their property. Plaintiffs claimed this land had been dedicated as a park when the area was platted. The plat, which was amended in 1836 and 1839, described certain land along the lakefront which was left vacant and was not subdivided. The plat was marked: "Open ground. No building. Public ground. Forever to remain vacant of building." In 1844, the City of Chicago, by resolution, declared that the open space should be enclosed as a public park. In 1847, 1851 and 1856 the land was designated as "Lake Park" in successive ordinances. The controlling issue in the case concerned land which was carried away by the waters of Lake Michigan and later reclaimed. The Illinios Supreme Court held:

> [T]he title to these lands submerged by the action of Lake Michigan was not lost, and that by their subsequent reclamation the city has completely reasserted its title thereto, as such title stood at the time of the dedication of the respective plats thereof. The trust impressed on them was that they should forever remain free from buildings, and it cannot be said that while they were submerged they were subject to be built upon. We do not see that the submergence and subsequent reclamation altered or destroyed the trust upon and for which they were held. As the city had, as we have seen, the fee in this park, impressed with the trust declared by the dedicators, the legislation of 1861 and 1863 added nothing to its trust, and can only be looked upon as confirmatory of the same.

Id. at 408, 48 N.E. at 932. *See also Mulry v. Norton*, 100 N.Y. 424, 3 N.E. 581 (1885). The Illinois court emphasized that the restriction of the land as a park created a vested right attaching to the abutting property owners by virtue of the original dedication. The court also presumed that the plaintiffs in *Ward* purchased their lots because of the enhanced value of the lots from the dedication.

Just as the City in *Ward* reclaimed title to its land as the title stood at the time of dedication, so too can plaintiff in this case reassert her title as it stood when she purchased the two lots. Plaintiff's vested right in the easement, depicted as Old Main Street, was reclaimed along with lots 3 and 4. Plaintiff's lots 3

and 4, even more so than plaintiffs' property in *Ward*, are enhanced by this easement. Without the easement, plaintiff's land would be accessible only by the ocean.

We feel that the tenor of prior North Carolina decisions is consistent with our holding. For example, in *Insurance Co. v. Carolina Beach*, 216 N.C. 778, 7 S.E. 2d 13 (1940), in which the width of a dedicated street was subsequently reduced from ninety-nine feet to eighty feet,[2] our Supreme Court held:

> [T]he New Hanover Transit Company [predecessor in title to plaintiff corporation], having made a map of its land, platting it into lots and streets, showing Lake Park Boulevard as a street ninety-nine feet wide, and having sold lots with reference to such map, thereby irrevocably dedicated the streets, including Lake Park Boulevard, to the use of the purchasers of lots so sold, and those claiming under them, and is estopped to deny the right of such purchasers, and those claiming under them, to an easement in all the streets represented and as represented on the map at the time of the purchase and conveyance with reference to it—irrespective of whether the town, when it was incorporated, accepted and opened the streets to their full width. The right of prior purchasers, and those claiming under them, to this easement was unaffected by the change of the map in 1916, even if it be conceded that the change was made pursuant to corporate action.

Id. at 787, 7 S.E. 2d at 19. As support for its holding in *Insurance Co. v. Carolina Beach*, the Supreme Court cited numerous cases sustaining the following principle:

> [I]f the owner of land, located within or without a city or town, has it subdivided and platted into lots and streets, and sells and conveys the lots or any of them with reference to the plat, nothing else appearing, he thereby dedicates the streets, and all of them, to the use of the purchasers, and those claiming under them, and of the public. . . .

Id. at 785, 7 S.E. 2d at 18. The reason for this principle is:

2. The reduction in width of this easement was carried out "to take care of erosion affecting the ocean front lots already sold and, as the said president [of the corporation] testified, 'to help us in the sale of other lots.' " 216 N.C. at 783, 7 S.E. 2d at 17.

> [T]hat the grantor, by making such a conveyance of his property, induces the purchasers to believe that the streets and alleys, squares, courts, and parks will be kept open for their use and benefit, and having acted upon the faith of his implied representations, based upon his conduct in platting the land and selling accordingly, he is equitably estopped, as well in reference to the public as to his grantees, from denying the existence of the easement thus created.

Green v. Miller, 161 N.C. 25, 30, 76 S.E. 505, 507 (1912). This principle and its rationale are equally applicable in the case before us. It seems clear in this case, as in most cases, that plaintiff was induced, in part, to purchase lots 3 and 4 because the lots were accessible by some means other than the ocean. Once defendant reclaimed plaintiff's land, plaintiff once again became fee simple owner with rights to her land, including access by way of the easement, as it existed at the time of purchase. Defendant could not revoke the easement as shown on the 1955 Map by having a new map platted.

We find it unnecessary to deal with plaintiff's assignment of error dealing with the finding of fact and conclusion of law that Old Main Street would be impossible to rebuild. As we earlier noted, since defendant was under no duty to reclaim plaintiff's land, defendant is under no duty to rebuild Old Main Street. Defendant has conceded though that once it reclaimed plaintiff's lots, plaintiff owned this land. We hold, therefore (1) that plaintiff retains an easement for purposes of ingress and egress to her lots in and over the entire area of Main Street, as that street was depicted on the 1955 Map; and (2) that plaintiff is not otherwise entitled to an easement by necessity to her lots across the lands of defendant, to and from Main Street as it now exists.

Affirmed in part; reversed in part.

Judge VAUGHN and Judge WELLS concur.

EDNA A. (WEBB) WITHROW v. BOBBY GENE WEBB

No. 8028DC835

(Filed 7 July 1981)

Evidence § 51; Parent and Child § 1.2— child custody and support—paternity issue raised—res judicata

The trial court properly denied defendant's motion for a blood test pursuant to G.S. 8-50.1 and properly determined that defendant's paternity had been previously adjudicated by the court where defendant could have raised the issue of paternity in the wife's action for alimony, custody, and child support; on the contrary, by verified answer, he admitted paternity and asked for custody; defendant did not appeal from the judgment entered finding that four children, among them the child in question, were born of the marriage between plaintiff and defendant; subsequently, in his own action for divorce, he alleged that the child in question was born of his marriage to plaintiff; the judgment in that action also found that the child in question was born of the marriage between plaintiff and defendant; and when defendant attempted five years later to raise the issue of paternity, he was barred from doing so by res judicata.

APPEAL by defendant from *Roda, Judge.* Judgment entered 28 May 1980, District Court, BUNCOMBE County. Heard in the Court of Appeals 30 March 1981.

This action was instituted in 1974 for alimony, child custody and support and for possession of the residence owned by the parties as tenants by the entirety. In that action, plaintiff alleged that one child was born of the marriage, to wit—Holly Lisa Webb, born 26 May 1966. By answer, defendant admitted the allegation, and, in his "further answer, defense and counterclaim" he asked "for custody of the minor child born of this marriage or reasonable visitation rights". Temporary order was entered in the matter on 10 May 1974 awarding custody of the child to plaintiff subject to the right of defendant to reasonable visitation with the child. Judgment was entered on 5 August 1975, finding both parents to be fit and proper persons for the custody of the child but placing the child in the custody of plaintiff, giving the plaintiff and the child possession of the home, providing for visitation by defendant with the child, and providing for $35 per week support for the child.

Prior to the entry of judgment, defendant filed an action for divorce. Plaintiff herein answered, denying his right to a divorce and counterclaiming for alimony, child support and custody and

possession of the house. Defendant filed an amendment to his complaint alleging that "there was one minor child born of said marriage, to wit: Holly Lisa Webb, born May 26, 1966." Judgment of divorce was entered 5 August 1975, and it contained a finding that "one child was born of the marriage of plaintiff and defendant, namely, Holly Lisa Webb", born 26 May 1966.

On 11 April 1980, defendant filed a motion in the cause in the original action, alleging that plaintiff had stated that the child was not defendant's child but the child of her present husband, and asking that plaintiff and the child be required to submit to a blood-grouping test.

Plaintiff responded to the motion, denying its allegations and averring that the court had adjudicated the paternity of the child and defendant had admitted paternity in his own pleadings.

The court, ruling on the court file and arguments of counsel, dismissed the motion, concluding that the issue of paternity had been previously adjudicated by the court. Defendant appeals from this order.

Gray, Kimel and Connolly, by David G. Gray, for plaintiff appellee.

Cecil C. Jackson, Jr., for defendant appellant.

MORRIS, Chief Judge.

By his third assignment of error, defendant contends that the court erred in its second conclusion of law which is: "The defendant's motion for blood test pursuant to N.C. G.S. § 8-50.1 is dismissed; issue of paternity between defendant and the minor child, Holly Lisa Webb, having been previously adjudicated by the court." We disagree. We think *Williams v. Holland*, 39 N.C. App. 141, 249 S.E. 2d 821 (1978), is dispositive of the question raised. There the plaintiff initiated an action in district court seeking to have defendant ordered to pay arrearages under a Nevada court order in a divorce action and for modification of the support order necessitated by a change in circumstances. The Nevada court had ordered defendant to make certain payments for the support of the parties' child. Defendant moved for an order requiring that plaintiff submit herself and the child for blood-grouping tests as provided for by G.S. 8-50.1. Plaintiff responded

contending that the defendant's request for blood-grouping tests was barred by *res judicata* and estoppel. We noted that *Wright v. Wright*, 281 N.C. 159, 188 S.E. 2d 317 (1972), had held that the portion of G.S. 8-50.1 applicable to criminal actions providing that the blood-grouping tests could be ordered in any criminal action "in which the question of paternity arises" also applied to civil actions.[1] We said in *Williams v. Holland*, supra:

> Thus, before a court is required to order a blood-grouping test in a civil action, the question of paternity must arise. If defendant in this case is barred by *res judicata* or estoppel from raising the issue of paternity as plaintiff contends, the statutorily imposed obligation of the court to order that the parties submit to blood-grouping tests never arose, and it was error for the court to enter such order.

39 N.C. App. at 143, 249 S.E. 2d at 823.

We found the Nevada order to be based on in personam jurisdiction, and entitled to full faith and credit. *See Brondum v. Cox*, 30 N.C. App. 35, 226 S.E. 2d 193 (1976), aff'd. 292 N.C. 192, 232 S.E. 2d 687 (1977). In holding that defendant was barred by the principle of *res judicata* from putting paternity in issue, we said:

> That a judgment rendered by a court having jurisdiction to do so finding paternity to exist bars the relitigation of that issue by the parties to the original judgment is a well established rule of law in other jurisdictions that have considered the question. *Adoption of Stroope*, 232 Cal. App. 2d 581, 43 Cal. Rptr. 40 (1965); *Peck v. Superior Court*, 185 Cal. App. 2d 573, 8 Cal. Rptr. 561 (1960); *Peercy v. Peercy*, 154 Colo. 575, 392 P. 2d 609 (1964); *Sorenson v. Sorenson*, 254 Ia. 817, 119 N.W. 2d 129 (1963); *Dornfeld v. Dornfeld*, 200 App. Div. 38, 192 N.Y.S. 497 (1922); *Time v. Time*, 59 Misc. 2d 912, 300 N.Y.S. 2d 924 (1969); *Arnold v. Arnold*, 207 Okla, 352, 249 P. 2d 734 (1952); *Byrd v. Travellers Insurance Co.*, 275 S.W. 2d 861 (Tex. Civ. App. 1955); *Johns v. Johns*, 64 Wash. 2d 696, 393 P. 2d 948 (1964); *E ____ v. E ____*, 57 Wis. 2d 436, 204

1. G.S. 8-50.1 now provides that "[i]n the trial of any civil action in which the question of parentage arises, the court before whom the matter may be brought, upon motion of the plaintiff, alleged-parent defendant, or other interested party, shall order that the alleged-parent defendant, the known natural parent, and the child submit to" blood-grouping tests.

N.W. 2d 503 (1973); *Limberg v. Limberg,* 10 Wis. 2d 63, 102 N.W. 2d 103 (1960). For a discussion of these and other cases that have considered this question, *see Annot.,* 65 A.L.R. 2d, 1381, pp. 1395-96.

Williams v. Holland, supra at 147, 249 S.E. 2d at 825-26.

Here defendant could have raised the issue of paternity in 1974 in the wife's action for alimony, custody, and child support. On the contrary, by verified answer, he admitted paternity and asked for custody. Nor did he appeal from the judgment entered finding that four children, among whom was Holly Lisa, were born of the marriage between plaintiff and defendant. Subsequently, in his own action for divorce, he alleged that Holly Lisa Webb was born of his marriage to plaintiff herein, and the judgment in that action also found that Holly Lisa Webb was born of the marriage between plaintiff and defendant. Five years later, he attempts to raise the issue of paternity. He is barred from doing so by *res judicata. Peercy v. Peercy,* 154 Colo. 575, 392 P. 2d 609, (1964); *McRae v. McRae,* 115 N.H. 353, 341 A. 2d 762 (1975), where the Court said:

> In this case the husband did not challenge paternity until more than three and one-half years after the final divorce decree was granted and almost five years after he had returned to Keene where he allegedly discovered the new "reliable information" that he might not be the natural father of Denise Ann. Nor was paternity disputed in August 1973 when Persis petitioned for payment of the support arrearage. To permit the husband to raise the question of paternity after an eight-year period of uninterrupted acquiescence, with several opportunities to raise the issue, would contravene the policy of this State's law to protect the child and the spouse from the belated resort to scientific proof in an effort to escape parental responsibility. *Watts v. Watts,* 115 N.H. 186, 337 A. 2d 350 (1975).

115 N.H. at 355, 341 A. 2d at 763-64, and Com. ex rel. *Palchinski v. Palchinski,* 253 Pa. Super. Ct. 171, 384 A. 2d 1285 (1978), where the Court said:

> In the instant case, the issue of paternity was decided at the August 3, 1973 support hearing. At that time, appellee had the opportunity to appear and assert his rights and defenses.

> Although a copy of the notice of the hearing was sent to appellee's attorney, appellee chose to appear by himself and to enter into a consent agreement and court order to support both Stacie and Julie Palchinski. Moreover, at the time of the hearing, appellee, unlike the petitioner in *Nedzwecky*, had the opportunity to demand blood tests but he neglected to do so for three years. Appellee also failed to appeal from the original order of support. Therefore, *res judicata* would operate to foreclose a subsequent challenge on the issue of paternity.

253 Pa. Super. Ct. 175-76, 384 A. 2d 1287.

With respect to the question of estoppel, our Supreme Court in *Wright v. Wright*, supra, said by way of dictum that ". . . the putative father of the child conceived or born during wedlock should [perhaps] be estopped to raise the issue of paternity unless he does so within a fixed time," but that ". . . is a matter for consideration by the General Assembly," 281 N.C. at 172, 188 S.E. 2d at 326, having found that the record before the Court did not disclose facts sufficient to estop the defendant from raising the issue of paternity. *Accord Williams v. Holland*, supra. *See also Johnson v. Johnson*, 7 N.C. App. 310, 172 S.E. 2d 264 (1970), where Judge Vaughn, writing for the Court, expressed the view of other jurisdictions when he said:

> We do not reach, nor do we imply, an affirmative answer to the question of whether this defendant's motion for a blood grouping test could have been allowed even if defendant had, by answer, denied paternity. In the light of the facts of this case, in which the defendant was married to plaintiff in 1959 and lived with her until November 1968, seven years after the birth of their daughter and four years following the birth of their son, common sense, public policy and overriding consideration for the welfare of innocent children would seem to dictate the contrary, despite the broad language of G.S. 8-50.1.

7 N.C. App. at 314, 172 S.E. 2d at 266-67. *See also Time v. Time*, 59 Misc. 2d 912, 300 N.Y. Supp. 2d 924 (1969); *Commonwealth v. Weston*, 201 Pa. Super. Ct. 554, 193 A. 2d 782 (1963); *McRae v. McRae*, supra. In this case the father has held himself out as the father of the child, asked for custody, insisted on visitation rights

and is certainly regarded by the child and the outside world as the father. Even if the principle of *res judicata* were not applicable, it would seem to us that to grant the motion for a blood-grouping test on this record, would open the door to unwarranted challenges of paternity, violate public policy, and clearly result in irreparable harm to the child whose parents appear to be bent on harrassing one another.

Finally, defendant contends that certain findings of fact are unsupported by evidence. This is quite true, since the judgment specifically relates that "[t]he court heard no oral evidence in this matter, ruled on the arguments of counsel and the record of the Court in the Court file." The matters of which defendant complains are clearly matters with respect to which the fact would be revealed by the official records and files in this matter which were before the court.

The order of the trial court denying defendant's motion for a blood-grouping test and finding plaintiff entitled to attorneys fees is

Affirmed.

Judges MARTIN (Harry C.) and HILL concur.

CLYDE VIRGINIA DELP v. HOBERT R. DELP

No. 8023DC948

(Filed 7 July 1981)

1. Appeal and Error §§ 45, 45.1— the brief—statement of questions presented—statement of case—exceptions and assignments of error

Appeal is subject to dismissal because of appellant's failure to comply with the Rules of Appellate Procedure where appellant failed to include a statement of questions presented for review and a concise statement of the case in his brief as required by Appellate Rules 28(b)(1) and (2), and where he failed to set out proper exceptions and assignments of error pertinent to his argument in violation of Rule 28(b)(3).

2. Cancellation and Rescission of Instruments § 11; Husband and Wife § 12.1— breach of separation agreement—alleged duress—failure to submit issue of validity of agreement

In an action for breach of the alimony provisions of a separation agreement in which defendant answered and counterclaimed for a rescission of the

separation agreement and deeds executed pursuant thereto on the ground that he signed the documents under duress, the trial court did not err in refusing to submit an issue as to whether a valid agreement supported by consideration existed between the parties prior to the issue of duress since defendant failed to plead the affirmative defense of failure of consideration; defendant admitted the existence of consideration for the separation agreement in his pleadings and at trial; defendant admitted signing the agreement and the deed and admitted his breach of the terms of the separation agreement; and the issues submitted to the jury were sufficient to settle the material controversies arising on the pleadings.

3. Husband and Wife § 12.1— rescission of separation agreement—inadmissible evidence

In an action for breach of a separation agreement in which defendant sought rescission of the agreement on the ground of duress, the trial court properly excluded testimony by defendant's witness that plaintiff was "jubilant," "well-pleased," "happy" and "boastful" over the separation agreement and that the witness had commented to plaintiff's daughter that plaintiff was going to take everything the defendant had and "break him."

APPEAL by defendant from *Kilby, Judge.* Judgment entered 9 June 1980 in District Court, ALLEGHANY County. Heard in the Court of Appeals 8 April 1981.

Plaintiff instituted this action seeking damages for breach of contract. In her complaint, plaintiff alleged, in pertinent part, the following:

> 7. That on or about the 23rd day of January 1979 the parties separated from each other and on said same date entered into a Separation Agreement, a copy of which is hereto attached as Exhibit "A".
>
> 8. That pursuant to the terms of said Separation Agreement, the defendant agreed to pay to the plaintiff permanent alimony in the amount of Five Hundred Thirty-Seven ($537) Dollars per month beginning on the 25th day of January 1979 and continuing on or before the 25th day of each month thereafter until the death or remarriage of the wife, whichever event shall occur first.
>
> 9. That the defendant has wrongfully and willfully breached said contract in that he has failed and refused to make said regular monthly payments and is presently in arrears in the making of the same in the amount of One Thousand Six Hundred and Eleven ($1,611) Dollars.

Apparently the separation agreement required the parties to deed certain parcels of real estate to each other. Neither the separation agreement nor the deeds have been included in the record on appeal or filed as exhibits with the Court.

Defendant answered, denying the allegations in paragraphs 7 and 9. As to paragraph 8, defendant answered as follows:

> VIII. It is admitted that the paper documents drafted by the attorney representing Clyde Virginia Delp said that he is to pay Five Hundred Thirty-seven ($537.00) Dollars per month. However, this allegation will be treated more completely and thoroughly in the Defendant's own counterclaim.

Defendant's counterclaim, seeking rescission of the separation agreement and two deeds on the grounds of duress and coercion, alleged that his adult children had coerced him into signing the separation agreement and deeds by physically abusing him and that he had not knowingly, freely and voluntarily entered into the separation agreement. In his counterclaim defendant admitted signing the separation agreement and deeds. Plaintiff replied to defendant's counterclaim by denying that defendant had been coerced into signing the agreement and by denying that defendant had not knowingly, freely and voluntarily entered into the separation agreement.

At trial, plaintiff's evidence tended to show that on 8 January 1979, one of the parties' sons argued with defendant over family matters and hit him. The separation agreement and property settlement were not discussed on 8 January. Around 16 or 17 January plaintiff and defendant began discussing the property settlement and separation agreement. The parties' agreement was eventually put into writing and was signed, along with the deeds, by the parties on 23 January 1979. The defendant signed the agreement without objection. Defendant paid plaintiff $537 per month, as required by the separation agreement, from January 1979 until November 1979, when defendant ceased making payments.

Defendant's evidence tended to show that three of the parties' adult sons "beat defendant up" on 8 January. Defendant signed the separation agreement because he feared for his life. Defendant also testified that he negotiated the terms of the agreement with his wife to a limited extent. He and his wife went

to an attorney's office and told the attorney what terms the parties had agreed upon. They returned later, when defendant read and signed the agreement and deeds. The separation agreement contained the terms the parties had agreed upon. Defendant recorded his deed and made the monthly payments to his wife as required by the separation agreement through November of 1979.

The trial court submitted the following issues to the jury:

> 1. Were the separation agreement and deeds executed on January 23, 1979, entered into by the Defendant under coercion and duress?
>
> 2. If the separation agreement and deeds executed by the Defendant on January 23, 1979, were entered into under coercion and duress, did the Defendant thereafter ratify the agreement and deeds?

The jury answered the first issue "No" and did not reach the second issue. From a judgment ordering defendant to pay plaintiff $3,222 plus interest and $537 per month in the future as provided in the separation agreement, defendant appeals.

Vannoy & Reeves by Jimmy D. Reeves, for the plaintiff-appellee.

Franklin Smith, for the defendant-appellant.

MARTIN (Robert M.), Judge.

[1] First, we note that the defendant-appellant violated several provisions of Rule 28(b), N.C. Rules App. Proc., in his appellate brief. He violated Appellate Rule 28(b)(1) and (2), by failing to include a statement of questions presented for review and a concise statement of the case in his brief. He also failed to set out the assignments of error and exceptions pertinent to his first argument in violation of Rule 28(b)(3), thereby abandoning that argument. *Id.* In addition, the appellant failed to set out the assignments of error pertinent to his second argument, in violation of Rule 28(b)(3). Although he set out exception numbers in his second argument, the exceptions to which he referred are unrelated to the argument. Appellant, therefore, has also abandoned the second argument contained in his appellate brief. *Id.*

This appeal is subject to dismissal due to appellant's failure to comply with the Rules of Appellate Procedure. This Court,

however, in its discretion, has decided to suspend the requirements of Rule 28(b) on its own initiative, and to decide this case on its merits pursuant to Rule 2, N.C. Rules App. Proc.

[2] At the close of all the evidence, the defendant tendered the following issue for submission to the jury: "[w]as [sic] the separation agreement and deeds executed on January 23, 1979, voluntarily and freely entered into between the Plaintiff and Defendant?" The trial court refused to submit that issue to the jury and instead submitted the following issue to the jury: "[w]ere the separation agreement and deeds executed on January 23, 1979, entered into by the Defendant under coercion and duress?" The trial court instructed the jury that defendant bore the burden of proof on this issue. Defendant argues that before the jury could reach the issue of duress, it should have first answered the issue of whether a valid contract existed, and plaintiff bore the burden of proving the existence of a valid contract. We disagree.

Defendant argues that the jury should have considered the issue of whether a valid contract existed because conflicting evidence was adduced at trial by both parties with regard to the element of valid consideration for the separation agreement, and plaintiff bore the burden of proving all of the essential elements of a valid contract, including the element of consideration. Defendant's argument fails for two reasons. First, defendant failed to plead failure of consideration in his answer or counterclaim. Failure of consideration is an affirmative defense. N.C. Gen. Stat. § 1A-1, Rule 8(c). Where a defendant does not raise an affirmative defense in his pleadings or in the trial, he cannot present it on appeal. *Grissett v. Ward*, 10 N.C. App. 685, 179 S.E. 2d 867 (1971). Second, defendant admitted the existence of consideration for the separation agreement in his pleadings and at trial. Defendant stated in his counterclaim "[t]hat at the time, [the time the separation agreement was executed by the parties and the defendant conveyed property to the plaintiff] the Plaintiff conveyed to the Defendant a tract of property. . . ." Defendant testified that he recorded his deed and that he also received personal property under the terms of the separation agreement. Inadequate consideration alone is not sufficient grounds to invalidate a contract. To defeat a contract for failure of consideration, the failure must be entire. *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539 (1962).

Plaintiff sued defendant for breach of the terms of the separation agreement. Defendant answered and counterclaimed for a rescission of the separation agreement and deeds executed pursuant thereto for the reason that he signed the documents under duress and coercion. Defendant admitted signing the agreement and the deeds and admitted his breach of the terms of the separation agreement. His sole defenses at trial and in his pleadings were duress and coercion. The issues submitted to the jury were sufficient to settle the material controversies arising on the pleadings and at trial and to support the judgment. *See Johnson v. Massengill*, 280 N.C. 376, 186 S.E. 2d 168 (1972). Duress and coercion are affirmative defenses and defendant bore the burden of proving the existance of duress and coercion to the jury's satisfaction. *Price v. Conley*, 21 N.C. App. 326, 204 S.E. 2d 178 (1974). The trial court did not err by refusing to submit the issue proposed by defendant to the jury.

[3] Defendant's second argument concerns the exclusion by the trial court of certain testimony by one of defendant's witnesses. We note that the only testimony excluded by the court was the witness's statement that the plaintiff was "jubilant," "well-pleased," "happy" and "boastful" over the separation agreement and that the *witness* had commented to plaintiff's daughter that plaintiff was going to take everything the defendant had and "break him." We find no error in the exclusion of this clearly inadmissible testimony. Further, even if the testimony was admissible, any error in excluding it was harmless. The essence of the witness's testimony, *i.e.*, that the plaintiff had stated to her that she would receive the house, furniture and $1,000 per month as alimony after consulting her attorney, was presented to the jury.

No error.

Judges WHICHARD and BECTON concur.

WILLIAM T. FIKE, JR., PETITIONER v. BOARD OF TRUSTEES, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM, RESPONDENT

No. 8010SC1119

(Filed 7 July 1981)

Estoppel § 4.7; Retirement System § 5— disability retirement benefits—equitable estoppel—sufficiency of evidence

Defendant was estopped from denying plaintiff disability retirement benefits where plaintiff relied on defendant's publication, "1978, Your Retirement System—How It Works" for the proper procedure to obtain disability retirement benefits, and plaintiff followed the procedures established by defendant, requested a disability retirement form, filled out the forms provided as directed, and properly relied upon assertions by the employer's payroll and benefits manager that he had done all that was necessary.

APPEAL by respondent from *Bailey, Judge.* Judgment entered 19 September 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 7 May 1981.

Dr. William T. Fike, Jr., the Petitioner-Appellee in this case, has been employed at North Carolina State University for 20 years and is a Professor of Crop Science with a Ph.D. in that field. His wife, Rosemary A. Fike, was also an employee of North Carolina State University and was a contributing member of the Teachers' and State Employees' Retirement System with more than five years of creditable service. In May of 1978, Mrs. Fike suffered a cerebral hemorrhage and went into a coma. On 15 August 1978, Dr. Fike consulted Mrs. Ruth Ellis, Payroll and Benefits Manager at North Carolina State University, concerning retirement options, salary continuation and social security benefits for his wife. At that time, Dr. Fike had recently learned that his wife's illness was terminal. Dr. Fike was himself a member of the Teachers' and State Employees' Retirement System and had read the Retirement System Handbook at least as early as July of 1978. Dr. Fike testified that he signed various documents in Mrs. Ellis' office on 15 August 1978. Both Dr. Fike and Mrs. Ellis believed that Dr. Fike filled out the retirement application as guardian for Mrs. Fike as well as the disability salary continuation form on 15 August 1978.

Mrs. Ellis testified that she thought the form for retirement disability was supposed to be filed at a later time, and for this reason she did not send in that application on 15 August. She also

testified that she could have called the Retirement System and asked when the form should be filed, but did not.

Not receiving any correspondence or payment by 29 September 1978, Dr. Fike called Mrs. Ellis and was advised to call Mr. David Moore of the central office of the Retirement System. Mr. Moore informed him that a disability retirement application had not been received on Mrs. Rosemary Fike. Mr. Moore then informed Mrs. Ellis that the application should be filed immediately. Mrs. Ellis could not find the original form and therefore had Dr. Fike sign another application on that day. This application was received by the Retirement System's Raleigh Office on 2 October 1978. Mrs. Fike died on 13 October 1978.

The Board of Trustees for the Teachers' and State Employees' Retirement System found that since the application for retirement was filed with the Retirement System on 2 October, and the System was in no way responsible for any delay in the filing of the application, the earliest possible effective date for Mrs. Fike's retirement was 1 November. Mrs. Fike therefore was never retired and Dr. Fike was not entitled to a monthly benefit from the Teachers' and State Employees' Retirement System. Upon Dr. Fike's petition to Superior Court for review, the trial court found that the decision of the Board was affected by errors of law and was unsupported by substantial evidence and reversed its decision. From the order deeming Mrs. Fike's application to be approved effective 1 October 1978 and ordering the Board to pay by lump sum the accrued and unpaid benefits to Dr. Fike, the Board appeals.

Attorney General Edmisten, by Assistant Attorney General Norma S. Harrell, for the respondent, Board of Trustees, Teachers' and State Employees' Retirement System.

Bailey, Dixon, Wooten, McDonald & Fountain, by John N. Fountain, for petitioner-appellee.

ARNOLD, Judge.

The dispositive issue of this appeal is whether the Retirement System may be estopped from denying Dr. Fike disability retirement benefits. Petitioner contends that Mrs. Ellis, as the retirement representative at North Carolina State University,

had apparent authority to accept the application on behalf of the Retirement System and therefore respondent should be estopped from denying that the application was filed on 15 August 1978 and approved effective 1 October 1978.

The essential elements of equitable estoppel were defined by the Supreme Court in *Hawkins v. Finance Corp.*, 238 N.C. 174, 77 S.E. 2d 669 (1953):

> [T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially. 238 N.C. at 177-178, 77 S.E. 2d at 672.

Meachan v. Montgomery County Board of Education, 47 N.C. App. 271, 277-78, 267 S.E. 2d 349, 353 (1980).

More specifically, the law of estoppel as applied to agency is as follows:

> Where a person by words or conduct represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact.

Daniel Boone Complex, Inc. v. Furst, 43 N.C. App. 95, 107, 258 S.E. 2d 379, 388 (1979); *disc. rev. denied*, 299 N.C. 120, 261 S.E. 2d 923 (1980).

Applying these principles to the present case, we conclude that the Superior Court did not err in ruling that the Board of

Trustees' decision denying Dr. Fike disability retirement benefits must be reversed. The Retirement System, through the representations made to Dr. Fike in its publication, "1978, Your Retirement System—How It Works" represented to Dr. Fike that the retiree's personnel officer would provide the proper forms, advise on the proper execution of the various forms and furnish any assistance necessary. It twice states that the completed application must be returned to the employer. It does not suggest filing the application directly with the Retirement System, but to the contrary, requires that the employer complete a portion of the application prior to forwarding it to the Retirement System. Mrs. Ellis testified that she thought she had Dr. Fike execute a disability retirement application on 15 August and that she erroneously thought that it could not be filed until the salary continuation form had been processed. She further testified that she could have called someone with the Retirement System and asked when the retirement application should be forwarded. By her words and conduct on 15 August she represented to Dr. Fike that he had done everything that was necessary, and that all was in order.

It is apparent therefore that Dr. Fike followed the procedures established by the Board, requested a disability retirement form, filled out the forms provided as directed and relied upon Mrs. Ellis' assertions that he had done all that was necessary. Although respondent contends that Dr. Fike had the means of knowledge of the true facts, we do not agree that he was required to make extensive inquiry for himself after being advised that he had done all that he need do.

While it is doubtful that the Retirement System had sufficient control over Mrs. Ellis, or her employer, for her to be its actual agent, we find that the evidence of representations to the contrary is sufficient to estop the Retirement System from denying the agency as to Dr. Fike, who dealt with Mrs. Ellis in reliance on its representations to his detriment.

Respondent is correct in its assertion that a governmental agency is not subject to an estoppel to the same extent as a private individual or a private corporation. *See Henderson v. Gill*, 229 N.C. 313, 49 S.E. 2d 754 (1948). As recognized in the recent opinion of *Meachan v. Montgomery County Board of Education*,

47 N.C. App. at 279, 267 S.E. 2d at 354, however, "an estoppel may arise against a [governmental entity] out of a transaction in which it acted in a governmental capacity, if an estoppel is necessary to prevent loss to another, and if such estoppel will not impair the exercise of the governmental powers of the [entity]." *Washington v. McLawhorn*, 237 N.C. 449, 75 S.E. 2d 402 (1953). We find that application of principles of estoppel in the present case would not impair the exercise of respondent's governmental powers.

Affirmed.

Judges VAUGHN and BECTON concur.

STATE OF NORTH CAROLINA v. TIMOTHY BERNARD BROWN

No. 8029SC1020

(Filed 7 July 1981)

Constitutional Law § 56; Criminal Law § 91.2— jurors in courtroom during guilty pleas in other cases—denial of continuance—right to impartial jury

In this prosecution for sale of cocaine and marijuana and possession of cocaine and marijuana with intent to sell and deliver, the denial of defendant's motion for continuance made on the ground that the jury venire from which the jurors in defendant's case were selected was present when the State's chief witness against defendant testified for the State to establish the factual basis for guilty pleas entered two days prior to defendant's trial by three other defendants charged with various drug offenses was not *per se* prejudicial to defendant's right to a fair trial by an impartial jury. Furthermore, the trial court did not abuse its discretion in the denial of defendant's motion for continuance where the record contains no indication that defendant utilized all the peremptory challenges afforded him or that any challenges of prospective jurors for cause were denied, and the record does not reveal facts tending in any way to establish actual bias or prejudice on the part of any member of the jury.

APPEAL by defendant from *Albright, Judge.* Judgments entered 30 May 1980 in Superior Court, POLK County. Heard in the Court of Appeals 11 March 1981.

Defendant appeals from judgments entered upon his convictions of sale of cocaine, sale of marijuana, possession of cocaine with intent to sell and deliver and possession of marijuana with intent to sell and deliver.

Attorney General Edmisten, by Associate Attorney General John F. Maddrey, for the State.

Lee Atkins for defendant appellant.

WHICHARD, Judge.

Defendant's sole contention is that his constitutional right to a fair trial by an impartial jury[1] was denied by the trial court's failure to grant his motion for a continuance. The ground of his contention is that the principal witness for the State, an undercover agent for the Polk County Sheriff's Department, also testified for the State to establish the factual basis for guilty pleas entered two days prior to defendant's trial by three other defendants charged with various drug offenses; that the jury venire from which the jurors in defendant's case were selected was present when this witness against defendant testified in those cases; and that "[t]he effect on the jury venire was to irrebutably establish the credibility of the State's chief witness against the defendant."

In *State v. Brown*, 39 N.C. App. 548, 251 S.E. 2d 706, *disc. review denied* 297 N.C. 302, 254 S.E. 2d 923 (1979), the defendant contended "that the trial court committed prejudicial error in permitting the case to be tried by a jury panel which had the opportunity to hear guilty pleas and the presentation of evidence and sentencing thereon in other cases." *Brown*, 39 N.C. App. at 550, 251 S.E. 2d at 709. He argued that this procedure violated his right to be tried by an impartial jury because (1) "prospective jurors became biased against all defendants when hearing the proceedings which precede the sentencing of those who plead guilty," and (2) "law enforcement officials are more likely to be given greater credence by the jury and . . . the jury may stray from their function as fact finders and only consider the prosecution's side of the case." *Brown*, 39 N.C. App. at 551, 251 S.E. 2d at 709. The Court rejected the contention, stating:

> The *voir dire* examination of jurors allowed by [G.S. 9-15(a)] serves the dual purpose of ascertaining whether grounds exist for challenge for cause to enable counsel to exercise intelligently the peremptory challenges allowed by law. [Cita-

1. U.S. Const. amend. VI and XIV; N.C. Const. art. I, § 19.

> tion omitted.] The record before us does not indicate that any of the jurors who served could not fairly and intelligently have reached a verdict; nor does it indicate the use of any peremptory challenges by the defendant. Hence, defendant has failed to show that any member of the jury was unable to give him a completely fair trial.

Brown, 39 N.C. App. at 551, 251 S.E. 2d at 709.

Other courts have reached the same result upon similar contentions. In *Holland v. State*, 260 Ark. 617, 542 S.W. 2d 761 (1976), defendant's trial had been the third marijuana sale case heard by the same jury panel within three days. The same undercover officer was the principal witness for the State in each case. Defendant's motion for a continuance on the ground that some of the jurors, because of the guilty verdicts in the two previous trials, had prejudged the credibility of the prosecuting witness, was denied. The Supreme Court of Arkansas, sitting *en banc*, upheld defendant's conviction, relying on *United States v. Williams*, 484 F. 2d 176 (8th Cir. 1973), which "held that the two defendants there were not denied an impartial jury merely because it was the seventh consecutive jury that had been selected from the same jury panel involving the same government witnesses." *Holland*, 260 Ark. at 619, 542 S.W. 2d at 763. The court quoted from *Williams* as follows:

> At the most the challenge must rest entirely on a *per se* theory of implied bias. This Court rejected a like argument in *Johnson v. United States*, 484 F. 2d 309 (8th Cir. 1973), and prior federal cases are to the same effect. * * * As this Court stated in *Johnson, supra*, we do not endorse the procedure followed here as being preferred or the most desirable. Still we cannot say that its use is reversible error in the absence of some showing of actual prejudice.

Holland, 260 Ark. at 620, 542 S.W. 2d at 763. The court noted that nothing in the record established any bias or prejudice on the part of any member of the jury and concluded that defendant there "ha[d] not demonstrated a manifest abuse of the discretionary authority which is accorded the trial court." *Holland*, 260 Ark. at 620, 542 S.W. 2d at 763.

In *United States v. Jones*, 486 F. 2d 476 (8th Cir. 1973), *cert. denied*, 415 U.S. 917 (1976), defendant was convicted of heroin

distribution. He contended he was denied a fair trial in that nine of the twelve members of the jury had served as jurors in other narcotics cases involving the same government witnesses, and another of the twelve had served as an alternate. The court affirmed defendant's conviction, noting that it had rejected the *per se* theory of implied bias[2] and that it found no actual bias.

In *White v. Commonwealth*, 499 S.W. 2d 285 (Ky. 1973), defendant was convicted of the unlawful sale of narcotics. The jury had heard similar testimony to that against defendant in two previous narcotics trials from the same witnesses who testified against defendant. Defendant had exhausted his "strikes" (apparently the equivalent of peremptory challenges in our practice) and then had moved for the removal of any remaining jurors who had participated in those trials. The court affirmed the denial of that motion, stating: "In the absence of a showing that a juror who served was prejudiced and because of that bias he could not render a fair and impartial verdict, we will not hold that the trial court erred in overruling the motion." *White*, 499 S.W. 2d at 286.

In *People v. Wyskochil*, 76 Mich. App. 468, 257 N.W. 2d 126 (1977), defendant moved to quash the jury array and to excuse certain jurors for cause on the ground that they had sat on previous trials involving similar drug charges in which the same two witnesses had testified for the government as would testify in defendant's trial. The trial court's denial of the motion was upheld. The Michigan court declined to adopt a *per se* exclusionary rule, stating: "To adopt a rule that would per se exclude a police officer or other witness from testifying before the same panel a second time would unduly constrain the judicial process." *Wyskochil*, 76 Mich. App. at 471, 257 N.W. 2d at 128.

In *State v. Charlot*, 157 W.Va. 994, 206 S.E. 2d 908 (1974), defendant moved for a continuance

> on the grounds that of the thirty-four jurors present from which the jury would be selected, only ten had not sat on prior drug cases during that term of court where the state's principal witnesses were the same as those witnesses who

2. Citing *United States v. Williams*, 484 F. 2d 176 (8th Cir. 1973) and *Johnson v. United States*, 484 F. 2d 309 (8th Cir. 1973).

> were going to testify against the defendant and the juries in the prior drug cases had returned guilty verdicts.

Charlot, 157 W.Va. at 996, 206 S.E. 2d at 910. Defendant contended "the court erred in refusing to grant the continuance because many of the jurors had already expressed their opinion as to the credibility of the state's principal witnesses as evidenced by the return of guilty verdicts in the [previous] drug trials." *Charlot*, 157 W.Va. at 997, 206 S.E. 2d at 910. The court rejected defendant's contention, stating:

> It has been held by both state and federal courts that jurors who had served in the trial of other cases involving similar, but independent criminal offenses, and in which identical witnesses were used by the prosecution to establish the criminal acts, such jurors are not disqualified where there was no showing of prejudice or bias shown to the defendant on the part of the jurors.

Charlot, 157 W.Va. at 1000, 206 S.E. 2d at 912.

In *United States v. Ollary*, 466 F. 2d 545 (4th Cir. 1972), defendant contended he was prejudiced by the denial of his motion for continuance because several members of the jury had either participated in or audited a related case. The court cited the failure of defendant to exercise all his peremptory challenges as one of several reasons which "provided ample grounds for denying the motion for a continuance." *Ollary*, 466 F. 2d at 546.[3]

In light of the foregoing authorities, we do not find the denial of the motion for continuance by defendant here *per se* prejudicial to his right to a fair trial by an impartial jury. Absent *per se* prejudice, the motion for continuance "is the subject of the trial judge's discretion, and is not subject to review absent an abuse of

3. *See also State v. Epperson*, 289 So. 2d 495 (La. 1974) (prospective jurors present while a co-defendant pled guilty held not prejudicial).

See, contra, Alvarez v. New Mexico, 92 N.M. 44, 582 P. 2d 816 (1978), and authorities cited. *Alvarez* is distinguishable from the case here, however, in that it held that *when challenged for cause* jurors may not serve at a subsequent trial with the same material witness unless the prosecution can satisfy the court that the testimony of the material witness will be corroborated by testimony of other witnesses. Nothing in the record here establishes that any jurors were challenged for cause.

discretion." *State v. Haltom*, 19 N.C. App. 646, 649, 199 S.E. 2d 708, 710 (1973). In considering whether the trial judge abused his discretion we note that the record contains no indication that defendant utilized all the peremptory challenges afforded him or that any challenges of prospective jurors for cause were denied. *See* G.S. 15A-1212, 15A-1217. Nor does the record reveal facts tending in any way to establish actual bias or prejudice on the part of any member of the jury. We thus find no basis for holding that the trial court abused its discretion.

The Arkansas Supreme Court concluded its opinion in *Holland* as follows: "In the case at bar appellant has not demonstrated a manifest abuse of the discretionary authority which is accorded the trial court. However, . . . 'we do not endorse the procedure followed here as being preferred or the most desirable.'" *Holland*, 260 Ark. at 620, 542 S.W. 2d at 763. We likewise do not endorse the procedure followed here as being preferred or the most desirable. The better practice would be to avoid the possibility of having prospective jurors privy to plea or trial proceedings in prior cases involving the same witness or witnesses for the State. However, the denial of defendant's motion for continuance was not *per se* prejudicial to his right to a fair trial by an impartial jury, and no abuse of discretion has been shown on the record now before us.

No error.

Chief Judge MORRIS and Judge MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. TIMOTHY LEE CONNER

No. 804SC1175

(Filed 7 July 1981)

1. Criminal Law § 34.7— other offenses by defendant—admissibility of evidence

The trial court did not err in denying defendant's motion to strike certain unresponsive testimony of the prosecuting witness which indicated that defendant had threatened him on a previous occasion, since the challenged evidence was relevant and competent to show defendant's quo animo, or state of mind or motive toward the victim at a time sufficiently proximate to com-

mission of the offense with which defendant was charged to be relevant and thus to permit its consideration by the jury.

2. **Criminal Law § 89.9— written statement of witness—no examination by defense counsel**

The trial court did not err in failing to allow defense counsel to examine the written statement of a witness to determine if the statement could have been used to impeach the witness.

3. **Constitutional Law § 30— witness's written statement—no disclosure by State**

There was no merit to defendant's contention that the trial court erred in admitting a statement written by a witness because the district attorney had failed to disclose this evidence prior to trial in response to defendant's discovery request, since the witness was not a codefendant in this case; except as provided by G.S. 15A-903 relating to statements by defendants and codefendants, pretrial disclosure of statements made by witnesses for the State is not required by the Criminal Procedure Act; the exclusionary sanction imposed by the Criminal Procedure Act for failure to comply with discovery orders is permissive rather than mandatory; and the statement was introduced for corroborative purposes only, and the essential contents of the statement were already before the jury.

APPEAL by defendant from *Rouse, Judge.* Judgment entered 21 July 1980 in Superior Court, ONSLOW County. Heard in the Court of Appeals 8 April 1981.

Defendant was indicted, tried and acquitted of the first degree murder of one Susan Kwiecien. He was indicted, tried and convicted of assault with a deadly weapon with intent to kill inflicting serious injury upon one Michael Dahl.

Evidence for the State tended to show that defendant, Robert Probeck, Chris Keithline and Michael Dahl spent a portion of the evening of 17 November 1979 at a trailer occupied by Keithline and Dahl playing strip poker with the deceased, Susan Kwiecien. After Dahl left to get some gasoline for his automobile, defendant, Probeck and Keithline all had intercourse with Ms. Kwiecien in Dahl's bedroom. Thereafter an argument between defendant, Keithline and Ms. Kwiecien ensued; and Ms. Kwiecien asked to be taken home. Defendant, Probeck, Keithline and Ms. Kwiecien left in Probeck's car and proceeded down Highway 258 to "the Match Road." At the end of the Match Road Probeck, upon defendant's instruction, turned onto a "smaller loop road." At some point on that road defendant told Probeck to stop the car and told the others that "they were going to have to kill [Ms. Kwiecien]." Ms. Kwiecien was then shot and killed with a shotgun

which belonged to Dahl. Because defendant was acquitted of the murder charge, conflicting evidence in the record as to who killed Ms. Kwiecien is not material to this appeal.

When the other men carried Keithline back to the trailer where he and Dahl resided, they discovered that Dahl had returned home. The following day defendant informed Probeck that Dahl "would have to be killed since he knew about the girl." Probeck told defendant he was scared and "wanted no part of it"; and defendant, Probeck and Keithline engaged in "further discussion . . . regarding the possible killing of Michael Dahl." Defendant and Keithline then went to Dahl's residence. Defendant had a screwdriver in his hand with which "[h]e kept sticking [Dahl] in the side." Keithline obtained a gun while defendant stayed with Dahl. Defendant told Keithline to shoot Dahl, and Keithline shot Dahl in the right side of his chest. Defendant then told Keithline to shoot Dahl again, "that he didn't kill [him]." As defendant was repeatedly telling Keithline to shoot Dahl again, Dahl managed to escape to a neighbor's house. He was hospitalized as a result of his wounds for eight or nine days.

Defendant testified in his own behalf denying that he "poked . . . Dahl with the screwdriver"; denying that he told Keithline to shoot Dahl; and denying that he knew Keithline was going to shoot Dahl.

From a judgment of imprisonment, defendant appeals.

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

Gaylor and Edwards, by Jimmy F. Gaylor, for defendant appellant.

WHICHARD, Judge.

[1] Defendant assigns error to the court's denial of his motion to strike certain unresponsive testimony of the prosecuting witness which indicated that defendant had threatened him on a previous occasion. The district attorney asked the prosecuting witness, Dahl, the following question: "Did you have anymore conversation with [defendant] there?" The witness replied: "Yes. A little bit later he pulled a knife on me." Defendant's motion to strike the answer was denied. The witness was then asked: "How did that

happen, Mr. Dahl?" The witness responded: "In our conversation he said 'don't fuck with me or I'll kill you.' " Defendant's motion to strike was again denied.

Defendant contends the court erred in refusing to grant his motion to strike this testimony because (1) it was unresponsive; and (2) it was irrelevant and inadmissible, tending to show that defendant had committed two additional crimes, assault and communicating a threat, for which he was not on trial. As to the issue of responsiveness, in *State v. Ferguson*, 280 N.C. 95, 98, 185 S.E. 2d 119, 122 (1971), we find the following:

> Whether an answer is responsive to a question is not the ultimate test on a motion to strike. If an unresponsive answer produces irrelevant facts, they may and should be stricken and withdrawn from the jury. However, if the answers bring forth relevant facts, they are nonetheless admissible because they are not specifically asked for or go beyond the scope of the question.

Thus, if the answers given brought forth facts which were relevant for any purpose, the court did not err in declining to strike them for unresponsiveness. As to the issue of relevancy, in *State v. Humphrey*, 283 N.C. 570, 572, 196 S.E. 2d 516, 518 *cert. denied* 414 U.S. 1042 (1973), we find the following:

> The general rule in North Carolina is that the State may not offer proof of another crime independent of and distinct from the crime for which defendant is being prosecuted even though the separate offense is of the same nature as the charged crime. [Citations omitted.] However, such evidence is competent to show 'the *quo animo*, intent, design, guilty knowledge, or scienter, or to make out the *res gestae*, or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions.

See also State v. Wilborn, 23 N.C. App. 99, 208 S.E. 2d 232 (1974). We find the challenged evidence relevant and competent to show defendant's *quo animo*, or state of mind or motive toward the victim Dahl at a time sufficiently proximate to commission of the offense with which defendant was charged to be relevant and thus to permit its consideration by the jury. It follows that the court did not err in refusing to grant defendant's motion to strike.

[2] Defendant further assigns error to the court's failure to allow defense counsel to examine the written statement of the witness Dahl, "since that statement may have contained matters that were contradictory to his in-court testimony and could have been used to impeach him." The written statement in question was given by Dahl to a special agent with the Naval Investigative Service two days subsequent to the assault upon Dahl by defendant. The trial court, in response to the request of defense counsel, viewed the statement *in camera* and determined that it did not contain any matter that might be used to impeach Dahl on cross examination. The court ordered the statement sealed and made part of the record, and defendant requests that we review the sealed statement to "determine if the statement is favorable in any respect to the Defendant and is material to the issue of the Defendant's guilt." We have examined the statement, and we find that it comports in all material particulars to the witness' testimony at trial. We find no basis in the statement for a determination that failure to disclose the statement to defense counsel resulted in the suppression of evidence which could have been favorable to the defendant. *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963). This assignment of error is overruled.

[3] Defendant finally assigns error to the admission of a statement written by the witness Robert Probeck on the day he was arrested and charged with the murder of Susan Kwiecien. The basis of his complaint is that the district attorney had failed to disclose this evidence prior to trial in response to defendant's discovery request, and that this failure constituted a violation of G.S. 15A-903(b)(1), which provides: "Upon motion of a defendant, the court must order the prosecutor: (1) to permit the defendant to inspect and copy or photograph any written or recorded statement *of a codefendant* which the State intends to offer in evidence *at their joint trial* . . . ." (Emphasis supplied.) Nothing in the record indicates that defendant and Probeck were tried in a "joint trial" or that the State ever intended so to try them. Probeck entered a plea of guilty to being an accessory after the fact to the murder of Susan Kwiecien. He is not a party defendant in this case wherein defendant was indicted for assault on Michael Dahl. Except as provided by G.S. 15A-903 relating to statements by defendants and codefendants, pre-trial disclosure of statements

made by witnesses for the State is not required by the Criminal Procedure Act. G.S. 15A-904; *State v. Abernathy,* 295 N.C. 147, 156, 244 S.E. 2d 373, 379-380 (1978); *State v. Hardy,* 293 N.C. 105, 123-125, 235 S.E. 2d 828, 839-840 (1977). Further, the exclusionary sanction imposed by the Criminal Procedure Act for failure to comply with discovery orders is permissive rather than mandatory. The Act provides that the court *"may* . . . [p]rohibit the party from introducing evidence not disclosed . . . ." G.S. 15A-910(3). (Emphasis supplied.) Finally, we note that the statement was introduced for corroborative purposes only. The essential contents of the statement were already before the jury as a result of Probeck's testimony. Consequently, even if we were to find that it was error to admit the statement, we do not believe "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached . . . . " G.S. 15A-1443. Defendant thus has failed to sustain his burden of showing prejudice.

No error.

Judges MARTIN (Robert M.) and BECTON concur.

F & D COMPANY v. AETNA INSURANCE COMPANY

No. 805SC1112

(Filed 7 July 1981)

Insurance § 143— insurance on yacht—physical loss or damage—statute of limitations

Where an insurance policy on a yacht did not contain provisions requiring the insured to submit a written proof of loss as a condition to recovery under the policy, a cause of action against the insurer accrued at the time the physical loss or damage giving rise to the action occurred rather than when the insurer received written proof of loss and refused to pay the loss; therefore, a policy provision requiring an action on the policy to be commenced "within twelve months next following the physical loss or damage" was not in conflict with the provisions of G.S. 58-31 prohibiting insurance policies from limiting the time within which suit may be brought "to less than one year after the cause of action accrues."

Judge WELLS dissenting.

APPEAL by plaintiff from *Fountain, Judge.* Judgment entered 23 September 1980 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 7 May 1981.

This is a declaratory judgment action seeking to interpret several provisions of an insurance policy issued to plaintiff F & D Company by defendant Aetna Insurance Company. The facts, stipulated to by the parties, may be summarized as follows:

Plaintiff was issued a policy of insurance by defendant covering plaintiff's yacht. Among other things, the policy included insurance against physical loss and damage from external causes. The policy excluded coverage against wear and tear, gradual deterioration, and weathering. While plaintiff's boat was moored in open berth at the Bradley Creek Marina in Wrightsville Beach, it was damaged as a result of its partially sinking on 9 October 1976. Plaintiff's action was commenced on 2 March 1978. The insurance policy contains the following provisions under a section entitled "General Conditions":

8. Notice of Accident, Claim or Suit.

   (a) In the event of any occurrence which may result in loss, damage or expense for which the Company is or may become liable, the Insured shall give immediate written notice thereof to the Company.

. . .

10. Payment of Loss. In case of loss, such loss shall be paid within thirty days after written proof of loss and proof of interest in the Yacht shall have been given to the Company; all indebtedness of the Insured to the Company being first deducted.

11. Limit of Time for Suit. No suit or action against the Company shall be maintainable in any court unless, as a condition precedent thereto, the Insured shall have complied with all of the warranties, terms and conditions contained in this policy and unless:

   (a) In respect of any claim for physical loss of damage to the property insured under this policy or any charge

> or expense incurred under Sections "A", "E" or "F" of this policy, such suit or action is commenced within the twelve months next following the date of the physical loss or damage out of which such claim arose.
>
> . . .
>
> Provided that where any of the above limitations of time is prohibited or invalid by or under any applicable law, then and in that event no suit or action shall be commenced or maintainable unless commenced within the shortest limitation of time permitted under such law.

After a hearing, the trial court made the following pertinent findings and conclusions:

> 4. That pursuant to Section 11 of the General Limitations of the Policy attached to the Stipulations [as] Exhibit A it is provided that an action or suit against the Defendant Company must be brought within 12 months of an alleged loss or damage.
>
> 5. That pursuant to Stipulation #5 it is provided that "This action was commenced on March 2, 1978 said date being more than twelve months next following the date of the physical loss or damage act of which this action arose["].
>
> Based on the above stipulated facts, the Court makes the following conclusions of law:
>
> 1. That the Insurance Policy issued by the Defendant as contained in Exhibit A provides an action or suit against the Defendant Company must be brought within 12 months after the alleged loss or damage out of which the action arose.
>
> 2. That the Plaintiff instituted this action on March 2, 1978 which is more than 12 months after the date of the loss or damage which occurred on October 9, 1976, in violation of Paragraph 11 of Section A of Exhibit A attached to the Stipulations filed with this Court.

From a judgment entered for defendant and dismissing plaintiff's action, plaintiff appealed.

Sperry, Scott & Cobb, by Herbert P. Scott, for plaintiff appellant.

Marshall, Williams, Gorham & Brawley, by William Robert Cherry, Jr., for defendant appellee.

HEDRICK, Judge.

Plaintiff's sole assignment of error is set out in the record as follows:

> That the Court erred in finding as a fact and concluding as a matter of law that this action was barred by a limitation period set forth in the policy of insurance, and further erred by entering Judgment based upon such finding and conclusions.

Plaintiff contends that because Paragraph 11(a) under "General Conditions" in the policy in question provides that actions by the insured against the insurer must be brought "within the twelve months next following the date of the physical loss or damage" giving rise to the action, the policy provides for a shorter period within which the insured can bring suit against the insurer than is permitted by G.S. § 58-31, and thus Paragraph 11(a) is void. We do not agree.

G.S. § 58-31 in pertinent part provides:

> No company or order, domestic or foreign, authorized to do business in this State under this Chapter, may make any condition or stipulation in its insurance contracts concerning the court of jurisdiction wherein any suit or action thereon may be brought, nor may it limit the time within which such suit or action may be commenced to *less than one year after the cause of action accrues* . . . . All conditions and stipulations forbidden by this section are void. [Emphasis supplied.]

We are of the view that under the policy in question, a cause of action against the insurer would accrue at the time the physical loss or damage giving rise to the action occurred, and thus the limitation provision of the policy, Paragraph 11(a) under "General Conditions," is not in conflict with G.S. § 58-31. Paragraph 8(a) under "General Conditions" requires that the insured give "immediate written notice" to the insurer in the event

of an occurence which may render the insurer liable under the policy. Paragraph 10 under "General Conditions" merely requires that the insurer pay for a loss within thirty days after being given written proof of the loss and proof that the insured has an interest in the insured property; neither that paragraph nor any of the other provisions of the policy contain a *requirement* that the insured file a written proof of loss before the insured could recover on the policy. In addition, the policy provisions mention no waiting periods before the insured can bring suit against the insurer.

Our attention is drawn to the cases of *Modlin v. Insurance Co.*, 151 N.C. 35, 65 S.E. 605 (1909); *Heilig v. Insurance Co.*, 152 N.C. 358, 67 S.E. 927 (1910); *Millinery Co. v. Insurance Co.*, 160 N.C. 130, 75 S.E. 944 (1912); and *Meekins v. Insurance Co.*, 231 N.C. 452, 57 S.E. 2d 777 (1950), which purportedly stand for the proposition that a cause of action against the insurer for a loss under the policy does not accrue until the insurer has received written proof of loss and has refused to pay the loss. Without passing on the merits of this proposition, we simply note that these four cases are clearly distinguishable from the case at bar in that the insurance policies involved in those cases, unlike the policy in question here, contained provisions requiring that the insured submit a written proof of loss *as a condition* to recovery under the policy.

Since the parties stipulated that plaintiff did not commence this action until more than one year after the date of loss, we conclude that the trial court properly entered judgment for defendant and dismissed plaintiff's action on the basis that plaintiff's action was barred by Paragraph 11(a) under "General Conditions" of the policy in question. Plaintiff's assignment of error cannot be sustained.

The judgment appealed from is

Affirmed.

Judge MARTIN (Harry C.) concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

I believe that the provisions of the policy in question are ambiguous as to when plaintiff might have been at liberty to sue upon its loss. While the policy does not contain a "waiting period" provision with respect to plaintiff's right to bring an action, and does not use the word "require" in the proof of loss clause, it is only reasonable and logical to assume defendant would have no obligation under the policy to pay plaintiff for a loss until it was established and quantified in a proof of loss. Such a proof of loss was apparently furnished defendant on 8 February 1977 in the form of a marine "survey" performed at the request of defendant. In my opinion, defendant had 30 days following 8 February 1977 in which to evaluate the proof of loss and make its determination to pay or not to pay the loss. To me, this means plaintiff's cause of action would, within the meaning of G.S. § 58-31, have accrued on 10 March 1977. The action having been commenced on 2 March 1978, I believe that the statute controls over the policy limitations and that the action was timely instituted. My vote is to reverse the judgment of the trial court.

WILLIAM T. BUIE AND WIFE, MARTHA BUIE; BENNIE ROGERS AND WIFE, JACQUELINE ROGERS; RICHARD L. HALL, JR. AND WIFE, LOIS HALL; C. KENNETH WOOD AND WIFE, SYLVIA M. WOOD; RALPH HULLENDER AND WIFE, GERALDINE HULLENDER; JOE MONTGOMERY AND WIFE, CORNELIA MONTGOMERY; BESS S. WAMPLER; AND MICHAEL H. CORNETTE AND WIFE, LINDA D. CORNETTE v. RICHARD C. JOHNSTON

No. 8018SC1091

(Filed 7 July 1981)

Deeds § 20.7— restrictive covenant in subdivision—removal of incomplete foundation

In plaintiffs' action to enjoin defendant from violating the restrictive covenant applicable to lots in a subdivision, the trial court erred in refusing to grant a mandatory injunction requiring defendant to remove the existing incomplete foundation of a residence after the court properly entered an order permanently enjoining defendant from constructing the residence.

APPEAL by plaintiffs from *Washington, Judge.* Judgment entered 25 July 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 5 May 1981.

Plaintiffs instituted this action on 17 August 1979 to enjoin defendant from violating the restrictive covenants applicable to lots in Northview Heights, Wheeler Subdivision, a residential subdivision in High Point, North Carolina. The complaint alleges the following. Plaintiffs own residences on lots within the subdivision, and defendant owns five lots within the subdivision. Defendant and his former wife acquired these lots by deed in August 1965. They deeded the lots to a trustee in November 1969, and the trustee conveyed the lots to defendant in his name alone in September 1970. Defendant's lots are subject to the same restrictive covenants applicable to all subdivision lots. One of these restrictive covenants provides that no residence shall be built upon less than a minimum of four lots as set out in the plat of the subdivision. The original developers, L. F. and Vera Wheeler, desired to develop a subdivision for residential purposes only and imposed the restrictive covenants as a general plan of development to preserve the value of the residences to be constructed. Defendant obtained building permits to construct two residences upon his five lots in July 1978. Plaintiffs advised defendant of the restrictive covenant, and defendant built only one residence. Around the first of August 1979 defendant commenced construction of the second residence and continued construction despite plaintiffs' protests. Finally, the complaint alleges that construction of the second residence by defendant will diminish the value of all residences in the subdivision, will change the character of the neighborhood, and will effectively circumvent the restrictive covenants.

Hearings were held to consider plaintiffs' request for a preliminary injunction; however, defense counsel stipulated that defendant would refrain from further construction while the case was pending, and no preliminary injunction was ever issued. Defendant answered the complaint.

Plaintiffs moved for summary judgment, and a hearing was held. Plaintiffs submitted various affidavits and exhibits tending to support the allegations of their complaint. Defendant introduced pictures of the foundation of the second residence and the

plans for it. He was allowed to testify at the hearing, and he stated that he knew of the restrictive covenants but that he thought he nonetheless had authority to build two residences on his lots since the City had issued building permits. He further testified that he "thought the restrictions did not count since the property was not in the City of High Point when I first bought it" and that he "felt that the restrictions ran out in 20 years."

The trial court allowed summary judgment permanently enjoining the defendant from construction of the second residence. The trial court specifically refused to grant a mandatory injunction requiring defendant to remove the existing incomplete construction of the second residence. Both plaintiffs and defendant gave notice of appeal, but only plaintiffs have perfected appeal.

Boyan and Loadholt, by Clarence C. Boyan, for plaintiff appellants.

No appearance for defendant appellee.

BECTON, Judge.

By their sole assignment of error, plaintiffs contend that the trial court erred by refusing to grant a mandatory injunction requiring the defendant to remove the existing incomplete foundation. We agree.

We find *Ingle v. Stubbins*, 240 N.C. 382, 82 S.E. 2d 388 (1954), controlling. *Ingle* was also an action to enjoin a defendant from violating restrictive covenants of a residential subdivision. The covenant at issue therein provided that no building should be located nearer than 50 feet from the front line of the subdivision lots. Lots 10 and 11 faced Bueno Street or Wildwood Lane at its intersection with Plaid Street. These two lots were re-subdivided into three lots facing Plaid Street. Stubbins owned the re-subdivided lot at the intersection, and he began construction of a dwelling on his part of lot 11 that was less than 50 feet from Bueno Street and Wildwood Lane. While plaintiffs' action against him was pending, he completed this dwelling and completed the foundation for another dwelling on his part of lot 10 that was also less than 50 feet from Bueno Street or Wildwood Lane. The trial court ruled that, notwithstanding the re-subdividing of lots 10 and 11, defendant was in violation of the 50-foot minimum setback

restriction. The trial court held that the plaintiffs were entitled to damages, but not to relief by means of a mandatory injunction. Both defendant and plaintiffs appealed. As to defendant's appeal, the Supreme Court affirmed. As to plaintiffs' appeal, the Supreme Court wrote:

> the defendant acquired the property with notice of the restrictions imposed upon lots 10 and 11 as originally platted. His attention was directed to these restrictions when he applied to the city for a building permit, and such permit was granted subject to the restrictive covenants. When he began the erection of building, plaintiffs sought in this action to enjoin him from proceeding. The court granted a temporary injunction which he obeyed. But when the plaintiffs could not furnish the bond required as condition for continuance of the injunction, defendant proceeded to take his chances as to the effect of his conduct upon plaintiffs' rights. Speaking to a like factual situation the Massachusetts Supreme Judicial Court in *Sterling Realty Co. v. Tredennick*, 162 A.L.R. 1095, 64 N.E. 2d 921 [1946], declared: "Upon similar facts it has been the practice of the courts to grant a mandatory injunction." While this statement of the principle is not binding on this Court, it is here appropriate, and is most persuasive. Hence, this Court holds that plaintiffs are entitled to mandatory injunction to require defendant to remove the building so that it shall not be nearer than fifty feet to Bueno Street or Wildwood Lane. Moreover, mandatory injunction is appropriate to prevent further construction of the building, foundation for which it appears has been laid by defendant.

240 N.C. at 391, 82 S.E. 2d at 395-96. *Accord, Currin v. Smith*, 270 N.C. 108, 153 S.E. 2d 821 (1967). *See* 20 Am. Jur. 2d, *Covenants, Conditions, and Restrictions* § 328 (1965).

In the present case the defendant acquired his lots with notice of the restrictive covenants. He was reminded of the particular restriction at issue when he first undertook construction of two residences on his lots. Defendant nonetheless commenced construction of the second residence. We find no genuine issue of material fact as to the mandatory injunctive relief sought. Defendant cannot rely upon the City's issuance of building permits to him, since zoning ordinances do not diminish the effect of more

stringent private restrictive covenants. *See Tull v. Doctors Building, Inc.*, 255 N.C. 23, 120 S.E. 2d 817 (1961); *Mills v. Enterprises, Inc.*, 36 N.C. App. 410, 244 S.E. 2d 469, *disc. rev. denied*, 295 N.C. 551, 248 S.E. 2d 727 (1978); 20 Am. Jur. 2d, *supra*, at § 277. Moreover, it is of no avail to the defendant that construction of the second residence is incomplete. The restrictive covenants are intended to preserve the value and character of the subdivision; and a useless, incomplete residential structure would be at least as detrimental to property values and the character of the neighborhood as a completed one. Although summary judgment is otherwise proper, the trial court erred in denying plaintiffs a mandatory injunction requiring the defendant to remove the existing incomplete construction of the second residence. The cause is remanded for further proceedings in accordance with this opinion.

Error and remanded.

Judge VAUGHN and Judge ARNOLD concur.

CLARE R. HEATER v. JOSEPH R. HEATER

No. 8028DC1221

(Filed 7 July 1981)

Husband and Wife § 11.2— separation agreement—alimony provision—meaning of "then gross income"

Where a separation agreement required the husband to pay the wife $25,000 per year in alimony for the first three years, payable in equal monthly installments, and thereafter to pay "an amount equivalent to thirty percent (30%) of the Husband's then gross income, which shall be payable in equal monthly installments during the fourth year," the phrase "then gross income" meant the husband's gross income for the previous year rather than current monthly earnings, and after the first three years the husband was required to pay the wife in monthly installments a yearly sum equivalent to thirty percent of his gross income for the immediately preceding year.

APPEAL by plaintiff from *Israel, Judge.* Judgment entered 11 August 1980 in District Court, BUNCOMBE County. Heard in the Court of Appeals 2 June 1981.

This is an action by plaintiff for arrearages due under the terms of a separation agreement with defendant and for a decree of specific performance of the agreement by defendant. Plaintiff also seeks an interpretation of the provisions of the agreement concerning support and maintenance payments. Defendant denies that he has breached the contract, but admits there is a dispute over the interpretation of the provisions of the agreement regarding support. The court heard the case without a jury and entered judgment finding facts and making conclusions of law. By the judgment the court resolved the interpretation question against plaintiff, and she appeals.

Riddle, Shackelford & Hyler, by Robert E. Riddle, for plaintiff appellant.

Erwin, Winner & Smathers, by Dennis J. Winner, for defendant appellee.

MARTIN (Harry C.) Judge.

The relevant portions of the disputed provision of the agreement are:

> 23.1 As alimony for her support and maintenance, the Husband shall pay to the Wife the sum of Twenty-Five Thousand Dollars ($25,000.00) per year as alimony, payable in equal monthly payments of Two Thousand Eighty—Three and 33/100 Dollars ($2,083.33), commencing on the first day of each succeeding month following the execution of this Agreement, and continuing thereafter for a period of three years. That at the expiration of the third year, said amount shall be adjusted and shall be an amount equivalent to thirty percent (30%) of the Husband's then gross income, which shall be payable in equal monthly installments during the fourth year.

In each succeeding year the percentage payable to the plaintiff is to be reduced until the support requirements terminate at the end of the eighth year following the execution of the agreement.

The dispute revolves around the phrase "then gross income," plaintiff arguing that it means defendant's gross income for the previous year, and defendant contending that it means current earnings. The trial court concluded that the provision meant "current earnings," and, based thereon, held that defendant was not

in arrears in his support payments. Plaintiff assigns this conclusion as error, and we agree.

Plaintiff's evidence with respect to the contested provision is largely from defendant, whom plaintiff called as an adverse witness. He testified:

> On the first of December, 1979 I made a payment to Mrs. Heater in the amount of $1,375.00. That figure was based upon my contractual salary with Sylvania and the non-compete agreement. The contractual salary was spelled out in the original employment contracts. I do not mean a percentage of that; the salary for the first year was $35,000.00. The salary for the second year was $40,000.00. The salary for the third year was $45,000.00. And then there was $10,000.00 per year paid for non-compete. I took an annual rate of forty-five, plus the ten on December 1st, which is my income for that month, and sent thirty percent (30%) of that.
>
> Yes I based the thirty percent on the annual rate for the year 1979; using the 1979 income as the basis upon which to make the December 1979 payment. My contract of separation was signed on November 26, 1976. I made my first payment in December of 1976. I made my last payment under that three years later in November of 1979.
>
> And my first payment for the next year, the fourth year, was made on December 1st.
>
> To arrive at what I should pay for the December payment I used the 1979 previous twelve months plus one month of 1978. It was my understanding at that time that that was the appropriate way to calculate the percentage arrangement that was to begin December 1, 1979 since the contracts with Sylvania were presented to both attorneys before we signed.
>
> My Sylvania job actually terminated on December 31, 1979. In January of 1980 I made a payment to Mrs. Heater in the amount of $1,375.00. I computed that on the same formula of thirty percent of my immediate preceding twelve months income.
>
> . . . .

RECROSS EXAMINATION By Mr. Winner:

I based my payments on December 1st and January 1st of thirty percent of the month of my earnings for the month before.

FURTHER EXAMINATION By Mr. Riddle:

I said months. I didn't mean a year's salary; just the month before I had income and I paid. My month's salary in the December of 1979 was twelve divided into forty-five thousand, whatever that comes out to be. What I actually received in December of 1979 was twelve divided into forty-five thousand and add $833.33; I just can't do that in my head.

That is what I received during the month of December. I am saying that I based it on earnings in December of 1/12 of $45,000.00, plus 1/12 of $10,000.00.

I used the annual salary as a salary figure to go by; that's how much I earned, that month.

Mrs. Heater testified:

It was my understanding, with respect to the separation agreement that the payments were based upon previous year's income, a percentage of that, I was trying to get some idea so I would know how to schedule my budget.

When we resolved this matter we talked in terms of annual income or previous year income rather than monthly income.

This evidence indicates that defendant made the December 1979 and January 1980 payments based upon his income for the preceding year. Evidence of statements and conduct by the parties after executing a contract is admissible to show intent and meaning of the parties. *Cordaro v. Singleton*, 31 N.C. App. 476, 229 S.E. 2d 707 (1976). "The conduct of the parties in dealing with the contract indicating the manner in which they themselves construe it is important, sometimes said to be controlling in its construction by the court." *Bank v. Supply Co.*, 226 N.C. 416, 432, 38 S.E. 2d 503, 514 (1946). The opinion of the great Chief Justice Stacy in *Cole v. Fibre Co.*, 200 N.C. 484, 157 S.E. 857 (1931), expounds on this rule and, in summation, reads:

> Finally, we may safely say that in the construction of contracts, which presents some of the most difficult problems known to the law, no court can go far wrong by adopting the *ante litem motam* practical interpretation of the parties, for they are presumed to know best what was meant by the terms used in their engagements.

Id. at 488, 157 S.E. at 859.

The language of the agreement itself supports plaintiff's argument: "Husband shall pay to the Wife the sum of Twenty-Five Thousand Dollars ($25,000.00) per year as alimony, payable in equal monthly payments . . .." This obligates defendant to pay a yearly amount in monthly installments. After three years, the yearly amount is to be adjusted and "shall be an amount equivalent to thirty percent (30%) of the Husband's then gross income, which shall be payable in equal monthly installments during the . . . year." It clearly appears that it was the intent of the parties that defendant pay a yearly amount of alimony in monthly installments. Plaintiff was to receive $25,000 a year for each of the first three years, and thereafter the yearly amount was to be determined at the end of each year on the basis of a percentage of defendant's gross income for the immediately preceding year. This, in turn, was payable monthly. Defendant himself followed this interpretation of the contract, as shown from his testimony. He made the December 1979 and January 1980 payments based upon "the formula of thirty percent of my immediate preceding twelve months income," paying plaintiff one-twelfth of that sum. Defendant's contention that each monthly payment after the three-year period is to be based upon a percentage of defendant's gross income for the preceding month would vitiate the express requirement that defendant pay a yearly sum to plaintiff as alimony in equal monthly installments. It is to be noted that defendant is not obligated to pay permanent alimony; his responsibility ends after eight years.

Conclusions of law must be supported by findings of fact and the evidence. *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). We hold that the findings of fact and evidence do not support the challenged conclusion of law. To the contrary, the evidence supports the conclusion that after the first three years of the con-

tract, defendant was obligated to pay to plaintiff as alimony a yearly sum equivalent to thirty percent of his gross income for the immediately preceding year, in monthly installments. For this reason the judgment must be vacated and the cause remanded for further proceedings not inconsistent with this opinion. In view of this disposition of the appeal, we do not consider it necessary to pass upon plaintiff's argument concerning specific performance of the separation agreement.

Vacated and remanded.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA v. WALTER CARNELL MULLEN

No. 811SC124

(Filed 7 July 1981)

1. Criminal Law § 50.1; Robbery § 3— armed robbery—lethal weapon—expert testimony admissible

In a prosecution of defendant for attempted armed robbery the trial court did not err in allowing the State's expert witness to testify that in his opinion the instrument allegedly used by defendant in the incident in question was "a lethal weapon, which could be used to kill," and such testimony did not invade the province of the jury to determine whether the instrument allegedly used by defendant constituted a "dangerous weapon" as used in G.S. 14-87, since the witness was tendered to and accepted by the court without objection by defendant as an expert in the field of martial arts and in the use of the martial arts weapon nunchuckas; the witness testified that use of the instrument in the way defendant allegedly used it could be lethal to the person being struck; but the witness did not go further and state that the nunchuckas was therefore a dangerous weapon, implement or means under the circumstances of the case.

2. Robbery § 4.4— attempted armed robbery—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for attempted armed robbery where it tended to show that defendant approached his intended victim as the victim was closing a restaurant for the night; the victim had in his possession a locked deposit bag holding receipts; defendant attempted to obtain possession of the deposit bag by striking the victim with nunchuckas; and defendant was identified by the victim and the victim's sister as the person who perpetrated the crime in question.

State v. Mullen

APPEAL by defendant from *Reid, Judge.* Judgment entered 6 November 1980 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 2 June 1981.

Defendant was charged in a proper bill of indictment with attempted armed robbery. After defendant pleaded not guilty, the jury found him guilty as charged, and from a judgment imposing a prison sentence of twelve years, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Frank P. Graham, for the State.

White, Hall, Mullen, Brumsey & Small, by G. Elvin Small, III, for the defendant appellant.

HEDRICK, Judge.

[1] Defendant first contends, based on his sixteenth, seventeenth, eighteenth, nineteenth, and twentieth assignments of error, that the trial court committed prejudicial error in allowing the State's expert witness, Tola Lewis, Jr., to testify that in his opinion the instrument allegedly used by defendant in the incident in question was "a lethal weapon, which could be used to kill." Defendant argues that such testimony "invades the province of the jury" to determine whether the instrument allegedly used by defendant constituted a "dangerous weapon" as that term is used in the statute under which defendant was charged, G.S. § 14-87. We do not agree. G.S. § 14-87(a) in pertinent part provides:

> Any person . . . who, having in possession or with the use or threatened use of any firearms or *other dangerous weapon, implement or means,* whereby the life of a person is endangered or threatened unlawfully . . . attempts to take personal property from another . . . , shall be guilty of a felony . . . . [Emphasis supplied]

The record in the present case indicates that after a *voir dire,* Tola Lewis, Jr., was tendered to and accepted by the court, without objection by defendant, as an expert in the "field of martial arts and in the use of the martial arts weapon nunchuckas." The record further shows that, based upon facts introduced into evidence through the testimony of the State's witnesses Simpson and Spence as to the manner in which defendant was striking

Spence with the nunchuckas, Lewis testified that using the instrument in such a way could be lethal to the person being struck. Lewis did *not*, however, go further and state that the nunchuckas was therefore a dangerous weapon, implement or means under the circumstances of the case. Such a determination was properly left in this case to the jury. *See, e.g., State v. Watkins*, 200 N.C. 692, 158 S.E. 393 (1931). These assignments of error are meritless.

[2] Defendant next contends, based on his twenty-fifth assignment of error, that the court erred in denying his motion for judgment as of nonsuit made at the close of all the evidence. He argues that "the record is devoid of any evidence which reasonably conduces to the conclusion of guilt as a fairly logical and legitimate deduction." We disagree. The State offered evidence tending to show the following:

On 14 September 1979, at approximately 12:30 a.m., Ms. Sheila Spence Simpson received a phone call at her Elizabeth City home from her brother, Shelton Spence, who was working the "night shift" that night at the Sonic Drive-In restaurant in Elizabeth City. Spence, who was responsible for counting and depositing the daily receipts, had just finished closing up the restaurant for the night and he asked Ms. Simpson to come pick him up at the restaurant. Ms. Simpson then drove alone to the Sonic Drive-In, arriving around 12:45 a.m. The weather was "sort of windy and cool" but "[i]t was not raining" when she arrived, and because "all the lights were on" the Sonic parking lot area was "very very bright." She parked her car, but left the headlights on and the engine running. No other cars were parked in the lot.

Spence was alone in the restaurant at that time. After Ms. Simpson had waited several moments for him to come out of the restaurant, she heard a dog bark, and when she looked around she observed defendant "in a stoop-like position" at the left corner of the Sonic parking lot, approximately 20 feet from where she was parked. Defendant had something in his hand. Ms. Simpson began to blow her car horn "to warn" her brother, whom she could see "checking out" at the cash register in the "glassed-in" front part of the restaurant. Spence, who was "finishing the books," began to wave, and Ms. Simpson continued to blow the horn. Spence then "closed up the books," and proceeded to

the rear of the restaurant, where he turned off all the lights, except for two outside "canopy lights" over the front door and several lights in the rear of the building. The parking lot area was still light, however, due to a "big night light" in the left corner and floodlights from neighboring businesses. Spence went to the front door to leave, but he could not get the door open, so, after waving his hand to let Ms. Simpson know he was coming, he returned to the rear of the restaurant to exit by the back door. He was carrying a black plastic bag which contained a locked deposit bag holding the "night deposit" of about $870.00.

As Spence proceeded to go around the corner of the building toward where his sister was parked, he heard a "cracking noise" at a picket fence located about thirty feet behind the building. He turned and saw a person come over the fence and begin to run toward him. Spence then started to run for his sister's car, with the person following. By the time he reached her car, the "door was open," and he "jumped immediately on the driver's side of the car" with his left foot outside the car. Spence threw the black plastic bag containing the deposit bag to Ms. Simpson, who then "half-way sat on it." The person running after Spence reached the car and while holding the car door open, the person reached across Spence, trying to get to the deposit bag. By "swinging" in a certain manner an object described as "two sticks each measuring eight to twelve inches in length, maybe three-quarters of an inch in diameter," with "a chain attached to the sticks," defendant began to hit Spence on the arm. Defendant used the object to hit Spence three times. Spence struggled with the person, trying to protect his face from being hit, and he recognized the person as defendant. Defendant was unable to get the deposit bag, and Ms. Simpson "began to holler." Defendant then backed out of the car and ran to the fence behind the restaurant building, and jumped over it.

Defendant had been employed at the Sonic Drive-In for about a month approximately six months prior to the incident. Defendant had worked the night shift with Spence. Defendant had not been employed since leaving the job at the Sonic Drive-In.

The State also offered evidence tending to show that the object used by defendant in attacking Spence was known as "nunchuckas," a weapon used by practitioners of the martial arts, and

that if the nunchuckas was used in such a fashion as described by Spence and Ms. Simpson, it could be lethal.

Defendant offered evidence tending to show that at the time of the incident he was at a residence at the Berkley Trailer Court, located several miles outside Elizabeth City.

We are of the opinion that the evidence was more than adequate to require submission of the case to the jury and to support the verdict. This assignment of error is meritless.

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

No error.

Judges MARTIN (Harry C.) and WELLS concur.

CHARLES RAY LONG v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

No. 815SC60

(Filed 7 July 1981)

False Imprisonment § 2.1— negligence in procuring false arrest—insufficient evidence—summary judgment

Summary judgment was properly entered for defendant telephone company in plaintiff's action based on the negligence of defendant which allegedly resulted in his false arrest for making a bomb threat to a university where plaintiff's evidence on motion for summary judgment showed that defendant did not inform law officers that plaintiff made the bomb threat call but merely told the officers that a call was made from plaintiff's telephone to the university at 8:35 a.m. and that this was the call most proximate in time to 8:36 a.m. when a reverter card indicated that the bomb threat was made, and that negligence, if any, was on the part of the university in failing accurately to report the time of the bomb threat or on the part of law officers in failing fully to investigate other calls that were made proximate in time to the bomb threat.

APPEAL by plaintiff from *Stevens, Judge.* Order entered 20 August 1980 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 5 June 1981.

In plaintiff's action based on the negligence of defendant which allegedly resulted in his false arrest in making a bomb threat, defendant moved for summary judgment supported by plaintiff's answers to interrogatories which tended to show the following:

Plaintiff was a student and employee at the University of North Carolina at Wilmington on 28 September 1977. At sometime that morning, plaintiff telephoned the university to notify the proper party he was ill and would not be in to work or to attend classes. The university's switchboard operator connected plaintiff with someone in the receiving department, who, in turn, connected him with the mail room where he was employed.

Prior to this time, the university had received annoying calls and had requested that defendant install special equipment in its Winter Park station to implement line identification procedures on all incoming calls to the university switchboard. The equipment was in place on 28 September 1977. The equipment monitored all incoming calls by causing the switchboard to make and eject a "trouble card" which recorded the time, date, and origin of each incoming call. Switchboard operators were instructed to immediately report receipt of a bomb threat by calling a "reverter number" and then calling defendant's Annoyance Control Center in Charlotte. Calling the reverter number caused a computer card to drop as if an incoming call had been made at that time and date. By cross-referencing the reverter cards and the trouble cards, the telephone number from which the annoying telephone call most likely originated could be established and the subscriber identified.

On 28 September 1977 at 8:37 a.m., an employee of defendant in the Annoyance Control Center in Charlotte received a call from the university switchboard operator in Wilmington who reported a bomb threat call. The switchboard operator reported that following the bomb threat, she had dialed the reverter code number, hung up and immediately called the Annoyance Control Center. Defendant's employee called the Winter Park station, requested the switchman on duty to find the reverter card that was activated by the university switchboard operator, and to obtain the trouble cards which immediately preceded the reverter card.

The switchman established that the reverter call was made at 8:36 a.m.; that the trouble card immediately preceding the reverter card dropped at 8:35 a.m.; and that the card identified a call originating from plaintiff's telephone. Another call from an outdoor coin-operated telephone had come in at 8:34 a.m. Other calls had come in at 8:31. Defendant's agents reported plaintiff's call, the call closest to the time of the reverter card call, to the SBI and the police department. Plaintiff was arrested on 28 September 1977 at his home on a charge of making a bomb threat call to the university. About a week later the charges against the defendant were dropped.

Plaintiff alleges that as a result of the negligence of the defendant he was psychologically abused by the police and later treated for emotional stress as a result of his arrest. He was suspended from employment by the university, forced to drop two courses which he had been taking, and his college degree was delayed a year. A job offer plaintiff had expected did not materialize. He had to move to another city and suffered other damages.

The trial judge allowed defendant's motion for summary judgment. From the granting of defendant's motion, plaintiff appeals.

George H. Sperry for plaintiff appellant.

Algernon L. Butler, Jr. for defendant appellee.

HILL, Judge.

Appellant concedes in his brief there is no issue of material fact. Appellant argues, nevertheless, that only in the exceptional case is summary judgment granted in actions involving negligence and that summary judgment was inappropriate in this case. We agree that summary judgment is generally not feasible in negligence actions where the standard of the prudent man must be applied, but, nevertheless, find summary judgment to be proper where it appears there can be no recovery even if the facts as claimed by plaintiff are true. *McNair v. Boyette*, 15 N.C. App. 69, 71, 189 S.E. 2d 590 (1972), *citing Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970).

After examining the facts in the proper light, we find there can be no recovery by plaintiff. The university switchboard operator advised Southern Bell at 8:37 a.m. that a bomb threat had been received and that a reverter call had been made immediately afterwards at 8:36 a.m. Southern Bell then examined the information available to them and discovered that a call originating from plaintiff's telephone had been made to the university switchboard at 8:35 a.m. Plaintiff does not dispute the accuracy of Southern Bell's information.

Southern Bell did not inform the law officers that plaintiff made the bomb threat call. Defendant company merely told the officers that a call was made from plaintiff's telephone to the university at 8:35 a.m. and that this was the call most proximate in time to 8:36 a.m. when the reverter card indicated that the bomb threat was made. Any negligence, if negligence there be, was on the part of the university in failing to accurately report the time of the bomb threat or on the part of the law enforcement officers in failing to fully investigate other calls that were made proximate in time to the bomb threat. Such negligence cannot be imputed to Southern Bell. *Weavil v. Myers*, 243 N.C. 386, 391, 90 S.E. 2d 733 (1953).

The order allowing summary judgment is

Affirmed.

Judges MARTIN (Robert M.) and CLARK concur.

JOHN W. HUFF, INDIVIDUALLY AND AS EXECUTOR FOR THE ESTATE OF ESLIE HOLTON HUFF v. TRENT ACADEMY OF BASIC EDUCATION INC., AND JAMES PADEN, JOHN C. TAYLOE, COOPER KUNKEL, JAMES EARL JONES AND WALTER JONES, D/B/A TRENT ASSOCIATES, A GENERAL PARTNERSHIP v. JAMES G. HUFF

No. 803SC660

(Filed 7 July 1981)

Assignments § 1; Quasi Contracts and Restitution § 5— payment of funds embezzled by relative—directed verdict for defendant improper

In an action for restitution the trial court erred in directing verdict for defendant where the evidence tended to show that a person who was the

brother and son of plaintiffs embezzled money from a bank and put the money in the account of defendant school; the money was used to construct buildings on the school property; the bank demanded of defendant school that the money be returned; this demand was refused; the U.S. Fidelity and Guaranty Company paid this sum to the bank and became subrogated to the rights of the bank against the school; plaintiffs paid U.S. Fidelity and Guaranty Company the sum allegedly embezzled, and U.S. Fidelity and Guaranty assigned all its rights in the claim against the school to plaintiffs; defendants were on notice as to plaintiffs' claim; although the school might have been an innocent party to the transaction in question, it was unjustly enriched at the expense of the bank, and it would be inequitable to allow it to retain the funds in question; and the fact that plaintiffs might have been volunteers did not affect their rights as assignees.

APPEAL by plaintiffs from *Strickland, Judge.* Judgment entered 27 February 1980 in Superior Court, CRAVEN County. Heard in the Court of Appeals 4 February 1981.

This is an action based on a claim for restitution in which the plaintiffs prayed for a judgment in the amount of $59,947.50 and that a trust or lien be impressed on certain property owned by the defendants. The defendants filed an answer in which they denied the material allegations of the complaint. The defendants also joined James G. Huff as a third party defendant and asserted a third party claim against him based on alleged fraudulent transfers of property. The third party claim was severed for purpose of trial and is not involved in this appeal. The action was originally filed on 7 May 1975 against Trent Academy of Basic Education, Inc. (Academy). A notice of lis pendens was filed on 17 June 1975. On 18 November 1977 the property of the Academy was sold at public auction under an order of foreclosure on a deed of trust to First Citizens Bank and Trust Company. The deed of trust had been recorded on 15 November 1974. The individual defendants purchased the property at this sale and were then made parties to the action.

The plaintiffs' evidence showed that from January 1970 until July 1972, James Huff was executive vice president of the Bank of New Bern (Bank) and treasurer of the Academy. During that period he fraudulently transferred funds of the Bank to the Academy. James Huff testified:

"I was in charge of the fund raising activity at the time. We were in a building program, Trent Academy, at that time.

> As to what extent was the fund raising successful, we just never raised enough money to do, to build a building and that's why this thing happened. We kept expecting it to come in and come in, promises of donations but they never came in like we had hoped for. As to what 'thing' I am referring to, when I had to start transferring money from the Bank of New Bern to Trent Academy because the contributions which we hoped for did not come in. We had thought that we would get enough contributions that we could build this building, and when they did not come in, that's when it started to happening."

On 3 October 1972 the Bank demanded of the Academy that this money be returned to the Bank. This demand was refused. The United States Fidelity and Guaranty Company (U.S.F. & G.) paid this sum to the Bank and became subrogated to the rights of the Bank against the Academy. James Huff pled guilty to embezzlement in the United States District Court for the Eastern District of North Carolina. John W. Huff and Eslie Holton Huff, who were the mother and brother of James Huff, paid U.S.F. & G. $59,947.50 and on 1 June 1973, U.S.F. & G. assigned all its rights in the claim against the Academy to John W. Huff and Eslie Holton Huff. U.S.F. & G. released James Huff from any claim it had against him.

At the close of plaintiffs' evidence, the defendants' motion for a directed verdict was allowed. Plaintiffs appealed.

Sanford, Adams, McCullough and Beard, by E. D. Gaskins, Jr., and Charles C. Meeker, for plaintiff appellants.

Dunn and Dunn, by Raymond E. Dunn and Raymond E. Dunn, Jr. for defendant appellees.

WEBB, Judge.

We hold it was error to grant the defendants' motion for a directed verdict. In the light most favorable to the plaintiffs the evidence shows that James Huff embezzled $59,947.50 from the Bank and deposited the money in the account of the Academy. Although the Academy might have been an innocent party to the transaction, it was unjustly enriched at the expense of the Bank, and it would be inequitable to allow it to retain these funds. *See*

American Surety Co. v. Baker, 172 F. 2d 689 (4th Cir. 1949); *Allgood v. Trust Co.*, 242 N.C. 506, 88 S.E. 2d 825 (1955); *Cheek v. Squires*, 200 N.C. 661, 158 S.E. 198 (1931). The claim was assignable. *See Amusement Company v. Tarkington*, 247 N.C. 444, 101 S.E. 2d 398 (1958); *Allgood v. Trust Co., supra; Cheek v. Squires, supra;* and *Railroad v. Railroad*, 147 N.C. 368, 61 S.E. 185 (1908). The defendants contend the claim was not assignable because the plaintiffs were volunteers, that the claim was extinguished when John Huff and Eslie Holton Huff paid U.S.F. & G. and that any attempted assignment was void as being against public policy. We do not believe the fact that John Huff and Eslie Holton Huff may have been volunteers affects their rights as assignees. When they paid U.S.F. & G. the evidence showed the claim was not cancelled but assigned to them. The appellees have cited no cases and we can find none that hold the assignment is against public policy. They have cited cases which hold that assignments for the purpose of bringing a law suit with the assignor and assignee to share in the proceeds are champertous and will not be allowed. That is clearly not the situation in the case sub judice. For a discussion of what claims are assignable, *see* 6 Am. Jur. 2d *Assignments* § 29 (1963) and 6A C.J.S. *Assignments* § 35 (1975).

The testimony of James Huff was to the effect that he embezzled the money from the Bank because the building program at the Academy was not sufficient for the construction of buildings on the Academy's property. The jury could conclude from this that the embezzled funds were used to construct buildings on the property of Trent Academy. If the jury should so find, the plaintiffs would be entitled to have a constructive trust impressed on the property. *See Peoples National Bank v. Waggoner*, 185 N.C. 297, 117 S.E. 6 (1923) and Dobbs, *Remedies*, Ch. 4 (1973). The evidence was that a notice of lis pendens had been filed at the time the individual defendants purchased the property. This put them on notice as to the plaintiffs' claim. G.S. 1-118.

We believe there was evidence in this case from which the jury could find that James Huff embezzled money from the Bank and put the money in the account of the Academy; that the money was used to construct buildings on the Academy's property; that U.S.F. & G. paid the Bank and was subrogated to the Bank's claim; that John Huff and Eslie Holton Huff paid U.S.F. &

G. and took an assignment of the claim from them; and that the defendants were on notice as to the plaintiffs' claim. If the jury should so find the facts, the plaintiffs would be entitled to a judgment impressing a constructive trust on the property of the defendants for their claim.

We note that in their answer the individual defendants alleged they took a fee simple title when the property was sold under the deed of trust which had been given to First Citizens Bank and Trust Company. The question of the plaintiffs' claim for a constructive trust being cut off by the sale under the deed of trust which was recorded prior to the filing of the notice of lis pendens was not discussed by the parties in their briefs, and we do not go into that question in this opinion. The record does not disclose what was done with the surplus from the sale, but we assume it was paid into the office of the clerk of superior court pursuant to G.S. 45-21.31, and if the plaintiffs are successful, they may have a constructive trust imposed on this fund. The parties have also not raised any question as to whether the individual defendants allowed the foreclosure in order to cut off the plaintiffs' claim. *See Paccar Financial Corp. v. Harnett Transfer*, 51 N.C. App. 1, 275 S.E. 2d 243 (1981). We do not pass on this question.

Reversed and remanded.

Judges MARTIN (Harry C.) and WHICHARD concur.

DR. N. FRANK COSTIN, DR. CARLOS T. COOPER AND DR. E. JOSEPH DANIELS, BOARD OF PODIATRY EXAMINERS FOR THE STATE OF NORTH CAROLINA v. RALPH SHELL

No. 8110SC15

(Filed 7 July 1981)

1. Physicians, Surgeons and Allied Professions § 1— injunction prohibiting practice of podiatry

The trial court properly granted summary judgment for the Board of Podiatry Examiners in its action for an injunction prohibiting defendant from practicing podiatry, holding himself out as a podiatrist or describing his occupation by the use of any words or letters calculated to represent that he is a podiatrist where defendant admitted that he was not licensed by the Board

and that his stationery included the letters D.P.M. which commonly mean Doctor of Podiatric Medicine, and where plaintiff's evidence tended to show that patients of defendant thought he was a qualified doctor to examine and correct their foot ailments, that defendant had surgically removed and treated an infected, ingrown toenail of a patient, and that the diagnosis and treatment of ingrown toenails is a medical matter.

2. **Equity § 2.2; Physicians, Surgeons and Allied Professions § 1— injunction against practice of podiatry—laches**

The doctrine of laches did not prevent the issuance of an injunction prohibiting the practice of podiatry by a defendant who opened a foot clinic some thirty years earlier where defendant presented no evidence that he was prejudiced by the delay, and defendant in fact benefited by any delay in bringing the action because he was able to continue to profit from his unlawful practice of podiatry.

3. **Physicians, Surgeons and Allied Professions § 1— injunction prohibiting practice of podiatry—statute of limitations**

The ten-year statute of limitations of G.S. 1-56 did not bar an action by the Board of Podiatry Examiners seeking an injunction prohibiting the practice of podiatry by a defendant who opened a foot clinic some thirty years earlier since defendant's violation of the podiatry statutes is an ongoing violation, and defendant was unlawfully practicing podiatry at the time the action was filed.

APPEAL by defendant from *Farmer, Judge.* Judgment entered 28 August 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 2 June 1981.

The North Carolina Board of Podiatry Examiners (Board) brought this action to enjoin the defendant, Ralph Shell, from "practicing podiatry in [North Carolina], holding himself out as a podiatrist or designating himself or describing his occupation by the use of any words or letters calculated to represent that he is a podiatrist." In 1950, defendant founded, and since that time has been operating, Shell's Foot Clinic in Kinston, North Carolina. In his Answer, defendant admitted that he does not possess a license to practice podiatry, that he is not registered with the Board of Podiatry Examiners and that his stationery letterhead contains the words "Dr. Ralph Shell, D.P.M., [Doctor of Podiatric Medicine] C. Ped. Podiatrist-Pedorthist." In defense however, defendant claims that his practice at Shell's Foot Clinic does not rise to the level of practicing podiatry and that no one has complained of being harmed by his treatment. Defendant asserts that the extent of his practice is to fit and manufacture orthopedic shoes and to administer "therapeutic measures designed to relieve foot discom-

fort [primarily ingrown toenails], frequently caused by the wearing of improper shoes."

Based on the pleadings and supporting affidavits, the trial court granted summary judgment in favor of the Board. Defendant is before us appealing from this adverse judgment.

Allsbrook, Benton, Knott, Cranford & Whitaker, by Thomas I. Benton, for defendant appellant.

Broughton, Wilkins & Crampton, P.A., by J. Melville Broughton, Jr. and H. Julian Philpott, Jr., for plaintiff appellee.

BECTON, Judge.

[1] In applying the standard for summary judgment, the trial court found, based on the pleadings and affidavits, that no genuine issue existed as to any material fact. *See Loy v. Lorm*, 52 N.C. App. 428, 278 S.E. 2d 897 (1981). Our view of the record is in accord with the findings and judgment of the trial court.

G.S. 90-202.3 makes it unlawful for any person to "practice podiatry unless he shall have been first licensed and registered so to do in the manner provided in this Article [Article 12—Podiatrists] . . . ." Podiatry under the Article is defined as "the surgical or medical or mechanical treatment of all ailments of the human foot . . . ." G.S. 90-202.2. The Board has been given specific statutory authority to petition the courts for injunctive relief to prevent violations of the statutes governing the practice of podiatry. G.S. 90-202.13.

In the case at bar, defendant acknowledged that he was not licensed by or registered with the Board and that his stationery included the letters D.P.M. which commonly mean Doctor of Podiatric Medicine. The defendant refers to himself as "Doctor" Shell even though he does not have a medical degree, and the affidavits of two of his patients indicate that they thought he was a "qualified doctor to examine and correct" their foot ailments. Moreover, the Board offered in support of its summary judgment motion a letter signed by "Dr. Ralph Shell" in which the defendant acknowledged that he had "surgically removed, relieved and treated on December 6, 1975" the infected, ingrown toenail of Mr. Rudolph Smith. Dr. Robert M. Hatcher, a licensed Doctor of

Podiatry, provided the Board with an affidavit in which he gave his opinion that "the diagnosis and the treatment of ingrown toenails is a medical matter . . . [and] should [not] be attempted by non-medical personnel." Based on the pleadings, admissions and affidavits, then, the trial court's order of summary judgment was properly granted.

[2] In the alternative, defendant argues that if he were found to be practicing podiatry, then the doctrine of laches and the statute of limitations prohibit the grant of an injunction. These arguments are without merit. The doctrine of laches requires a showing (1) that the petitioner negligently failed to assert an enforceable right within a reasonable period of time, *Builders Supplies Co. v. Gainey,* 282 N.C. 261, 192 S.E. 2d 449 (1972); *and* (2) that the propounder of the doctrine was prejudiced by the delay in bringing the action, *Rape v. Lyerly,* 287 N.C. 601, 215 S.E. 2d 737 (1975). Defendant presented no evidence by way of affidavit that he was prejudiced by the delay. In fact, defendant benefited by any delay in bringing this action because he was able to continue to profit from his unlawful practice of podiatry.

[3] Defendant also contends that the Board is barred from bringing this action by the ten-year statute of limitations under G.S. 1-56. Defendant's violation of the podiatry statutes, however, is an ongoing violation; defendant was unlawfully practicing podiatry and holding himself out as a Doctor of Podiatry at the time this action was filed. Hence, the ten-year statute of limitations, if applicable, would not have been tolled at the time the complaint was filed.

The grant of the Board's motion for summary judgment was in all respects correct, and therefore we

Affirm.

Judge VAUGHN and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. HOWARD OWEN

No. 8029SC1201

(Filed 7 July 1981)

Extradition § 1— extradition to S.C.—sufficiency of findings

The trial court did not err in denying defendant's motion that extradition to S.C. be denied where the trial court made findings of fact supported by the evidence that the extradition documents were in order; defendant had been charged in S.C. with the crime of possession of marijuana with intent to distribute; defendant was the person named in the extradition request; and there was probable cause to believe that defendant had fled the jurisdiction of S.C.

APPEAL by defendant from *Gaines, Judge.* Undated oral order entered in Superior Court, TRANYSLVANIA County. Heard in the Court of Appeals 10 April 1981.

On 13 October 1979 R. A. Crowe, Magistrate of Pickens County, South Carolina, issued a warrant for defendant's arrest on a charge of possession of marijuana with intent to distribute. The warrant was issued in response to an affidavit filed by an agent of the Pickens County Sheriff's Department. On 30 October 1979 Governor Richard W. Riley of South Carolina requested defendant's extradition to that State. On 6 November 1979 Governor James B. Hunt, Jr., of North Carolina, ordered that defendant be delivered into the custody of the Sheriff of Pickens County.

Upon his arrest defendant filed a petition for writ of habeas corpus seeking inquiry by a judge of the superior court into the legality of the extradition. The petition asserted

> [t]hat the State of South Carolina should be put to strict proof that the petitioner was within the State of South Carolina at any time alleged in the Request for Extradition and that [he] is in fact such person as could have committed any crime within the State of South Carolina at the times alleged.

A writ of habeas corpus was issued ordering defendant to appear before the Superior Court of Transylvania County for inquiry into the legality of the extradition. At the hearing held pursuant to this order an officer of the Pickens County Sheriff's Department testified that he had worked on the drug case pending against

defendant; that the case involved possession of one-half ton of marijuana allegedly transported from Georgia to Pickens County in a U-Haul truck which was located at the residence of defendant's brother in Pickens County; that the truck lease contract had been executed in defendant's name and defendant's driver's license number was written on the contract; that the contract was executed in Athens, Georgia; and that the license plate number and equipment number on the truck matched the numbers on the contract. He further testified that on the date the truck and marijuana were confiscated three people came out of the home of defendant's brother. Two, Charles Owen and Edgar Owen, brothers of defendant, were apprehended; but the third, a white male more than six feet in height, escaped.

The trial court denied defendant's motion that the extradition be denied, finding as facts (1) that defendant was the person named in the extradition request; (2) that he was charged in Pickens County with possession of marijuana with intent to distribute; (3) that there was probable cause to believe defendant had fled the jurisdiction of South Carolina; (4) that the papers from South Carolina were in order; and (5) that defendant was in lawful custody of the Transylvania County Sheriff's Department, which was empowered to turn his person over to lawful authorities of the State of South Carolina for transportation to that State.

From this denial of his motion that extradition be denied, defendant appeals.

Attorney General Edmisten, by Associate Attorney General Lisa Shepard, for the State.

Potts and Welch, by Jack H. Potts, for defendant appellant.

WHICHARD, Judge.

"An extradition proceeding is intended to be a summary and mandatory executive proceeding. *See,* U.S. Constitution, Art. IV, § 2, cl. 2; G.S., Chap. 15A, Art. 37 (Uniform Criminal Extradition Act.)" *State v. Carter,* 42 N.C. App. 325, 328, 256 S.E. 2d 535, 537, *appeal denied,* 298 N.C. 301, 259 S.E. 2d 302 (1979).

> Whatever the scope of discretion vested in the governor of an asylum state, . . . the courts of an asylum state are

> bound by Art. IV, § 2 . . . and, where adopted, by the Uniform Criminal Extradition Act [N.C. G.S. 15A, art. 37]. A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. . . .
>
> Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.

Michigan v. Doran, 439 U.S. 282, 288-289, 58 L.Ed. 2d 521, 527, 99 S. Ct. 530, 535 (1978).

The trial court here made findings of fact in the specific language of the first three of the four items set forth above as the only matters into which the courts of an asylum state may properly inquire. It found that the extradition documents were in order; that the defendant had been charged in South Carolina with the crime of possession of marijuana with intent to distribute; and that defendant was the person named in the extradition request. As to the fourth item, whether defendant is a fugitive, the court found that there was probable cause to believe defendant had fled the jurisdiction of South Carolina. A fugitive is "one who flees." Black's Law Dictionary 604 (5th ed. 1979). The term is "used in criminal law with the implication of a flight, evasion, or escape from arrest, prosecution, or imprisonment." *Id.* Thus the finding that there was probable cause to believe defendant had fled the jurisdiction of South Carolina constituted a finding that there was probable cause to believe that he was a fugitive from that state. These findings are amply supported by competent evidence in the record; and "[i]t is settled law that the findings of the trial judge when supported by competent evidence . . . are binding and conclusive in appellate courts in this jurisdiction." *State v. Stepney*, 280 N.C. 306, 317, 185 S.E. 2d 844, 851 (1972).

The trial court having limited its decision to those matters into which the courts of an asylum state may properly inquire,

and its findings on those matters being amply supported by competent evidence in the record, its order should be and is

Affirmed.

Judges MARTIN (Robert M.) and BECTON concur.

JOURNEYS INTERNATIONAL, INC., AND CONCRETE SERVICE CO. OF JACKSONVILLE, INC., T/B/A L. R. ARMSTRONG & SONS v. ROBERT HUGH CORBETT, TRUSTEE, AND SUPERIOR MACHINE SHOP, INC.

No. 815SC31

(Filed 7 July 1981)

Courts § 6— special proceeding—no appeal from clerk—no jurisdiction in superior court

The superior court had no jurisdiction of a special proceeding brought by judgment creditors to determine the ownership of surplus funds remaining after a foreclosure sale where the matter was simply put on the calendar for hearing in the superior court and there was no appeal from an order of the clerk by an aggrieved party.

APPEAL by respondents from *Strickland, Judge.* Order entered 6 November 1980 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 3 June 1981.

This is a special proceeding brought pursuant to the provisions of G.S. 45-21.32. The petitioners alleged that Atlantic Manufacturing, Ltd. executed a note in the amount of $250,000.00 to the respondent Superior Machine Shop, Inc. secured by a deed of trust to respondent Robert Hugh Corbett, Trustee. The petitioners alleged further that they were judgment creditors of Atlantic Manufacturing Ltd.; that the respondent Robert Hugh Corbett foreclosed the real estate secured by the deed of trust, which property was sold for $325,505.49 to Superior Machine Shop, Inc.; that the trustee delivered the surplus from the sale to Superior Machine Shop rather than to the clerk of superior court as he was required to do under G.S. 45-21.31(b); and that petitioners were entitled to have been paid from the surplus resulting from the sale. Petitioners prayed that the clerk order the

respondents to deliver the surplus from the sale to the clerk for a determination of which parties are entitled to it.

The respondents moved to dismiss the proceeding under G.S. 1A-1, Rule 12(b)(1). The case was calendared for hearing before a judge of superior court. The respondents objected to the hearing by a judge before the matter was heard by the clerk. The matter was heard over the objection of the respondents, and their motion to dismiss was denied.

The respondents appealed.

James A. MacDonald, for petitioner appellee Journeys International, Inc., and Elton G. Tucker, for petitioner appellee Concrete Service of Jacksonville, Inc.

James L. Nelson, for respondent appellant Robert Hugh Corbett, and Louis A. Burney, for respondent appellant Superior Machine Shop, Inc.

WEBB, Judge.

The motion to dismiss deals with jurisdiction over property of the respondents and is appealable under G.S. 1-277(b).

The appellants assign error to the ruling by the superior court without an appeal from the clerk. We believe this assignment of error has merit. The appellees contend that by filing the motion to dismiss, an issue of fact was raised as to the ownership of the funds and for this reason the proceedings should have been transferred under G.S. 45-21.32(c) to the civil issue docket of the superior court for trial. The filing of a motion to dismiss under Rule 12(b)(1) does not raise an issue of fact. It challenges the jurisdiction of the court over the subject matter.

In *Redevelopment Comm. v. Grimes*, 277 N.C. 634, 178 S.E. 2d 345 (1971), our Supreme Court held that although a special proceeding was erroneously appealed to the superior court, the superior court could determine all matters before it. The Supreme Court said: "The clerk is but a part of the superior court, and when a proceeding before the clerk is brought before the judge in any manner, the superior court's jurisdiction is not derivative but it has jurisdiction to hear and determine all matters in controversy as if the case was originally before him." *Id.*

at 638, 178 S.E. 2d at 347. We do not believe *Redevelopment* governs this case. There was no appeal in the case sub judice and the record discloses that there was not a transfer of this proceeding. It was simply put on the calendar for hearing in the superior court. We believe we are bound by *Gravel Co. v. Taylor*, 269 N.C. 617, 153 S.E. 2d 19 (1967). In that case a superior court judge entered an order in a special proceeding. The Supreme Court held that the case was not properly before the superior court since the record did not show an appeal from the clerk of superior court. The Supreme Court said that G.S. 1-276, giving the power to the superior court judge to determine all matters in controversy when a special proceeding is transferred for any ground from the clerk, must be construed in *pari materia* with G.S. 1-272, which allows appeals from the clerk only by parties aggrieved.

We note that *Lenoir County v. Outlaw*, 241 N.C. 97, 84 S.E. 2d 330 (1954) is very close to being on all fours with the case sub judice so far as the propriety of determining the matter by special proceedings is concerned. In that case the plaintiff claimed a lien on property which was subject to a deed of trust. The trustee foreclosed the deed of trust and delivered the surplus to someone other than the clerk of superior court. Our Supreme Court held that a special proceeding pursuant to the provisions of G.S. 45-21.32 was a proper method to determine the ownership of the surplus funds.

For the reasons stated in this opinion, we reverse and remand so that the respondents' motion to dismiss may be heard by the clerk of superior court.

Reversed and remanded.

Chief Judge MORRIS and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. ROOSEVELT MACK

No. 8126SC102

(Filed 7 July 1981)

Criminal Law § 122.2— deadlocked jury—additional instructions improper

Defendant is entitled to a new trial where the jury appeared in court and announced that it was deadlocked; the trial judge indicated that he was placing no pressure on the jurors to change their minds or reach a verdict and then proceeded to advise the jury that at some future time twelve more jurors would have to decide the case at additional cost to the taxpayers of the county and the State; the jury retired and returned a verdict within an hour; and it was reasonable to assume that, had the judge not so instructed the jury, the minds of the jurors would have remained the same. G.S. 15A-1235.

APPEAL by defendant from *Owens, Judge.* Judgment entered 28 August 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 May 1981.

Defendant was charged with operating a motor vehicle in violation of G.S. 20-138(b). Defendant pled guilty and was convicted of the charge in district court. On appeal to the superior court, defendant was again convicted. Defendant appeals his conviction in superior court, contending the trial judge erred in failing to grant defendant's motion for mistrial and in his instructions to the jury.

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

Assistant Public Defender Cherie Cox for defendant appellant.

HILL, Judge.

Defendant brings forth four assignments of error on appeal. We have considered each and find the fourth assignment to be dispositive.

After having begun their deliberations, the jury returned to the courtroom and informed the court that it had not reached a verdict. Thereupon, the court said:

> [N]ow ladies and gentlemen, the Court, as I have previously instructed you, is certainly not putting any pressure on you

> to change your minds, or to reach a verdict in this case. I would remind you, however, that if you do not decide this case, that twelve more jurors will have to decide it at some future date at additional expense to the taxpayers of this county and the State.

Defendant contends these additional instructions were coercive under G.S. 15A-1235. This Court has addressed limitations imposed by this statute on the trial judge in his charge to deadlocked juries in *State v. Lamb*, 44 N.C. App. 251, 261 S.E. 2d 130 (1979), *cert. denied*, 299 N.C. 739 (1980). In that case, it was pointed out that G.S. 15A-1235 now excludes any mention to the jury of the potential expense and inconvenience of retrying the case should the jury fail to agree. *See State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980); *State v. Hunter*, 48 N.C. App. 689, 269 S.E. 2d 736 (1980).

Without question, the charge by the court is impermissible under the statute and *Lamb, supra*. Nevertheless, in construing *Lamb*, Justice Exum, speaking for the Court, said:

> Not every violation of the procedures embodied in Chapter 15A amounts to prejudicial error.
>
> . . . .
>
> [W]e see no reason to dispense with the usual requirement that an error in the judge's instructions to the jury must be to the prejudice of the defendant in order to warrant corrective relief by the appellate division. G.S. 15A-1442(4)(d).

Easterling, at p. 608.

There can be no fixed rule in determining when the mention of potential additional expense and inconvenience is prejudicial. "Such prejudice will normally be deemed present, in cases relating to rights arising other than under the Federal Constitution *only* 'when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . .." G.S. 15A-1443(a). Furthermore, the burden of showing that such a possibility exists rests upon the defendant." *Id.*

Generally speaking, our courts have addressed the question of prejudicial error in the judge's charge when potential addi-

tional expense and inconvenience in a new trial are involved within three categories:

(1) Such mention of inconvenience and expense in the initial charge to the jury is harmless. *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978). At this point, the decision making process by the jury is yet to begin.

(2) Where the jury has begun deliberation but no evidence of deadlock is before the trial judge, the mention of inconvenience and additional potential expense as a part of additional further instructions, which instructions also demonstrate the trial judge does not intend that any juror surrender his conscientious conviction or judgment and contains no such element of coercion as to warrant a new trial, is harmless error. *State v. Easterling*, supra; *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975); *State v. Darden*, 48 N.C. App. 128, 268 S.E. 2d 225 (1980).

(3) But where the jury is deadlocked, and this fact is known to the trial judge, the mention of inconvenience and additional expense may well be prejudicial and harmful to the defendant, and must be scrutinized with extraordinary care. *See State v. Lipfird*, 302 N.C. 391, 276 S.E. 2d 161 (1981), as evidence of the trend of additional protection offered by the Supreme Court to a defendant. At this point the minds of jurors are fixed, and have been fixed for some time. Presumably, their decisions have been reasonably made, based upon the evidence presented. Only then with the weight of additional instructions by the trial judge is it likely that a complete reversal of judgment by a juror takes place.

In the case *sub judice*, the jury had appeared in court and announced that it was deadlocked. The trial judge indicated that he was placing no pressure on the jurors to change their minds or reach a verdict, and then proceeded to advise the jury that at some future time twelve more jurors would have to decide the case at additional cost to the taxpayers of the county and the state. The jury retired and returned a verdict within an hour. It is reasonable to assume that had the judge not so instructed the jury, the minds of the jurors would have remained the same. Cer-

tainly, a unanimous verdict appearing in so short a time arouses question concerning the thrust of the judge's charge.

For the reasons set out herein, the case is remanded to the Superior Court of Mecklenburg County for a

New trial.

Judges MARTIN (Robert M.) and CLARK concur.

STATE OF NORTH CAROLINA v. LINDA ELAINE REID

No. 8119SC89

(Filed 7 July 1981)

1. **Homicide § 28 — instructions — final mandate — possible verdicts — not guilty by reason of self-defense**

Defendant is entitled to a new trial because of the trial court's failure to include not guilty by reason of self-defense in its final mandate to the jury.

2. **Criminal Law §§ 99.2; 101 — remark by trial judge — newspaper article read by jurors — expression of opinion on evidence**

Defendant was prejudiced when four jurors in a murder trial read a newspaper article which quoted the trial judge as stating "too many shots" in denying defendant's motion for nonsuit. Furthermore, the trial judge's statement to the jury that his earlier statement was made at a time when the trial was like a baseball game "with the score seventeen to nothing, but our side ain't been up yet" constituted an expression of opinion on the evidence.

APPEAL by defendant from *Hairston, Judge.* Judgment entered 25 September 1980 in Superior Court, ROWAN County. Heard in the Court of Appeals 26 May 1981.

Upon an indictment for murder defendant was found guilty by a jury of voluntary manslaughter.

Evidence for the State showed that defendant shot her husband while the two were in their bedroom. Defendant's evidence tended to show that her husband was intoxicated, started an argument, grabbed a club and threatened to kill defendant. Defendant thereupon retrieved a gun, retreated from deceased who continued to pursue her, fired a warning shot and then fired at

deceased when she realized he was not going to stop advancing on her.

Defendant appeals.

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

Carroll and Scarbrough, by Phillip G. Carroll and James E. Scarbrough, for defendant-appellant.

ARNOLD, Judge.

[1] Defendant asserts that the failure of the trial court to charge in its final mandate that the jury could find her not guilty by reason of self-defense was reversible error. She relies on *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974); *State v. Hunt*, 28 N.C. App. 486, 221 S.E. 2d 720 (1976); and *State v. Girley*, 27 N.C. App. 388, 219 S.E. 2d 301 (1975), *disc. rev. denied*, 289 N.C. 141, 220 S.E. 2d 799 (1976).

The State asserts that the court's instructions as to self-defense, when viewed as a whole, would have allowed a verdict of not guilty by reason of self-defense. However, the State concedes that it cannot distinguish the case *sub judice* from *Dooley, Hunt* and *Girley*. The charge must include not guilty by reason of self-defense as a possible verdict in the final mandate where the defense is raised by the evidence, as it was in defendant's trial. *State v. Dooley, supra; State v. Hunt, supra;* and *State v. Girley, supra.*

[2] Error is also assigned by defendant to the trial court's failure to declare a mistrial as a result of at least four jurors' admission that they read a newspaper article about defendant's trial. After charging the jury the court recessed until the following morning at which time the jury would begin deliberations. During this overnight recess a newspaper article, attached as an exhibit to this appeal, was read by some of the jurors.

The newspaper reported a statement the trial judge made out of the presence of the jury in denying defendant's motion to dismiss for insufficiency of the evidence. In response to defendant's motion the trial judge replied "too many shots . . . . Motion denied." It was this response which was accurately quoted by the newspaper and read by the jurors.

The question of excessive force was a crucial issue before the jury, and the judge's inadvertent statement, once read in the newspaper by the jurors, almost certainly and irreparably prejudiced defendant. Were there no other errors in this trial defendant would be entitled to a new trial due to the unfortunate and needless quote by the newspaper of the trial judge's surplusage made during the press of the trial proceedings, but nevertheless made outside the presence of the jury.

Moreover, the maladroitness of uttering and reporting the "too many shots" statement was compounded to defendant's further prejudice when the trial judge attempted to cure the prejudice caused by the newspaper. Defendant asserts that the judge's analogy of the trial to a baseball game "with the score seventeen to nothing, but our side ain't been up yet," although not so intended by the court, amounted to a comment on the weight of the evidence. We cannot disagree with defendant that the judge's comment might have added credibility to the State's case in the eyes of the jury.

Defendant is entitled to a

New trial.

Judges VAUGHN and BECTON concur.

WILLIAM F. FAUGHT v. BRANCH BANKING & TRUST CO.

No. 8013SC1026

(Filed 7 July 1981)

Banks and Banking § 3; Execution § 1— bank account of judgment debtor—bank's payment to sheriff

Where plaintiff deposited sums into an account at defendant's bank, execution was issued against plaintiff in another suit, the sheriff presented the execution to defendant, and defendant transferred funds in plaintiff's account to the sheriff and notified plaintiff that it had done so, G.S. 1-359 provided defendant with a complete defense to plaintiff's action to recover for defendant's allegedly unlawful withholding of plaintiff's funds, since, under the statute, a bank voluntarily can pay to the sheriff the amount in a judgment debtor's bank account when it is notified that there is an outstanding writ of execution against its depositor.

APPEAL by plaintiff from *Braswell, Judge.* Order entered 8 September 1980 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 29 April 1981.

The following facts are undisputed. Plaintiff deposited sums into an account at defendant's Fayetteville branch. Execution was issued against plaintiff in another suit on 10 March 1980 and the Sheriff of Cumberland County presented the execution, which was in the amount of $14,573.75, including interest to date, to the defendant. The defendant transferred the funds in plaintiff's account, totalling $14,645.44, to the Sheriff on 11 March 1980 and notified plaintiff that it had done so. Approximately two months later plaintiff demanded the funds in his account and the bank denied plaintiff's demand, stating that the account was nonexistant.

Plaintiff subsequently instituted this action alleging the above-recited facts and alleging that the defendant's unlawful withholding of plaintiff's funds had caused plaintiff severe mental and nervous shock, emotional stress, aggravated heart trouble and general deterioration of his health; had caused plaintiff to incur medical expenses; had prevented plaintiff from pursuing his vocation; and had prevented plaintiff from paying his personal debts. Plaintiff prayed for damages in the amount of $14,302.92 plus interest as restitution for funds taken from plaintiff's bank account; $50,000 as punitive damages; and $514,000 additionally.

Defendant's answer denied that it had wrongfully released the funds and asserted, among other things, N.C. Gen. Stat. § 1-359 as a complete defense to plaintiff's action.

The trial court granted defendant's motion for summary judgment and dismissed the action. Plaintiff appeals from this order.

Davey L. Stanley, for the plaintiff-appellant.

Clark, Shaw, Clark & Bartelt by John G. Shaw, for the defendant-appellee.

MARTIN (Robert M.), Judge.

N.C. Gen. Stat. § 1-359 provides:

> After the issuing of an execution against property, all persons indebted to the judgment debtor, . . . may pay to the

> sheriff the amount of their debt, or as much thereof as is necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount paid.

It is undisputed that the plaintiff was a judgment debtor; that the defendant was a debtor of the plaintiff at the time the sheriff levied execution; and that the defendant paid the sheriff the amount of its debt to the judgment debtor.

Under N.C. Gen. Stat. § 1-359 a bank voluntarily can pay, if it chooses, to the sheriff the amount in a judgment debtor's bank account when it is notified that there is an outstanding writ of execution against its depositor. Thus, N.C. Gen. Stat. § 1-359 provides the defendant with a complete defense to plaintiff's action. *See Parks v. Adams*, 113 N.C. 473, 18 S.E. 665 (1893).

As the pleadings and affidavits before the trial court showed that there was no genuine issue as to any material fact and that the defendant was entitled to a judgment as a matter of law, the trial court correctly granted defendant's motion for summary judgment. N.C. Gen. Stat. § 1A-1, Rule 56(c). The order of the trial court from which the plaintiff appealed is affirmed.

Affirmed.

Judges WHICHARD and BECTON concur.

IN THE MATTER OF: THE APPEAL FROM THE ENVIRONMENTAL MANAGEMENT COMMISSION FINAL ORDER GRANTING A CERTIFICATE OF AUTHORITY TO ORANGE WATER AND SEWER AUTHORITY PURSUANT TO G.S. 162A-7

No. 8010SC1069

(Filed 21 July 1981)

1. **Waters and Watercourses § 4— construction of reservoir—environmental impact statement required**

The issuance of a certificate by the Environmental Management Commission authorizing acquisition of land for the construction of a reservoir constitutes a "recommendation or report on proposals for legislation and actions involving expenditure of public moneys for projects and programs significantly affecting the quality of the environment," G.S. 113A-4(2), thereby necessitating an environmental impact statement, since the proposed reservoir affected some 700 acres of land, most of which was woodland, there were potentially serious, adverse environmental effects which could not be avoided should the reservoir be constructed, and there were several viable alternatives to the reservoir project.

2. **Administrative Law § 8— judicial review of administrative decision—whole record test**

The superior court judge did not apply the proper scope of review in determining the propriety of a decision by the Environmental Management Commission where the court's review described in its judgment did not comport with the "whole record" test required by the N.C. Administrative Procedure Act. G.S. 150A-51(5).

APPEAL by intervenors, Cane Creek Conservation Authority, Lower Cape Fear Water and Sewer Authority, Edward Johnson, Forrest Young, Cecil Crawford and Teer Farms, Inc., from the 5 March 1980 judgment of *Judge Herring* as amended by order entered 8 April 1980. Heard in the Court of Appeals 4 May 1981.

In 1976, acting pursuant to the provisions of G.S. 162A-3, the Board of Commissioners of Orange County, the Board of Aldermen of the Town of Chapel Hill, and the Board of Aldermen of the Town of Carrboro, by joint and several actions, organized and incorporated the Orange Water and Sewer Authority (hereinafter referred to as OWASA). Thereafter, in 1977, OWASA officially acquired title to, and possession of, the water and sewer utility systems and properties then owned by the State of North Carolina and operated by the University of North Carolina at Chapel Hill, by the Town of Chapel Hill, and by the Town of Carr-

boro. By law, the Authority was granted certain powers, among which were the powers to acquire, construct, improve, extend, maintain, and operate any water system or part thereof within or without the three participating political subdivisions, G.S. 162A-6(5).

On 21 December 1977, the Authority, acting pursuant to the provisions of G.S. 162A-7, petitioned the Environmental Management Commission (hereinafter the Commission) for a certificate authorizing institution of eminent domain proceedings in order to construct a dam and reservoir for water supply purposes. In its petition, OWASA alleged that, until the summer of 1968, the existing water supply source, University Lake, with its 675 million gallon impoundment on Morgan Creek, had been adequate to supply the needs of what is now OWASA's service area. In that year, however, a drought occurred, and the resulting shortage of water caused the University of North Carolina to sponsor several studies designed to solve the problem of an inadequate water supply. As a result of those studies, the continued growth of the population within the service area, and its inability to obtain an adequate and assured supplement of water from other municipalities, OWASA determined that there was a need to impound a permanent additional supply of water and that the best location for that impoundment would be on the waters of Cane Creek and its tributaries at a dam site located approximately one-half mile north of N.C. Highway 54 in southwestern Orange County. It, therefore, sought a certificate of approval and authorization from the Commission so that it might proceed with the acquisition of property by the power of eminent domain, if necessary.

On 6 January 1978, the Cane Creek Conservation Authority, an unincorporated association of landowners whose property was to be affected, filed a motion to intervene. On 7 February 1978, the Commission gave notice of an administrative hearing on OWASA's petition. Thereafter, in April 1978, the following parties moved to intervene in the petition: the Lower Cape Fear Water and Sewer Authority, the Town of Chapel Hill, the Town of Carrboro, the Board of Trustees of the University of North Carolina, and Edward Johnson, Forrest Young, Cecil Crawford, and Teer Farms, Inc. The motions to intervene were allowed by a hearing officer of the Commission.

On seven days in April, May, and June 1978, a three-member panel of the Commission heard the petition for the Cane Creek reservoir. At the hearing, OWASA presented evidence which tended to show that the existing water supply source, University Lake, was constructed during the early 1930's. That source was adequate until the drought of 1968 which necessitated emergency conservation measures as well as the purchase of treated water from the City of Durham. Since 1968, similar emergency measures have been necessary in three separate years. The adequacy of the water supply has also been affected by an increase in population; between 1968 and 1977, the population requiring service increased fifty percent.

Among the sources considered for the additional supply of water were (1) Morgan Creek (additional development), (2) Cane Creek, (3) the City of Durham, and (4) Lake Jordan. A 1969 study sponsored by the University of North Carolina and conducted by the New York engineering consulting firm of Hazan and Sawyer included a comparative analysis of these four alternative sources and resulted in a recommendation that the University of North Carolina, which owned the water system at that time, authorize, without delay, the Cane Creek project.

Five witnesses called by OWASA and associated either with the University of North Carolina or the State of North Carolina testified that Cane Creek would be the best source of water for OWASA. The principal advantage of the Cane Creek project appeared to be that the watershed, relative to other watersheds in the Piedmont area of North Carolina, would provide a higher-quality water. In the Cane Creek watershed, there are no "point" sources of pollution. On the other hand, the Lake Jordan dam will receive water from the Haw and New Hope Rivers both of which are downstream of growing and well-developed urban and industrial areas, sources of pollution which render the quality of water at that lake questionable.

The feasibility of purchasing a permanent water supply from the City of Durham received a low evaluation by OWASA witnesses because of OWASA's dependence on the City of Durham and the unpredictablity of cost. As to the fourth alternative, additional development of Morgan Creek, OWASA's position, as stated by its witnesses, appeared to be that this source

would be protected for future municipal water supply purposes. Use of the Cane Creek reservoir at this point, therefore, would preserve both alternatives.

OWASA, therefore, proposed an earthen dam on Cane Creek 2,600 feet north of the N.C. Highway 54 bridge across the creek. The proposed Cane Creek reservoir would impound the runoff of 32 square miles and have the capacity of three billion gallons. A safe yield would be ten million gallons per day. In order to construct the reservoir, OWASA must acquire approximately 700 acres of land: The cost, projected in 1977, was $7,800,000.

The appellants, opponents of the Cane Creek alternative, put on evidence which tended to focus on the viability of other alternatives. One expert, a water quality chemist from the U.S. Army Corps of Engineers, testified that three segments of the Jordan reservoir would be suitable for public water supply purposes and that, of these three segments, one was the area of the reservoir between U.S. 64 and Farrington Road, the point at which an intake and pumping station for OWASA's needs might be located. There was additional evidence by the appellants that raised the question of whether the proposed Cane Creek reservoir would be subject to runoffs of water containing argicultural herbicides and pesticides which would contaminate the supply.

As to the impact of the proposed reservoir on the Cane Creek area, predominantly prime agricultural land, an expert in the field of dairy farming testified that the proposed project would be very detrimental to the dairy farms located there because of resulting pressures for residential development and increased environmental pressures against the use of herbicides and pesticides, necessities in dairy farm operations. Furthermore, Michael Godfrey, an expert in the field of botany and natural history testified that there is a rare plant life along the stretch of Cane Creek that would be inundated. Mr. Godfrey characterized Cane Creek as biologically "the most . . . important place in Orange County."

After hearing this and other evidence, the three-member panel issued a majority report recommending denial of the certificate sought by OWASA. The majority report proposed finding, among other things, deficiencies in OWASA's analysis of environmental impacts and economic factors, the use of unwar-

ranted assumptions related to water treatment, inadequate assessment of the social impact of the proposed reservoir, and an inadequate survey of botanical life threatened by the project. Nevertheless, the full Commission adopted the recommendation of the minority report and granted OWASA a certificate authorizing acquisition of the necessary water, water rights, and land for the Cane Creek reservoir. The appellants herein sought judicial review, pursuant to the provisions of G.S. 150A-43 *et seq.*, in superior court, Wake County. The judgment of the court, filed 5 March 1980, and amended 8 April 1980, upheld the order of the Commission. An appeal was brought to this Court.

Claude V. Jones for petitioner-appellee, Orange Water and Sewer Authority.

Emery B. Denny, Jr., for intervenor-appellee, Town of Chapel Hill.

Michael B. Brough, for intervenor-appellee, Town of Carrboro.

Attorney General Edmisten, by Special Deputy Attorney General W. A. Raney, Jr., for intervenor-appellee, the Board of Trustees of the University of North Carolina at Chapel Hill, and for appellee, the Environmental Management Commission.

Pinna and Corvette, by T. E. Corvette, Jr., and Singleton, Murray, Harlow and Little, by David A. Harlow, for intervenors-appellants, Cane Creek Conservation Authority, Lower Cape Fear Water and Sewer Authority, Edward Johnson, Forrest Young, Cecil Crawford, and Teer Farms, Inc.

MORRIS, Chief Judge.

[1] The first assignment of error that we shall consider is whether the superior court judge erred in affirming the decision of the Commission, which was made without the filing or consideration of an environmental impact statement. The requirement that State agencies prepare environmental impact statements of proposed projects is contained in the provisions of North Carolina's Environmental Policy Act, G.S. 113A-1 *et seq.* An analysis of the question posed in the case *sub judice* must, therefore, begin with an examination of that Act.

Despite the fact that the Environmental Policy Act became effective almost ten years ago, our courts have rendered few deci-

sions clarifying what we read to be a mandate for State agencies to take an active role "to conserve and protect . . . [the State's] natural resources and to create and maintain conditions under which man and nature can exist in productive harmony." G.S. 113A-3. The purposes of the Act are, *inter alia*, to declare a State policy which encourages "the wise, productive, and beneficial use of the [State's] natural resources . . . without damage to the environment," which maintains a healthy environment, and which preserves the natural beauty of the State. G.S. 113A-2. A further purpose is to require agencies of the State to consider and report upon environmental aspects and consequences of their actions which involve the expenditure of public moneys. *Id.*

The requirement of an environmental impact statement, as described in the provisions of G.S. 113A-4(2), clarifies the sort of consideration of environmental values and inter-agency cooperation compelled by the Act:

> § 113A-4. *Cooperation of agencies; reports; availability of information.*—The General Assembly authorizes and directs that, to the fullest extent possible:
>
> * * *
>
> (2) Any State agency shall include in every recommendation or report on proposals for legislation and actions involving expenditure of public moneys for projects and programs significantly affecting the quality of the environment of this State, a detailed statement by the responsible official setting forth the following:
>
> a. The environmental impact of the proposed action;
>
> b. Any significant adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> c. Mitigation measures proposed to minimize the impact;
>
> d. Alternatives to the proposed action;
>
> e. The relationship between the short-term uses of the environment involved in the proposed action and the maintenance and enhancement of long-term productivity; and
>
> f. Any irreversible and irretrievable environmental changes which would be involved in the proposed action should it be implemented.

> Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any agency which has either jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such detailed statement and such comments shall be made available to the Governor, to such agency or agencies as he may designate, and to the appropriate multi-county regional agency as certified by the Director of the Department of Administration, shall be placed in the public file of the agency and shall accompany the proposal through the existing agency review processes. A copy of such detailed statement shall be made available to the public and to counties, municipalities, institutions and individuals, upon request.

The requirement of the impact statement is designed, therefore, to provide a mechanism by which all affected State agencies raise and consider environmental factors of proposed projects.

With this background of the Environmental Policy Act before us, the first question we must consider is whether the issuance of a certificate authorizing acquisition of land for the construction of a reservoir constitutes, on the part of the Commission, a "recommendation or report on proposals for legislation and actions involving expenditure of public moneys for projects and programs significantly affecting the quality of the environment . . .," G.S. 113A-4(2), thereby necessitating an environmental impact statement.

The question of whether certification action by the Commission constitutes State action triggering the preparation of an impact statement is one of first impression in this jurisdiction. Under federal law, however, the issue is well decided. Under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, and specifically 42 U.S.C. 4332(2)(C), all federal agencies must include an impact statement on "major Federal actions significantly affecting the quality of the human environment. . . ." "Federal action" has been interpreted to mean "not only action undertaken by the agency itself, but also any action permitted or approved by the agency." *Sierra Club v. Morton*, 514 F. 2d 856, 875 (D.C. Cir. 1975), *cert. dismissed* 424 U.S. 901, 96 S.Ct. 1091, 47 L.Ed. 2d 105, *reversed on other grounds* 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed. 2d 576 (1976). In *Sierra Club v. Morton*, the District of Columbia

Court of Appeals held that, since development of coal resources in the Northern Great Plains Province was subject to federal approval, federal action necessitating an impact statement was involved. Similarly, in *Davis v. Morton*, 469 F. 2d 593 (10th Cir. 1972), the Tenth Circuit Court of Appeals held that the Secretary of the Interior's authority to ratify or reject leases relating to Indian lands constituted major federal action necessitating a study and evaluation of the environmental impact of the project. *See also Greene County Planning Board v. Federal Power Com'n*, 455 F. 2d 412 (2d Cir. 1971), *cert. denied*, 409 U.S. 849, 93 S.Ct. 56, 34 L.Ed. 2d 90 (1972).

A determination of whether certification by the Environmental Management Commission is considered State action triggering the necessity of an impact statement is aided by a review of the Commission's function in exercising this authority. Under the provisions of G.S. 162A-7(c), the Environmental Management Commission is directed to "issue certificates only to projects which it finds to be consistent with the maximum beneficial use of the water resources in the State. . . ." In doing so, the Commission must consider:

(1) The necessity of the proposed project;

(2) Whether the proposed project will promote and increase the storage and conservation of water;

(3) The extent of the probable detriment to be caused by the proposed project to the present beneficial use of water in the affected watershed and resulting damages to present beneficial users;

(4) The extent of the probable detriment to be caused by the proposed project to the potential beneficial use of water on the affected watershed;

(5) The feasibility of alternative sources of supply to the petitioning authority and the comparative cost thereof;

(6) The extent of the probable detriment to be caused by the use of alternative sources of supply to present and potential beneficial use of water on the watershed or watersheds affected by such alternative sources of supply;

(7) All other factors as will, in the Board's opinion, produce the maximum beneficial use of water for all in all areas of the State affected by the proposed project or alternatives thereto.

G.S. 162A-7(c). From a reading of this mandate, it appears obvious that the Legislature, in granting the Commission the authority to issue certificates authorizing land and water rights acquisition, intended that the Commission consider carefully not only the development of water resources but also the effect of that development on present beneficial users within the watershed. When G.S. 162A-7(c) is read in conjunction with North Carolina's Environmental Policy Act, it becomes apparent that certification action by the Commission is State action which, if it significantly affects the environment, necessitates an impact statement.

The proposed Cane Creek reservoir affects some 700 acres of land most of which is woodland. There was ample evidence at the hearing that there are potentially serious, adverse environmental effects which cannot be avoided should the reservoir be constructed. There was also ample evidence that there were several viable alternatives to the Cane Creek project. We believe that, in this situation, the statutory requirement that the State action significantly affect the environment has been met.

This Court, therefore, having reviewed the federal cases requiring environmental impact statements in the granting or denial of licenses and permits, having compared the federal and state environmental policy acts, and having studied the function of the Commission in the certification process, concludes that the North Carolina Environmental Management Commission should have had before it a final environmental impact statement before rendering its decision to grant a certificate for OWASA to proceed with the Cane Creek reservoir.

In so holding, this Court is not dictating what the final decision of the Environmental Management Commission should be or even what effect an impact statement should have on that decision. It is not for this Court to substitute its judgment for that of the Commission as to the environmental consequences of the proposed reservoir. *See, e.g., Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 265 S.E. 2d 890 *disc. review denied*, 301 N.C. 94, --- S.E. 2d --- (1980). It is proper, however, for this

Court to review the manner in which an agency decision has been made to insure that environmental consequences have been considered in the manner prescribed by law. *Id.*

In finding that an environmental impact statement is necessary, we have rejected appellees' argument that, in the present case, "environmental issues were thoroughly discussed and anyone who wished to present their [*sic*] views on environmental impacts could participate in the administrative hearing." This reasoning defies the clear mandate of the act that State agencies assume the responsibility of studying and considering environmental consequences of proposed actions. This duty may not be avoided on the theory that interested parties will perform it. Nor is the provision of a forum for discussion of environmental issues sufficient.

At this point we note that an environmental impact assessment of the proposed Cane Creek reservoir was prepared for OWASA. At the hearing, however, substantial deficiencies in both the environmental analysis as well as the economic analysis of the proposed project were identified by parties to the proceeding, including the U.S. Army Corps of Engineers. That assessment, therefore, was not adequate to perform the function required of an environmental impact statement.

In making our decision, this Court has also rejected appellees' argument that the U.S. Army Corps of Engineers' future compliance with the National Environmental Policy Act* fulfills the obligations of the Commission to file an environmental impact statement with its certification. We believe that, as in the federal system, the purpose of an environmental impact statement is to provide the responsible State agency with a useful decision-making tool. *See, e.g., Minnesota Public Interest Research Group v. Butz*, 541 F. 2d 1292 (8th Cir. 1976), *cert. denied*, 430 U.S. 922, 97 S.Ct. 1340, 51 L.Ed. 2d 601 (1977). In order for the statement to be a decision-making tool, the responsible State agency must have the statement before it when it is determining the action it is going to take or recommend. In the present case, the fact that the U.S. Army Corps of Engineers was in the process of preparing

*Under 33 U.S.C. 1344, the Corps of Engineers must issue to OWASA a dredge and fill permit which, under the national act, necessitates the Corps' filing of an environmental impact statement.

an environmental impact statement is not sufficient to comply with the requirement that the Commission itself consider the statement and that the Commission circulate the environmental impact statement among other State agencies which, because of special expertise or jurisdiction, have an interest in the environmental impacts involved.

Because the Commission did not have a final environmental impact statement as required by G.S. 113A-4(2) when it made its decision to issue a certification for the Cane Creek reservoir, the superior court judgment finding that the decision of the Commission was not affected by any error of law (*see*, G.S. 150A-51) must be vacated. The matter must be remanded to the Environmental Management Commission for a review of OWASA's petition in light of an environmental impact statement.

[2] Because of the likelihood that this highly contested case will, after reconsideration by the Commission, proceed through the judicial review process again, we deem it necessary to address the question, raised by the appellants, of whether the superior court judge applied the proper scope of review in determining the propriety of the Commission's action. His judgment as amended contained the following introductory paragraph:

> "This matter was heard before the undersigned Judge on Petition for Review of a decision of the Environmental Management Commission (Commission or EMC) and a Petition to Reopen the matter by remanding it to the EMC for the consideration of additional evidence. *While the Court has not read the entire Record which was before the EMC*, it has considered the pertinent portions of the Record as referred to in the petition and briefs of the parties, it having been stated by counsel for petitioners on the hearing in open court that some portions of the Record were not material to the exceptions taken and questions raised and no useful purpose would be served by considering those portions and the Court has also considered the briefs filed by the parties and the oral arguments made by counsel for the parties. Based on the entire record as herein stated, as well as the briefs and arguments of counsel, the Court finds and concludes that. . . ." [Emphasis added.]

This Court finds that the review described in the amended judgment did not comport with the "whole record" test required by the North Carolina Administrative Procedure Act, G.S. 150A-1, *et seq.*, specifically, G.S. 150A-51(5). In *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977), the Supreme Court described the requirements of the test:

> [T]he "whole record" rule requires the court, in determining the substantiality of evidence supporting the . . . [agency's] decision, to take into account whatever in the record fairly detracts from the weight of the . . . [agency'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.

Id. at 410, 233 S.E. 2d at 541. Under the whole record test, the judge reviewing an administrative decision must consider the *complete* testimony of *all* the witnesses. *Thompson v. Board of Education, supra.*

In the present case, it is impossible to determine from the judgment entered by the superior court exactly what the judge reviewed. It is clear, however, that his review did not encompass the entire record and, therefore, fell short of the statutorily mandated scope of review. We deem strict adherence to the whole record test especially important in the instant case where the proceedings are held before a commission which is part of the executive branch of State government and the parties to the proceeding include at least one other arm of State government (the University of North Carolina). No party to this appeal has raised the issue of constitutional due process, nor do we address that issue here. We do hold, however, that, under the facts of this case, a complete review of the agency decision by the judicial branch of government, *i.e.* by the Wake County Superior Court, is absolutely essential.

In this appeal, appellants also raise the question of whether the decision of the Commission, which was, to some degree, predicated upon its determination that the Haw River and Lake Jordan did not present viable alternatives to the Cane Creek reservoir, was precluded by the doctrine of collateral estoppel. Appellants argue that the case of *Conservation Council of North*

Carolina v. Froehlke, 435 F. Supp. 775 (M.D.N.C. 1977), which contained numerous findings of fact supportive of the use of these bodies of water as a public water source, was *res judicata* on the issue of water quality and, therefore, barred the Commission from its determination of that issue. We reject this contention. Since the plea of *res judicata* ordinarily may be maintained only where "there is an identity of parties, subject matter, and issues," *Kleibor v. Rogers*, 265 N.C. 304, 144 S.E. 2d 27 (1965), the doctrine is clearly not applicable to this case. Neither the parties nor the issues being considered is identical in the two cases.

Finally, we note that, in their brief, appellants have raised numerous evidentiary questions. Since these questions are unlikely to recur on the remand of this case, we deem it unnecessary to address them.

The decision of the Wake County Superior Court is vacated, and this case is remanded to the Environmental Management Commission for action consistent with this opinion.

Vacated and remanded.

Judges WEBB and WHICHARD concur.

ROBERT ZIGLAR, ADMINISTRATOR OF THE ESTATE OF LIZZIE IRENE ZIGLAR, DECEASED PLAINTIFF v. E. I. DU PONT DE NEMOURS AND COMPANY; STONEY VENABLE; MIDKIFF AND CARSON HARDWARE COMPANY; BASIL G. GORDON; AND A. B. CARSON, DEFENDANTS

No. 8017SC730

(Filed 21 July 1981)

1. Sales § 24— toxic pesticide—no negligence of seller

In plaintiff's action to recover for the wrongful death of a farm worker who died shortly after drinking poisonous pesticide, the trial court properly entered summary judgment for the seller of the insecticide where plaintiff did not present any specific facts tending to show that the seller knew or should have known that the manufacturer's written warnings on the product's label were inadequate to warn others who could be expected to come into contact with the insecticide of its poisonous character nor did plaintiff demonstrate that the seller should have known that the purchaser would not appreciate the possible harm involved in using a toxic pesticide which was packaged in a clear plastic container and looked like water.

2. Sales § 24— toxic pesticide—negligence of manufacturer

In plaintiff's action to recover for the wrongful death of a farm laborer who drank a toxic pesticide, the trial court erred in entering summary judgment for the manufacturer of the pesticide where plaintiff's evidence raised questions for the jury as to whether the manufacturer exercised the required degree of due care in its general manufacture and packaging of the pesticide, whether the manufacturer failed to provide adequate warnings on the product's label to notify others of its toxicity, and whether the manufacturer's first aid instructions on the product's label were ambiguous and incomplete.

APPEAL by plaintiff from *Albright, Judge.* Judgment entered 29 April 1980 in Superior Court, SURRY County. Heard in the Court of Appeals 12 February 1981.

Plaintiff, as administrator, filed a negligence claim against defendants for the wrongful death of Mrs. Lizzie Irene Ziglar, who died shortly after she drank some poisonous insecticide. The court entered summary judgment for two of the defendants, the manufacturer and the retail seller of the insecticide.

The essential facts, as gleaned from the pleadings, interrogatories, depositions and affidavits, are these. In May 1974, Stoney Venable, a tobacco farmer, was using an experimental pesticide, "Vydate L Oxamyl Insecticide/Nematicide," in his tobacco plant beds. Du Pont manufactured the highly toxic chemical, which was, at that time, a clear liquid, with "a terrific odor—like rotten eggs," packaged in a translucent one-gallon container, similar to a plastic milk jug. The warning "Danger—Poison" was printed in red bold-face letters that were approximately 3/17 of an inch in height, on the front panel of the label on the Vydate L container. This warning included the symbol of a red skull and crossbones which was about 4/17 of an inch in height and 4/17 of an inch in width. The back panel of the label provided antidote and first-aid information and again emphasized the words "Danger" and "Poison" in red, bold-face type and included two additional red skulls and crossbones.

On 7 May 1974, Venable purchased another sealed container of Vydate L from a clerk at Midkiff and Carson Hardware Store. The employee who sold the product to Venable did not caution him in any way about the use of the product around humans. Venable placed the chemical in the back of his pickup truck under some old coveralls to keep it from falling over. Later that same

day, he put a blue mason jar of iced water and paper cups in the back of his truck, for the refreshment of his field hands and drove to where they were pulling tobacco plants.

Upon arriving there, Venable offered the water to the workers and poured himself a cup from the mason jar. A short while later, Mrs. Ziglar, a laborer, walked over to the truck to get a drink of water. She did not, however, pour from the mason jar; instead, she opened the container of Vydate L, which was located on the same side of the truck as the carton of paper cups, and drank some of the poison. She immediately commented, "[t]his tastes bitter," whereupon Venable jumped up and told her not to drink any more. After some discussion with Mrs. Ziglar, Venable drove her to his house where he gave her some warm salt water, in accordance with the instructions on the Vydate L label. A local doctor administered injections of the antidote to her, but she died shortly after she was admitted to a hospital. Her death was caused by a combination of the ingestion of the poisonous chemical and sickle cell disease in crisis.

Plaintiff now appeals from the entry of summary judgment on his negligence claims against Du Pont and the hardware store.

David B. Hough, for plaintiff appellant.

Smith, Moore, Smith, Schell and Hunter, by J. Donald Cowan, Jr., for defendant appellee, E. I. Du Pont De Nemours and Company.

William G. Reid, for defendant appellees, Midkiff and Carson Hardware Store, Basil G. Gordon and A. B. Carson.

VAUGHN, Judge.

Though this appeal is interlocutory because the judgment entered did not adjudicate all of the claims in the case or dispose of the cause as to all of the parties, *Bailey v. Gooding*, 301 N.C. 205, 270 S.E. 2d 431 (1980), we have elected, in our discretion, to treat the "appeal" as a petition for a writ of certiorari and shall proceed to address the merits of the case. G.S. 7A-32(c); App. R. 21(a).

The sole issue is whether the manufacturer and retail seller of an inherently dangerous toxic substance were entitled to summary judgment on plaintiff's products liability claims.[1]

It is elemental that it is usually the jury's perogative to apply the standard of reasonable care in a negligence action, and summary judgment is, therefore, appropriate only in exceptional cases where the movant shows that one or more of the essential elements of the claim do not appear in the pleadings or proof at the discovery stage of the proceedings. *Ragland v. Moore*, 299 N.C. 360, 261 S.E. 2d 666 (1980). *See, e.g., Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Strickland v. Dri-Spray Division Development*, 51 N.C. App. 57, 275 S.E. 2d 503 (1981). Consequently, when defendants moved for summary judgment in the instant case, they assumed the task of demonstrating that plaintiff would be unable to prove at trial sufficient facts to establish the following essential elements of a products liability action sounding in tort: "(1) evidence of a standard of care owed by the reasonably prudent person in similar circumstances; (2) breach of that standard of care; (3) injury caused directly or proximately by the breach, and; (4) loss because of the injury." *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 656, 268 S.E. 2d 190, 194 (1980) [citing Prosser, Handbook of the Law of Torts § 30 (4th ed. 1971)]. We hold that the defendant retail seller of the insecticide, Midkiff and Carson Hardware Store, has met this burden with respect to plaintiff's negligence claim against it and affirm the summary judgment entered in its favor. Nonetheless, we reverse the order of summary judgment for the defendant manufacturer because plaintiff did establish, by a forecast of his own evidence, the necessary elements of a products liability claim against Du Pont on several theories.

[1] The sum and substance of plaintiff's claim against the defendant Hardware is that it was negligent due to its "abject failure to give any warning whatsoever" to the purchaser, farmer

1. We note at the outset that this litigation was pending prior to 1 October 1979, the effective date of the new products liability act in Chapter 99B of the General Statutes. The statute does not, therefore, apply to the instant case, and we express no opinion as to whether its provisions might require a different analysis or result than that rendered herein. *See generally* Blanchard and Abrams, *North Carolina's New Products Liability Act: A Critical Analysis*, 16 Wake Forest L. Rev. 171 (1980).

Venable, about "the dangers inherent in using a poison which appears like water in a plastic beverage jug."[2] We disagree.

It is indeed true that a retail seller must exercise reasonable care in the sale of a dangerous product and that the performance of due care necessarily requires him to warn the purchaser of any hazard attendant to the product's use. Restatement (Second) of Torts § 401 (1965). *See Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21 (1960). The supplier's duty to admonish, with respect to products manufactured by another, however, only arises if two circumstances simultaneously exist: (1) the supplier has actual or constructive knowledge of a particular threatening characteristic of the product and (2) the supplier has reason to know that the purchaser will not realize the product's menacing propensities for himself. *Stegall v. Oil Co.*, 260 N.C. 459, 133 S.E. 2d 138 (1963); Restatement, *supra*, § 388. *See generally* Annot., "Manufacturer's or seller's duty to give warning regarding product as affecting his liability for product-caused injury," 76 A.L.R. 2d 9 (1961). Neither circumstance appears on this record for the following reasons.

First, plaintiff did not present any specific facts, as opposed to mere general allegations, in response to defendant's motion for summary judgment, which tended to show that the Hardware knew or should have known that the manufacturer's written warnings on the product's label were inadequate to warn others, who could be expected to come into contact with the Vydate L, of its poisonous character. For example, plaintiff might have asserted the Hardware's actual or constructive knowledge about the defective nature of the manufacturer's warnings by showing that other customers had complained about Vydate L's dangerous propensity for being confused with water, that it had received special instructions from the manufacturer regarding this danger, or that the manufacturer had notified it that Vydate L was now available in a safer form, with amber coloration. *See, e.g., Wilson*

2. Plaintiff also alleged in the complaint that the Hardware was negligent because it sold the poison: (a) in a clear liquid form when it should have known that it was available in an amber color and (b) in a container which had no safety devices to prevent ingestion by humans. In his brief, however, plaintiff has relied on a single basis to show defendant's negligence: its failure to warn Venable verbally about the dangerous possibility that someone might mistakenly drink Vydate L as water. Accordingly, that is the sole issue we address in determining whether the trial court properly entered summary judgment for the hardware store.

v. Chemical Co., 281 N.C. 506, 189 S.E. 2d 221 (1972). In the absence of facts similar to these, we must conclude that any insufficiency in the manufacturer's warnings, in light of the poison's colorless form and packaging in a translucent container, constituted a hidden defect which the Hardware had no duty to detect or remedy.[3] For, it is well-established that a seller of a product made by a reputable manufacturer, where he acts as a "mere conduit,"[4] "is under no affirmative duty to inspect or test for a latent defect, and therefore, liability cannot be based on a failure to inspect or test in order to discover such defect and warn against it." 2 Frumer and Friedman, Products Liability § 18.03[1][a] (1979); *Cockerham v. Ward*, 44 N.C. App. 615, 262 S.E. 2d 651, *review denied*, 300 N.C. 195, 269 S.E. 2d 622 (1980) (affirming the entry of summary judgment for the seller in a products liability case). *See* Restatement (Second) of Torts § 402, Comment d (1965), which explains that "[t]he burden on the seller of requiring him to inspect chattels which he reasonably believes to be free from hidden danger outweighs the magnitude of the risk that a particular chattel may be dangerously defective." This rule is particularly sound where, as here, the product is sold by the supplier in its original, sealed container. *See Davis v. Siloo, Inc.*, 47 N.C. App. 237, 267 S.E. 2d 354, *review denied*, 301 N.C. 234, 283 S.E. 2d 131 (1980) (affirming the dismissal of negligence claims against the distributors of a toxic substance); 63 Am. Jur. 2d Products Liability § 40, at 51 (1972). *See also* G.S. 99B-2(a). Thus, plaintiff has failed to show the first prerequisite to a retail seller's duty to warn: that the Hardware had reason to know about, or a legal duty to discover by the exercise of reasonable care, the product-connected danger complained of.

Second, plaintiff has also not demonstrated that the Hardware should have known that the purchaser, Venable, would not

3. The manufacturer's compliance with the minimum statutory labeling requirements for toxic pesticides under federal and state law further supports the conclusion, that in these circumstances, any deficiency in the written warnings on the Vydate L label was not reasonably discoverable by the retail seller. *See* 7 U.S.C. § 136(q)(2)(D) and G.S. 143-443(a)(3) (mandating the use of skull and crossbones, the display of the word "poison" prominently in red on a contrasting background, and the inclusion of antidote information).

4. There is no evidence in this record that the defendant Hardware did anything more than simply serve as a "middleman" between the manufacturer and a willing purchaser in an ordinary commercial sale.

appreciate the possible harm involved in using a toxic pesticide which was packaged in a clear, plastic container and looked like water. In the instant case, Venable testified that he frequently administered toxic chemicals in his professional pursuit of farming "to make it pay off." At a minimum then, he should have been generally aware of the dangers involved in using pesticides and the special need to store such substances carefully. In addition, however, Venable also had reason to know of the peculiar dangers associated with Vydate L, for he said that when he purchased the *second* container of the poison on 7 May 1974, he had previously read the manufacturer's label and warnings, had also read about the product in an agricultural bulletin and understood it was an experimental pesticide. These facts persuade us that any tendency of Vydate L to be mistaken for harmless water should have been plainly observable to Venable, a professional user of toxic substances, which thereby obviated any obligation of the Hardware to warn him further. It is manifest that a retail seller has no duty to warn of an obvious hazardous condition which a "mere casual looking over will disclose." Restatement (Second) of Torts § 388, Comment k (1965); Annot., *supra*, 76 A.L.R. 2d 9, 28 (1961). Moreover, there is simply no compelling reason to require a seller "to warn a person who in his occupation or profession regularly uses the product against any risk that should be known to such a regular user." 63 Am. Jur. 2d Products Liability § 51, at 61 (1972).

We thus hold that no legal duty of the retail seller to warn the purchaser was triggered in this case as a matter of law. In sum, the Hardware did not violate any standard of reasonable care by failing to give verbal warnings, about the myriad circumstances in which Vydate L might be confused with drinking water, in addition to the general warnings provided by Du Pont on the sealed container's label. In this situation then, the Hardware has plainly shown that an essential element of plaintiff's negligence claim is missing—defendant's breach of due care, the absence of which properly authorized the judge to enter summary judgment in its favor.

[2] On the other hand, however, the defendant manufacturer, Du Pont, did not successfully negate the existence of an essential element of plaintiff's negligence claim against it. Viewing all the evidence in this record in the light most favorable to plaintiff

with the benefit of every reasonable inference arising therefrom, *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E. 2d 189, 194 (1972), we hold that genuine issues of material fact, concerning the reasonableness of Du Pont's conduct, were raised on three bases.

The first basis of plaintiff's products liability claim is that Du Pont did not exercise the required degree of due care in its general manufacture and packaging of Vydate L. A manufacturer must execute the "highest" or "utmost" caution, commensurate with the risks of serious harm involved, in the production of a dangerous instrumentality or substance.[5] *See Davis v. Siloo, Inc.*, 47 N.C. App. 237, 267 S.E. 2d 354, *review denied*, 301 N.C. 234, 283 S.E. 2d 131 (1980); *see also Luttrell v. Mineral Co.*, 220 N.C. 782, 18 S.E. 2d 412 (1942). Here, a jury question was raised about whether Du Pont was sufficiently cautious in the production of Vydate L by plaintiff's *prima facie* showing that: (a) Du Pont knew that the insecticide was a dangerous substance; (b) Du Pont manufactured the highly toxic chemical as a colorless liquid and packaged it in clear plastic jugs; and (c) Vydate L, in this form, could be easily mistaken for water in its appearance. *See* Restatement (Second) of Torts § 388 (1965). In this regard, the relevant facts are as follows.

Du Pont noted, in its own information bulletin about the product, that Vydate formulations were highly toxic and that its exposure to humans should be avoided. Du Pont also admitted, in its answers to plaintiff's interrogatories, that the insecticide was a clear liquid in a translucent container during its experimental marketing in 1973 and 1974, and Venable said he purchased the product in this form in May 1974. Dr. Modesto Scharyj, an expert witness in pathology, testified that Vydate L was a "completely colorless chemical; and for that reason it was easy for [him] to

5. This standard of care is not to be confused with strict liability which is not recognized in this State in products liability cases. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E. 2d 504 (1980). Simply put, even though a negligence standard is applied, a manufacturer must be more careful in the manufacture of dangerous articles for his conduct to be deemed reasonable than would otherwise be necessary in the manufacture of products with less dangerous propensities. *See also Cockerham v. Ward*, 44 N.C. App. 615, 619, 262 S.E. 2d 651, 654 (1980), where the Court explained: "a manufacturer is not an insurer of the safety of products designed and manufactured by him, but is under an obligation to those who use his product to exercise that degree of care in its design and manufacture which a reasonable prudent man would use in similar circumstances."

understand how [decedent] could possibly confuse that chemical with water," at least while the container was sealed. The affidavits of decedent's fellow laborers, as well as the deposition of her employer, moreover, all tend to support the conclusion that she drank the poisonous chemical intending to refresh her thirst, with some *water*, as she had previously been advised.

The law requires a manufacturer to eliminate the dangerous character of goods to the extent that the exercise of reasonable care, considering all of the circumstances, enables him to do so. *See Cashwell v. Bottling Works*, 174 N.C. 324, 93 S.E. 901 (1917). It is not without significance, therefore, that Du Pont began bottling Vydate L in gray, opaque containers, on 24 May 1974, shortly after this tragic accident occurred, as requested by the State of North Carolina, and that it added amber coloration to the colorless poison in January 1975. Thus, on this record, a critical factual issue, and one not susceptible to disposition by summary judgment, was whether Du Pont was negligent in manufacturing an inherently dangerous toxic substance without taking reasonable precautions to decrease the risk of its lethal confusion with ordinary, harmless drinking water.

Another basis of plaintiff's claim is that Du Pont did not provide the kinds of warnings on the product's label which were reasonably necessary to notify persons of Vydate L's poisonous character, especially in light of the chemical's marked resemblance to water. It is well-established that a product is defective if it is not accompanied by adequate warnings of the dangers associated with its use and that these warnings must be sufficiently intelligible and prominent to reach and protect all those who may reasonably be expected to come into contact with it. Prosser, Handbook of the Law of Torts §§ 96, 99 (4th ed. 1971); *see Corprew v. Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98 (1967). The manufacturer's duty to warn unquestionably requires him to be particularly careful in labeling poisons so they may be properly identified and used. *See Fowler v. General Electric Co.*, 40 N.C. App. 301, 307, 252 S.E. 2d 862, 866 (1979); Epstein, Products Liability: The Search for the Middle Ground, 56 N.C. L. Rev. 643, 653 (1978). While it is true that Du Pont fulfilled the applicable statutory requirements for the labeling of a poisonous insecticide (see note 3, *supra*) and that Vydate L had a "slight

sulfurous" odor,[6] we cannot say that such warnings were entirely adequate as a matter of law. Rather, such facts were but a part of the total circumstances to be weighed and considered. Indeed, the following facts tended to show that Du Pont had *not* taken every reasonable precaution to admonish against the risk of confusion of the chemical with a drinkable beverage: (1) again, the insecticide was distinctly similar to water in appearance; (2) there was no evidence that decedent could read or write; and (3) the skull and crossbones symbols on the label were small—only 4/17 of an inch in height and 4/17 of an inch in width. Further, we would note that it should not have been unforeseeable to Du Pont that Vydate L would be used in close proximity to farm laborers, who might be illiterate, since it intended the insecticide "to be used mainly as a spray or transplant water treatment" on tobacco, which is generally known to be a labor-intensive crop.

Two decisions of this Court are particularly instructive here: *Davis v. Siloo, Inc.*, 47 N.C. App. 237, 267 S.E. 2d 354, *review denied*, 301 N.C. 234, --- S.E. 2d --- (1980), and *Whitley v. Cubberly*, 24 N.C. App. 204, 210 S.E. 2d 289 (1974). In *Davis*, the decedent was killed by aplastic anemia resulting from exposure to Petisol 202 in the course of his employment. The plaintiff administratrix filed a negligence claim against the manufacturer, alleging, among other things, that the label on the product's container inadequately admonished the user to avoid prolonged skin contact with the chemical. The Court affirmed the denial of defendant's motion to dismiss the negligence claim and held, in pertinent part, that:

> "the manufacturer of the dangerous substance will be subject to liability under a negligence theory for damages which proximately result from the failure to provide adequate warnings as to the product's dangerous propensities which are known or which by the exercise of care commensurate with the danger should be known by the manufacturer, or from the failure to provide adequate directions for the foreseeable user as to how the dangerous product should or should not be used with respect to foreseeable uses."

6. We agree with plaintiff that at least a question of fact is raised as "to whether or not an odor [of the insecticide] in an open tobacco field on a hot and muggy day suffices as a warning of a dangerous poison to a farm worker who has labored and sweated under the hot sun for several hours."

47 N.C. App. at 245-46, 267 S.E. 2d at 359. In *Whitley*, the plaintiff's intestate also died from aplastic anemia after the administration of a certain drug duly prescribed by her physician. Two of the bases of the administrator's claim against the drug manufacturer were that it improperly marketed and over-promoted the drug and failed to provide sufficient warnings about the drug's dangerous tendencies to the medical profession, as well as consumers thereof. This Court held that such allegations raised genuine factual issues and therefore reversed the trial judge's order of summary judgment for the defendant manufacturer. Significantly, the Court further stated:

> "That Parke, Davis may have fully complied with all applicable Federal laws in its marketing and labeling Chloromycetin would not in itself free it of liability for harm caused by use of the drug if it were shown that such use and resulting harm was caused by the company's negligent acts in over-promoting the drug, the dangerous properties of which it was aware or in the exercise of due care should have been aware."

24 N.C. App. at 207, 210 S.E. 2d at 292. These two cases provide authoritative support for our holding that plaintiff's allegations regarding the inadequacy of Du Pont's warnings raised factual issues, legally sufficient to withstand a motion for summary judgment, because defendant did not come forward with "uncontradicted evidentiary material to show that it was not negligent" in this respect. *Whitley, supra.* We likewise do not believe that Du Pont's compliance with all statutory labeling requirements would necessarily exonerate it from liability for its possibly negligent acts in failing to take greater steps, *i.e.*, using more prominent written warnings and symbols on the product's label, to prevent this toxic colorless liquid from being mistaken for water.

Plaintiff presented ample evidence to support its negligence claim on another competent ground: that the product's label was further deficient because the first-aid instructions listed thereon were not clear or complete. Those instructions provided, in part, as follows: "If swallowed, give a tablespoon of salt in a glass of warm water and repeat until vomit fluid is clear." Stoney Venable testified that, almost immediately after decedent drank some of the poison, he read the label on the jug and noted the foregoing

advice. He then got decedent to accompany him in his truck to go to his house to get some warm salt water. This took approximately eight minutes. Decedent became unconscious a short while later. Plaintiff contends that Du Pont's emphasis on the use of warm salt water was misleading because it incorrectly focused attention "on obtaining salt water rather than on inducing regurgitation" and that this improper focus on the actual remedy to be pursued "precipitated a time-consuming rush in search of salt water and caused the quick induction of vomiting to be overlooked altogether." This contention is well-supported by the following facts. First, Du Pont admitted, in its own answers to interrogatories, that it was "desirable to induce vomiting by whatever means is immediately available in order to remove as much of the substance as possible from the body." In addition, Du Pont clearly stated in its information about Vydate L which was sent to poison control centers across the country that the first-aid treatment for ingestion was to "[i]nduce emesis or perform gastric lavage." Moreover, Du Pont advised, in a 1977 publication of information for physicians regarding the symptomatology and treatment of cases involving Vydate L, that an appropriate first-aid step to be taken before the arrival of a physician was to "drink 1 or 2 glasses of water and induce vomiting by touching back of throat with finger or blunt object." We believe that such facts raised a substantial question as to whether Du Pont was negligent in not instructing more plainly, on the product's label itself, that, in cases of accidental ingestion, vomiting should be immediately induced by whatever means available.[7]

Plaintiff's evidence challenging the completeness of the label's antidote information was as follows. The label advised: "Atropine sulfate should be used for treatment. Administer repeated doses, 1.2 to 2.0 mg intravenously every 10 to 30 minutes until full atropinization is achieved." In its 1977 information bulletin to physicians about Vydate L poisoning, however, Du Pont distinguished between the procedures to be followed in cases of mild or severe intoxication. The directions in the bulletin for mild intoxication were the same as those printed on the product's label in 1974, but a different treatment was advised for

7. Many situations could arise where, as here, a glass of warm salt water is not instantly obtainable as compared with the almost constant availability of a finger or two.

severe intoxication: an initial intravenous dosage of 2 to 4 mg to be repeated every three to ten minutes. Du Pont offered no evidence showing why it did not provide the additional antidote information for cases of severe poisoning, or why it was not negligence for it to fail to do so, on the product's label during its experimental marketing. Du Pont thus failed to negate plaintiff's claim that it was negligent for only providing adequate antidote instructions for cases of mild poisoning alone. Moreover, the following facts clearly demonstrate that plaintiff's claim was well-substantiated. Venable testified that, after attempting the warm salt water treatment at his house, he drove decedent to a physician's office, and when they arrived there, she was already unconscious and "slumped over" in the back of his truck. Venable took the Vydate L jug into the office and explained what had happened. The doctor then went out to the truck and gave her a shot. The rescue squad was called, and she was taken to the hospital, which was some twenty to twenty-five minutes away. From these facts, it would be reasonable to infer: (1) the doctor read the antidote information on the jug's label and administered *one* injection of atropine in the amount suggested, which was only sufficient for mild intoxication; (2) that decedent was suffering from severe intoxication of the chemical when the antidote was given since she was unconscious at the time; (3) that if the physician had read about the different treatment for severe poisoning on the label, he would have administered greater quantities of atropine and instructed the rescue squad team to give her additional shots every three to ten minutes during the twenty-five minute trip to the hospital; and (4) that decedent's death might have been prevented if she had received larger amounts of atropine.

Plaintiff also alleged that Du Pont was negligent because it did not exercise reasonable care in disseminating medical information about Vydate L to poison control centers from the outset of the product's experimental marketing in 1973 and 1974. The record indicates that an index card, including treatment information for Vydate L poisoning, was not filed with the National Clearinghouse for Poison Control Centers until August 1974, three months after this fatal accident occurred. These facts, standing alone, would not, however, support plaintiff's products liability claim because, even if Du Pont did not exercise due care in disseminating this information earlier, there is no evidence

anywhere in this record tending to establish a causal connection between such an omission of care and the resulting injury.[8]

In sum, we hold that plaintiff substantiated a products liability claim against the defendant manufacturer on three grounds: (1) its negligent manufacture and packaging of Vydate L; (2) its failure to provide adequate warnings on the product's label to notify others of its toxicity; and (3) its negligent provision of ambiguous and incomplete first-aid instructions on the label.[9] We further hold that the defense of contributory negligence was not established in this case as a matter of law. "[P]roximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." Prosser, Handbook of the Law of Torts § 45, at 290 (4th ed. 1971); *see Williams v. Power & Light Co.*, 296 N.C. 400, 403, 250 S.E. 2d 255, 258 (1979). Though it may be true, as Du Pont contends, that decedent should have known that this poisonous liquid was not water in a beverage jug because she first had to break the seal of the container, and the liquid had a distinct odor like rotten eggs, such factual occurrences were merely a part of the total circumstances to be considered by a jury in deciding whether decedent's death was caused by her omission of due care for her own safety or by the manufacturer's failure to exercise reasonable care in the production of an inherently dangerous substance. *See Hale v. Power Co.*, 40 N.C. App. 202, 252 S.E. 2d 265, *review denied*, 297 N.C. 452, 256 S.E. 2d 805 (1979).

Plaintiff also assigned as error the trial court's refusal to permit the introduction of two affidavits on the day of the hearing on defendants' motions for summary judgment. Rule 56 of the Rules of Civil Procedure plainly provides that, on a motion for summary

8. Plaintiff might have established the essential causal link of such a claim by showing, for example, that either the initial treating physician, or the hospital physicians, had attempted, in their efforts to revive decedent, to locate this medical information by contacting the nearest poison control center.

9. Though the statute does not apply to this litigation, see note 1, *supra*, we would comment that our holding is consistent with the tenor of the new products liability act which recognizes claims for personal injury or death resulting from "the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging or labeling of any product." G.S. 99B-1(3).

judgment, the adverse party may serve opposing affidavits "*prior to the day of hearing.*" G.S. 1A-1, Rule 56(c). Thus, it would seem that the judge did not abuse his discretion in denying plaintiff's request to introduce the affidavits; however, for purposes of this case, it suffices to say that plaintiff has suffered no prejudice from the omission of this material from the record for two reasons. First, neither affidavit contained facts which would further support the existence of a duty to warn by the retail seller, and, thus, even if such evidence should have been admitted and considered, it would not alter our affirmance of the judgment entered in the defendant Hardware's favor. Second, while the evidence in these affidavits did tend to enhance plaintiff's negligence claim against the defendant manufacturer, any consideration of the propriety of the judge's exclusion thereof, is rendered unnecessary by our decision reversing the judgment entered for Du Pont on the record as it *now* stands. Plaintiff will presumably have, therefore, the opportunity to present and develop this evidence, as he wishes, at the full trial of the matter.

The order of summary judgment entered for Midkiff and Carson Hardware Store is affirmed.

The order of summary judgment entered for E. I. Du Pont De Nemours and Company is reversed.

Affirmed in part; reversed in part.

Judges WELLS and BECTON concur.

JOHNNIE F. CARAWAN, PLAINTIFF v. TOM TATE AND FRIENDLY PARKING SERVICE, INC., DEFENDANTS-AND-THIRD PARTY PLAINTIFFS v. AETNA CASUALTY AND SURETY COMPANY, THIRD PARTY DEFENDANT

No. 8026SC473

(Filed 21 July 1981)

1. Evidence § 22.2— *conviction in criminal prosecution*—evidence inadmissible

In plaintiff's action to recover for an assault, the trial court erred in permitting plaintiff and a police officer to testify that defendant was convicted in district court of assaulting plaintiff, since evidence of a person's conviction in a criminal prosecution for the very act which constitutes the basis of liability in a civil action for damages is not admissible in the civil action.

2. Master and Servant § 34— assault by parking lot attendant—scope of employment—jury question

In plaintiff's action to recover damages for an assault allegedly perpetrated by defendant parking lot attendant, the trial court erred in failing to submit an issue to the jury as to whether the attendant was acting in the course and scope of his employment with defendant employer at the time of the alleged assault.

3. Evidence § 44— assault—evidence of mental anguish admissible

In an action to recover damages for assault where plaintiff testified that defendant pointed a pistol at him, plaintiff and his wife could testify concerning the mental anguish which plaintiff suffered as a result of the alleged assault.

4. Damages § 17.7— assault—punitive damages—judgment n.o.v. for defendants improper

In plaintiff's action to recover damages for an assault allegedly perpetrated by defendant parking lot attendant, the trial court erred in granting defendants' motion for judgment n.o.v. as to punitive damages, since evidence of an aggravated and criminal assault was such that the punitive damages issue was properly submitted to the jury.

5. Damages § 14— punitive damages—financial worth of defendant—evidence improperly excluded

In a civil assault case where plaintiff sought punitive damages, the trial court erred in excluding evidence offered by plaintiff as to the assets, liabilities, income tax returns and net worth of defendant employer.

Judge MARTIN (Harry C.) dissenting.

APPEAL by plaintiff and defendants, Tom Tate and Friendly Parking Service, Inc., from *Howell, Judge.* Judgment entered 20 December 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 November 1980.

This is an action for an assault for which the plaintiff asks for compensatory and punitive damages. Defendant Tate counterclaimed for damages for what he alleged was as assault on him by the plaintiff. The original defendants joined the third party defendant, praying that they recover against the third party defendant any amount recovered by the plaintiff against the original defendant. At trial, the evidence showed that on 25 November 1976 the plaintiff drove his automobile with his wife and two children to the Thanksgiving Parade in Charlotte. He drove his automobile into a parking lot owned by the defendant Friendly Parking Service, Inc. He left the lot when he was told by the defendant Tate, an employee of Friendly Parking Service, Inc., that

it would cost $3.00 to park. The plaintiff then drove to another lot owned by Friendly Parking Service, Inc. and parked his automobile. He was again approached by the defendant Tate who asked for $3.00 as a parking fee. Plaintiff testified that he told Mr. Tate he would only pay fifty cents and that after another request and refusal, Mr. Tate drew a pistol, pointed it at the plaintiff's face and said: "Give me three M.F. dollars, or get your M.F.A. off this parking lot one." The plaintiff also testified Mr. Tate threatened to shoot him if he did not give him $3.00. The evidence showed the plaintiff is a former marine and a former police officer who weighs between 195 and 200 pounds.

The defendant Tate was fifty years of age at the time of the incident. He has had an arm amputated and weighs 175 pounds. He testified that his supervisor sets the prices, and they are always raised on the day of the parade. He testified that the plaintiff advanced upon him and threatened him with his fist saying: "It's fixing to be a ball." Mr. Tate testified further that when he asked the plaintiff what he meant, the plaintiff responded: "You're going to see what I mean." Mr. Tate testified he told the plaintiff not to advance any further and then drew his pistol and pointed it at the ground at which point the plaintiff stopped.

The jury found that Mr. Tate had assaulted the plaintiff, that Mr. Tate did not act in self-defense, and that the plaintiff did not assault Mr. Tate. The jury gave the plaintiff $3,000.00 compensatory damages and $12,000.00 in punitive damages. The court granted the defendants' motion for judgment notwithstanding the verdict as to punitive damages. It entered a judgment in favor of the original defendants against the third party defendant for the compensatory damages recovered by plaintiff against the original defendants plus attorney fees. The third party defendant paid this judgment and did not appeal. Plaintiff appealed from the judgment. The original defendants appealed "the judgment . . . awarding the plaintiff . . . the sum of $3,000.00."

William H. Booe for plaintiff appellant.

Newitt and Bruney, by John G. Newitt, Jr., for defendant appellees.

WEBB, Judge.

[1] We consider first the defendants' appeal. The defendants assign error to testimony by the plaintiff and a police officer that Mr. Tate was convicted in district court of assaulting the plaintiff, Mr. Tate having pled not guilty to the criminal charge. We believe this assignment of error has merit. In this jurisdiction evidence of a person's conviction in a criminal prosecution for the very act which constitutes the basis of liability in a civil action for damages is not admissible in the civil action. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976); *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E. 2d 36 (1966); *Trust Co. v. Pollard*, 256 N.C. 77, 123 S.E. 2d 104 (1961). For this error, we hold there must be a new trial.

[2] The defendant Friendly Parking Service, Inc. also contends that it was error not to submit an issue to the jury as to whether Mr. Tate was acting in the course and scope of his employment at the time of the alleged assault. We hold this issue should have been submitted to the jury. The evidence is uncontradicted that Mr. Tate was an employee of Friendly Parking Service, Inc. at the time of the alleged assault. The jury must determine whether Mr. Tate acted within the scope of his authority and was about his master's business or whether he stepped aside from his employment to commit a wrong prompted by a spirit of vindictiveness or to gratify his personal animosity or to carry out an independent purpose of his own. *See Clemmons v. Insurance Co.*, 274 N.C. 416, 163 S.E. 2d 761 (1968) and *Robinson v. McAlhaney*, 214 N.C. 180, 198 S.E. 647 (1938).

[3] The defendants also assign as error the court's allowing the plaintiff and his wife to testify as to the mental anguish which the plaintiff suffered as a result of the alleged assault. They rely on *McCracken v. Sloan*, 40 N.C. App. 214, 252 S.E. 2d 250 (1979); *Ross v. Yelton*, 39 N.C. App. 677, 251 S.E. 2d 666 (1979); *McDowell v. Davis*, 33 N.C. App. 529, 235 S.E. 2d 896 (1977); *Alltop v. Penney Co.*, 10 N.C. App. 692, 179 S.E. 2d 885 (1971). We do not believe any of the cases are applicable to the case sub judice. *McCracken* involved an assault by smoking a cigar in the presence of a person who objected to smoking. There was no evidence that the plaintiff suffered physical injury from the cigar smoke. We held that evidence of mental distress by the person who smelled the

cigar smoke would not support an action for battery against the person who smoked a cigar in his own office. In *Ross*, we held that qualified medical testimony is required to prove that mental anguish caused a physical illness. In *McDowell*, this Court held that in an action based on negligence there is no recovery for emotional distress not caused by some physical impact or injury. In *Alltop*, it was held that summary judgment was proper for defendant because the plaintiff had not proved she was damaged. In the case sub judice, the plaintiff's claim is not based on negligence. He has alleged and offered evidence that the defendant Tate assaulted him by pointing a pistol at him. Evidence of his mental anguish as a result of this assault is admissible. He and his wife may testify to it. *See Trogden v. Terry*, 172 N.C. 540, 90 S.E. 583 (1916).

[4] The plaintiff assigns as error the court's granting the defendants' motion for judgment notwithstanding the verdict as to punitive damages. Punitive damages may be recovered in an action for assault. *See Allred v. Graves*, 261 N.C. 31, 134 S.E. 2d 186 (1964). If there is evidence of an aggravated criminal assault, an issue of punitive damages should be submitted to the jury. The awarding of punitive damages and the amount to be allowed rests in the sound discretion of the jury although the amount assessed is not to be excessively disproportionate to the circumstances of contumely and indignity present in the case. *See Worthy v. Knight*, 210 N.C. 498, 187 S.E. 771 (1936). In this case we hold that evidence of an aggravated and criminal assault was such that the punitive damage issue was properly submitted to the jury. It was error to grant the defendants' motion for judgment notwithstanding the verdict. It may have been that, in light of the evidence, the court felt the punitive damages awarded were excessive. It did not set the verdict aside or reduce it in its discretion, however, and that question is not before us for review.

[5] The plaintiff's second assignment of error is to the exclusion of evidence as to the financial worth of the Friendly Parking Services, Inc. In this case the plaintiff offered evidence as to the assets, liabilities, income tax returns and the net worth of Friendly Parking Services, Inc. which was excluded. This was error. Evidence of a defendant's ability to respond in damages is competent in cases warranting punitive damages. *See Harvel's, Inc. v.*

Eggleston, 268 N.C. 388, 150 S.E. 2d 786 (1966) and *Strickland v. Jackson*, 23 N.C. App. 603, 209 S.E. 2d 859 (1974).

The original defendants joined the third party defendant for the purpose of recovering from the third party defendant any recovery by the plaintiff against the original defendants. The third party defendant did not participate in the trial between the original parties. After the verdict had been rendered in the original action, the court entered a judgment in favor of the original defendants against the third party defendant for the compensatory damages and legal fees. The third party defendant paid this judgment and it was cancelled.

The plaintiff contends the original defendants are estopped from appealing as to the compensatory damages by their accepting payment and cancelling the judgment against the third party defendant. The plaintiff cites no cases as authority for this proposition. He argues that it would allow the original defendants to be unjustly enriched at the expense of the third party defendants if the original defendants should prevail at a new trial. The plaintiff has not been damaged and cannot complain if the third party defendant has made a payment to the original defendant which the original defendant was not entitled to receive. The plaintiff has not changed his position by relying on this action by the original defendant. Estoppel does not apply.

Judge Martin has voted to dismiss the defendants' appeal and remand for judgment on the punitive damage issue. He argues that as to the compensatory damage issue, neither of the appealing defendants is an aggrieved party. As to the punitive damage issue, he argues that it was error to set it aside, and we should order it reinstated. If the only issue raised on appeal were the compensatory damage issue, we might agree with Judge Martin. We have held that several substantial errors were made in reaching the verdicts on the two issues. Although the defendants did not appeal on the punitive damages issue, we hold that because of the errors involved in the trial of this issue, the ends of justice require a new trial as to punitive damages. *Watkins v. Grier*, 224 N.C. 334, 30 S.E. 2d 219 (1944) and *In re Will of Herring*, 19 N.C. App. 357, 198 S.E. 2d 737 (1973). Having determined there should be a new trial as to the punitive damages, we believe there should be a new trial as to all issues. We believe

there is a substantial likelihood that the two issues were so intertwined in the minds of the jurors that it would result in an injustice to remand this case for a trial on one issue only. *See Robertson v. Stanley,* 285 N.C. 561, 206 S.E. 2d 190 (1974).

We hold there should be a new trial on all issues.

New trial.

Chief Judge MORRIS concurs.

Judge MARTIN (Harry C.) dissents.

Judge MARTIN (Harry C.) dissenting:

I respectfully dissent from the majority opinion. From the record it is clear to me that defendants Tate and Friendly Parking Service, Inc. are not aggrieved by the proceedings and judgments of 20 December 1979, and may not appeal therefrom.

The record on appeal reveals:

1. The case was tried at the 22 October 1979 session of the Superior Court of Mecklenburg County.

2. At the commencement of trial, the court severed the defendants' third-party action for indemnity against Aetna Casualty and Surety Company from the principal action.

3. On 24 October 1979, the verdict of the jury was returned by written answers to issues.

4. Thereafter, during the same session, the defendants proceeded with their crossclaim against Aetna, the court finding that Aetna had issued a policy of insurance that covered the damages recovered by plaintiff in this action and that defendants were entitled to recover from Aetna the amount of the judgment plus costs including counsel fees.

5. Defendants filed motion for judgment notwithstanding the verdict and, separately, for a new trial, filed 24 October 1979.

6. On 20 December 1979, the court entered its order denying the motion for judgment notwithstanding the verdict as to compensatory damages and allowing the judgment notwithstanding the verdict with respect to punitive damages.

7. Judgment was filed on 20 December 1979 in favor of plaintiff against defendants for compensatory damages in the amount of $3,000, together with costs.

8. On 20 December 1979, judgment was filed in favor of defendants against Aetna under its policy of insurance, for damages defendants were legally obligated to pay, in the amount of $3,000 plus costs including attorney fees. Attorney fees in the amount of $3,990 were included in the cost bill of $4,030.

9. Plaintiff gave notice of appeal in open court, the appeal entries being dated 20 December 1979.

10. Defendants gave notice of cross-appeal in apt time, on 31 December 1979 (30 December 1979 being a Sunday), "from the Judgment against them entered 20 December 1979, awarding plaintiff, Johnnie F. Carawan, the sum of $3,000.00."

11. On 23 January 1980, Aetna paid the judgment against it by depositing with the Clerk of Superior Court of Mecklenburg County the sum of $7,030.

12. On 29 January 1980, the attorney of record for defendants received the $7,030 from the clerk of superior court and satisfied and cancelled the judgment against Aetna.

Under the statute, N.C.G.S. 1-271, and the case law of North Carolina, only an aggrieved party can appeal. *Coburn v. Timber Corporation*, 260 N.C. 173, 132 S.E. 2d 340 (1963). If the order complained of does not adversely affect the substantial rights of appellant, the appeal will be dismissed. *Id.* The party who is required to suffer the loss under the judgment is the party aggrieved within the meaning of this rule. *Coach Co. v. Coach Co.*, 237 N.C. 697, 76 S.E. 2d 47 (1953). In determining who is the aggrieved party, it is necessary to consider the whole record of the proceedings: the pleadings, issues, facts found, and judgment(s); not simply the judgment itself. *Id.*

When we apply this principle, it is manifest that defendants here are not aggrieved by these proceedings. Neither of them is required to suffer the loss imposed by the judgment against them. They have already received from Aetna the money to pay this judgment and costs. They are not required to pay the judgment from their own funds. *See Blount v. Taft*, 29 N.C. App. 626,

225 S.E. 2d 583 (1976), *aff'd*, 295 N.C. 472 (1978). It would be a strange procedure indeed to allow defendants to ratify and rely upon the judgment against them for the purpose of securing indemnification from Aetna, and then permit defendants to attack the same judgment upon appeal. It could be argued that if defendants had only secured the judgment against Aetna, they should be allowed to appeal because by so doing they would also be protecting the interests of Aetna. Here, however, defendants have not only secured the judgment against Aetna, but that judgment has been paid by Aetna and defendants have received the proceeds without paying plaintiff's judgment for compensatory damages.

Defendants are not the real parties in interest in seeking appellate review of plaintiff's judgment. Every claim shall be prosecuted in the name of the real party in interest. N.C. Gen. Stat. 1A-1, Rule 17(a). A real party in interest is a party who is benefited or injured by the judgment in the case. *Parnell v. Insurance Co.*, 263 N.C. 445, 139 S.E. 2d 723 (1965); *Insurance Co. v. Walker*, 33 N.C. App. 15, 234 S.E. 2d 206, *disc. rev. denied*, 293 N.C. 159 (1977). In considering the entire record on appeal, defendants are not the aggrieved real parties in interest and have at most only an incidental interest in the judgment complained of, as they are not injured by plaintiff's judgment. *See Insurance Co. v. Ingram, Comr. of Insurance*, 288 N.C. 381, 218 S.E. 2d 364 (1975). Aetna, not the defendants, has suffered because of plaintiff's judgment.

Under the North Carolina Rules of Civil Procedure, defendants may, as third-party plaintiffs, commence an action against Aetna for indemnity before judgment has been entered against them. N.C. Gen. Stat. 1A-1, Rule 14. In proving their claim against Aetna, defendants must show that plaintiff has recovered a judgment against them which they are legally obligated to pay or have paid. *Heath v. Board of Commissioners*, 292 N.C. 369, 233 S.E. 2d 889 (1977). Rule 14 provides " 'a mechanism for disposing of multiple claims arising from a single set of facts in one action expeditiously and economically.' " *Heath, supra*, at 376, 233 S.E. 2d at 893. Defendants would frustrate the salutary purposes of the rule if they were allowed to proceed against Aetna for indemnification and then challenge plaintiff's judgment against them by appeal. The Court in *Heath* held that the indemnitee must *pay*

the judgment against it before it could collect from the indemnitor in a Rule 14 proceeding. Evidently this was for the precise purpose of preventing what defendants have done in this case. Defendants have not paid the judgment against them, yet they have proceeded against Aetna and collected and received the proceeds. By so doing, they have acquiesced in the judgment against themselves and admitted its validity. Defendants have ratified and acquiesced in plaintiff's judgment against them. *See Moore v. Insurance Co.*, 266 N.C. 440, 146 S.E. 2d 492 (1966). They cannot now appeal. *Rice v. McAdams*, 149 N.C. 29, 62 S.E. 774 (1908).

Defendants allege that if plaintiff is entitled to recover against them, they are entitled to recover such amount from Aetna under their contract of insurance. The court, in its judgment against Aetna, found that Aetna by its contract of insurance agreed to pay to defendants such damages which they (defendants) "shall become legally obligated to pay." The court further held Aetna was liable to defendants in the amount of plaintiff's verdict against them, together with costs. Defendants could not win their case against Aetna unless they proved that they were legally obligated to pay plaintiff the amount of the verdict. The court found that defendants carried this burden and no appeal was taken from this judgment; it is the law of the case that defendants are legally obligated to pay plaintiff the amount of the verdict.

By proceeding against Aetna as stated, defendants established the validity of plaintiff's judgment against them, and that question is now moot. This Court will not hear and decide a moot question. *Kendrick v. Cain*, 272 N.C. 719, 159 S.E. 2d 33 (1968). In *Kendrick*, we find:

> "A party who accepts an award or legal advantage under an order, judgment, or decree ordinarily waives his right to any such review of the adjudication as may again put in issue his right to the benefit which he has accepted. This is so even though the judgment, decree, or order may have been generally unfavorable to the appellant."

272 N.C. at 722, 159 S.E. 2d at 35. Defendants, by proceeding against Aetna, securing a judgment, and accepting the benefits of that judgment, have waived their rights to review the adjudication of plaintiff's claim against defendants. Appellate review

would allow defendants to again put into issue their right to the benefit which they have already accepted. Defendants have, by their actions against Aetna, validated plaintiff's judgment and waived their rights to challenge that judgment upon appeal. Plaintiff's claim against defendants does not involve matters of public interest so as to exclude it from the general rule denying appellate review of moot questions. *See Leak v. High Point City Council*, 25 N.C. App. 394, 213 S.E. 2d 386 (1975).

The majority opinion reaches the anomalous result of ordering a new trial on plaintiff's claim against defendants, for which defendants have already received indemnification. There is no guarantee that the case will ever be retried. Parties die, move, and lose interest in legal proceedings. If by such happenstance defendants were allowed to keep their recovery from Aetna, they would be profiting from their own wrong. Surely the law is not so foolish as to provide a vehicle for such eventuality.

I agree with the majority in holding that the trial court committed error in granting defendants' motion for judgment notwithstanding the verdict with respect to the award of punitive damages. The majority opinion reverses that order, and in that I concur. Therefore, in my opinion, defendants' appeal should be dismissed, *see Boone v. Boone*, 27 N.C. App. 153, 218 S.E. 2d 221 (1975), and the cause remanded to the superior court for entry of judgment awarding plaintiff $12,000 punitive damages.

BILLY GRAY WILLIAMS v. LINN HAMILTON JONES AND LLOYD HASSELL JONES

No. 8017SC1008

(Filed 21 July 1981)

1. Automobiles § 11.5— vehicle parked on highway—instructions inadequate

In an action to recover damages suffered by plaintiff when his vehicle collided with that of defendant which was stopped at night in the 12 foot wide outside traffic lane of a four-lane two-way highway where the evidence tended to show that the highway shoulder was 10 feet wide with a 4 foot paved buffer and a 6 foot grassy area, that the motor of defendant's vehicle stopped while moving downhill, that several times defendant put in the clutch and tried down shifting in other gears in an effort to start the motor and that it was

foggy in the area where the collision occurred, the trial court should have instructed the jury that plaintiff had the burden of proving that defendant violated G.S. 20-161(a) by parking or leaving standing his vehicle on the paved portion of the highway when he had the opportunity to park the vehicle on the shoulder of the highway, and that the burden was on defendant to prove that he was excused from such parking because it was not reasonably practical under the circumstances to avoid stopping on the paved portion of the highway.

2. Automobiles § 90.11— sudden emergency—failure to instruct improper

In an action to recover damages sustained by plaintiff in an automobile accident, the trial court erred in failing to charge on the doctrine of sudden emergency as requested by plaintiff where the evidence tended to show that plaintiff saw defendant's vehicle in his traffic lane when he was four car lengths away; plaintiff did not pull onto the left lane because he was afraid that he would be hit by a tractor trailer behind him in that lane; plaintiff probably could have pulled to the right but he would have been on a narrow grassy area and a guardrail was there; the entire shoulder was only 10 feet wide; and there was fog in the area at the time of the collision.

APPEAL by plaintiff from *Walker (Hal Hammer), Judge.* Judgment entered 29 May 1980 in Superior Court, SURRY County. Heard in the Court of Appeals 28 April 1981.

This case involves both claims and counterclaims for personal injuries and property damages arising out of a rear-end collision between a 1970 Plymouth taxi being driven by the plaintiff Williams and a stalled 1972 Datsun pickup owned by the defendant Lloyd Hassell Jones and being operated by the defendant Linn Hamilton Jones on U.S. Highway 52. At the time of impact, the defendant Linn Hamilton Jones was in the process of attempting to push the pickup off the traveled portion of the highway. The case was tried solely on the question of liability. The plaintiff appealed from an adverse jury verdict and to the trial court's denial of the plaintiff's motions for a directed verdict, judgment notwithstanding the verdict, or a new trial.

The accident complained of occurred around midnight Sunday evening, 22 August 1977 in the right (westernmost) southbound travel lane of four-lane U.S. Highway 52. The point of impact was located between one-half and three-quarters of a mile south of the Reaves Road overpass in Surry County. From the Reaves Road overpass down to the point where the accident occurred, the roadway proceeds down a hill, then levels off. There are no obstructions between the point where the accident occurred and the

Reaves Road overpass. U.S. Highway 52 at this point has two lanes for southbound traffic, 12 feet wide each, for a total width of 24 feet. To the west of the southbound lanes of travel, there is a 10-foot wide shoulder, consisting of a 4-foot wide paved buffer and a 6-foot wide grassy area and a guardrail. There is sufficient room between the guardrail and the white line on the west edge of the highway to drive the vehicle completely off the road.

The speed limit on U.S. Highway 52 was 55 miles per hour at the time of the accident; there were no lights on the highway and no illuminated signs in the area. The evidence was conflicting on the weather conditions and visibility at the time of the accident. The plaintiff testified that the accident occurred after he entered an area of fog at the bottom of the hill. The defendant Linn Hamilton Jones maintained that, at the time of the accident, the weather was clear, such that he could see from his truck all the way back to the Reaves Road overpass. The investigating officer testified that the weather conditions were foggy when he arrived at the scene about 12:45 a.m.

At the time of the accident, the defendant Linn Hamilton Jones was returning to his home in Pilot Mountain from a weekend with a friend in Mt. Airy driving his father's 1972 Datsun pickup. When Jones attempted to leave his friend's home shortly after 11:00 p.m. Sunday evening, the pickup initially would not start. The engine turned over slowly; Jones "supposed" that the battery "had run down or something." Jones push-started the truck by allowing the truck to roll forward down the hill from where he had parked it earlier and letting the clutch out. He noticed that the gasoline needle in the truck was slightly above empty. Although he testified that the vehicle had gasoline, he also testified that he stopped to purchase gasoline at two stations but they were closed.

While proceeding south on U.S. Highway 52 at a speed of 30 to 35 miles per hour in a 55 miles per hour zone, Jones testified that the truck "went dead." He attempted to restart the vehicle while the vehicle was moving by pushing the clutch in and out and down-shifting through other gears. Jones maintained that although the truck stopped running, the lights did not dim at all. He told the investigating officer that the vehicle acted like it was out of gas. The entire truck stopped in the right (westernmost)

southbound lane. Before the truck stopped, Jones did not try to drive the truck off the road. As soon as the truck stopped, Jones was aware of the need to remove the truck from the road.

When the truck stopped, Jones looked in his rearview mirror and saw no lights or anything else behind him; he was able to see all of the way back to the bridge. He got out of the truck, checked the roadway, and saw no vehicles coming up behind him. Jones, a weight lifter, had on previous occasions physically lifted his truck up off the ground. After stepping out and looking back to see that there was no traffic coming, he turned the steering wheel all of the way to the right, placed his hand on the door jamb and pushed the vehicle. He felt the right front wheel go off the road. The night was quiet and he heard no traffic from any direction. As Jones felt the right front wheel go off the pavement, he saw some glare from headlights reflecting in his windshield, heard tires squeal and tried to turn around. However, before he could turn his head around, Mr. Williams' car hit the truck.

At the time of the accident, the plaintiff Billy Gray Williams and his passenger were proceeding south on U.S. Highway 52 in Mr. Williams' taxi. As he proceeded down the hill from the Reaves overpass, the plaintiff, traveling between 45 and 50 miles per hour, encountered a foggy area. A tractor-trailer began to pass in the left lane. As he entered this area at the bottom of the hill, he saw the pickup no more than four car-lengths away sitting in the middle of his lane without any lights. The plaintiff applied brakes, but could not stop in time and hit the rear of the pickup. He could not pass to the left because of the tractor-trailer. The plaintiff's passenger also stated that, as he and the plaintiff entered the denser foggy area, he was watching the roadway and suddenly saw a pickup in the right lane. The plaintiff's passenger saw no lights and recalled that the accident happened "so fast."

The investigating officer measured 62 feet of tire impressions traceable to Mr. Williams' 1970 Plymouth. The officer determined the point of impact from the debris to be in the middle of the right southbound lane. Mr. Williams' Plymouth traveled 31 feet after impact. The officer recalled that the plaintiff Williams stated at the scene that the boy appeared to be standing there looking at Williams at the time of the accident. The jury found

that on plaintiff's claim defendant was not negligent, and on defendant's counterclaim that plaintiff was negligent.

Tuggle, Duggins, Meschan, Thornton & Elrod by Kenneth R. Keller and Max D. Ballinger for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by Michael L. Robinson, and James H. Kelly, Jr.; Faw, Folger, Sharpe & White by Richard Pardue and W. Thomas White for defendant appellees.

CLARK, Judge.

[1] Did the trial court err in instructing the jury on the issue of defendant's negligence in violating G.S. 20-161(a) by parking or leaving standing the motor vehicle on the paved portion of the highway? In determining this issue, it is significant that the uncontradicted evidence disclosed that the vehicle operated by defendant Linn Jones stopped at night in the 12-foot wide outside traffic lane of a four-lane two-way highway. The highway shoulder was 10 feet wide, with a 4-foot paved buffer and 6-foot grassy area. The motor of his vehicle stopped while moving downhill, and several times he put in the clutch and tried down-shifting in other gears in an effort to start the motor. Plaintiff offered evidence, denied by defendant, that it was foggy in the area where the collision occurred.

G.S. 20-161(a) provides as follows:

> "No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled portion of any highway or highway bridge outside municipal corporate limits unless the vehicle is disabled to such an extent that it is impossible to avoid stopping and temporarily leaving the vehicle upon the paved or main-traveled portion of the highway or highway bridge."

Defendant takes the position that there was no prejudice to plaintiff because G.S. 20-161(a) was not applicable in that defendant did not "park or leave standing" his vehicle within the meaning of the statute. Defendant testified that when his vehicle stopped he got out, turned the wheels to the right, began pushing the vehicle toward the shoulder, and he felt the right front wheel go off the road. Plaintiff testified that the pickup was in the mid-

dle of the lane, and he told trooper R. L. Morris that defendant was standing beside his pickup looking at plaintiff's approaching vehicle.

In many cases the courts of this State have interpreted the terms "park" or "leave standing" as used in G.S. 20-161(a) as meaning something more than a mere temporary stop on the road for a necessary purpose. See 2 Strong's N.C. Index 3d *Automobiles* § 11 (1976) and cases cited. Whether the stop, though temporary, was for a necessary purpose is a factor to be considered in determining a violation of G.S. 20-161(a). And in several cases where the stop on the highway was the result of mechanical trouble or a flat tire it was held that the statute was violated if the operator had the opportunity and sufficient area to park off the highway on the shoulder. *Sharpe v. Hanline*, 265 N.C. 502, 144 S.E. 2d 574 (1965); *Melton v. Crotts*, 257 N.C. 121, 125 S.E. 2d 396 (1962). 2 Strong's N.C. Index 3d *Automobiles* § 11.5.

This evidence was sufficient to require the trial judge, in applying the law to the evidence as required by G.S. 1-180, to charge on the violation of G.S. 20-161(a) in instructing on the first issue, the negligence of the defendant. The evidence tended to show that defendant Linn Jones had the opportunity to drive the disabled vehicle to a position of safety on the shoulder of the highway.

In instructing the jury the trial court read G.S. 20-161(a), added that a violation of the statute was negligence within itself, stated that defendant contended the vehicle stopped suddenly and it was impossible to avoid stopping on the paved portion of the highway, and then concluded: "So if you find that he violated that and that it was not impossible to avoid stopping and if you find that that was one of the proximate causes of the accident, it would be your duty to answer the first issue 'yes', in favor of the plaintiff." No contention of the plaintiff was stated.

Whether the disablement of defendant's vehicle justified him in stopping in the middle of the paved traffic lane was a question for the jury under proper instructions from the court, but the instruction of the court did not properly explain G.S. 20-161(a) and apply its provisions to the evidence.

The burden was on the plaintiff to prove that defendant violated the statute. If defendant was to escape the consequences

of this violation, the defendant had the burden of bringing himself within the provision that "it is impossible to avoid stopping . . . ." G.S. 20-161(a); *see Melton v. Crotts, supra.* The word "impossible" does not mean physical, absolute impossibility but rather means not reasonably practical under the circumstances. *Id.*; 2 Strong's N.C. Index 3d *Automobiles* § 11. Statutes in other jurisdictions having the "impossible" provision similar to G.S. 20-161(a) have been so interpreted. See 60A C.J.S., *Motor Vehicles* § 332, p. 383 (1969).

In *Melton*, the court held that whether the puncture and flat tire at a point where the operator of a motor vehicle could not get off the highway for several hundred feet were sufficient to warrant him in stopping to change tires, leaving a part of his vehicle on the paved part of the highway, was a question for the jury. In *Sharpe v. Hanline*, 265 N.C. 502, 504, 144 S.E. 2d 574, 576 (1965), defendant's vehicle was parked about 10 inches on the paved portion of a four-lane highway with a shoulder 15 to 18 feet wide. The court stated: "In our opinion, the provisions of G.S. 20-161 require that no part of a parked vehicle be left protruding into the traveled portion of the highway when there is ample room and it is practicable to park the entire vehicle off the traveled portion of the highway."

The trial court should have instructed the jury that plaintiff had the burden of proving that defendant violated G.S. 20-161(a) by parking or leaving standing his vehicle on the paved portion of the highway when he had the opportunity to park the vehicle on the shoulder of the highway, and that the burden was on the defendant to prove that he was excused from such parking because it was not reasonably practical under the circumstances to avoid stopping on the paved portion of the highway. The failure to so charge was error which was prejudicial to the plaintiff.

[2] The plaintiff also assigns as error the failure of the trial court to instruct the jury on the doctrine of sudden emergency, though requested by plaintiff. The doctrine was recently stated in *Foy v. Bremson*, 286 N.C. 108, 116-17, 209 S.E. 2d 439, 444 (1974) as follows:

> "An automobile driver who, by the negligence of another and not by his own negligence, is suddenly placed in an

emergency and compelled to act instantly to avoid a collision or injury, is not guilty of negligence if he makes such a choice as a person of ordinary prudence placed in such a position might make, even though he made neither the wisest choice nor the one that would have been required in the exercise of ordinary care except for the emergency."

The plaintiff testified that he saw defendant's vehicle in his traffic lane when he was four car-lengths away, that he did not pull onto the left lane because he was afraid that he would be hit by a tractor-trailer behind him in that lane, that he probably could have pulled to the right but he would have been on a narrow grassy area and a guardrail was there. This testimony and the other circumstances, including evidence that the shoulder was 10 feet wide and that there was fog in the area, make the doctrine of sudden emergency applicable, and the court erred in not charging on the doctrine as requested by the plaintiff.

These errors were prejudicial to the plaintiff in the determination of the issues submitted to the jury on both plaintiff's claim and defendant's counterclaim.

The judgment is reversed and we order a

New trial.

Judges HEDRICK and WELLS concur.

RONALD LEE BEATTY, PLAINTIFF v. H. B. OWSLEY & SONS, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF v. KAISER ALUMINUM AND CHEMICAL SALES, INC., A CORPORATION, THIRD-PARTY DEFENDANT

No. 805SC984

(Filed 21 July 1981)

1. Master and Servant § 7— crane operator—agent of general employer

An employee who was allegedly operating a crane at the time plaintiff suffered his injuries was an agent of defendant general employer where defendant was in the business of renting heavy equipment and people to operate the equipment; defendant had the power to hire and fire the crane operator; the crane operator was a specialist; and the fact that the third party defendant special employer instructed the operator specifically when to lift aluminum

panels, how to lift them, and where and how to place them was not enough, standing alone, to make the operator an employee of the third party defendant.

2. **Negligence § 29.2— operation of crane—sufficiency of evidence of negligence**

In plaintiff's action to recover for personal injuries sustained during the operation of a crane, plaintiff offered ample evidence from which the jury could have found that defendant's agent negligently failed to take the slack out of the cables of a crane, allowing a spreader bar to be balanced precariously and to fall on plaintiff.

3. **Negligence § 35.2— use of crane—no contributory negligence as matter of law**

In an action to recover for personal injuries sustained by plaintiff during the operation of a crane evidence did not disclose that plaintiff was contributorily negligent as a matter of law where it tended to show that defendant leased a crane and provided an operator to plaintiff's employer; plaintiff was standing where he had a right to be and in fact needed to stand in order to perform the duties which defendant knew plaintiff had to perform; plaintiff was unable to determine from his location how much slack there was in the cables; plaintiff was unable to determine by observation how precariously balanced a spreader bar was; and plaintiff did nothing to contribute to defendant's agent leaving excessive slack in the cables.

4. **Rules or Civil Procedure § 33— answers to interrogatories—admissibility**

In an action to recover for personal injuries sustained by plaintiff during the operation of a crane, the trial court erred in excluding defendant's answers to interrogatories where plaintiff was not seeking by their admission to prove the truth of the matters asserted therein, but was instead seeking to prove that defendant had knowledge or notice of the facts declared, for example, the inherently dangerous condition of spreader bars without supporting braces, or to show that defendant believed them to be true and failed to act.

APPEAL by plaintiff from *Tillery, Judge.* Judgment entered 7 December 1980 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 10 April 1981.

Plaintiff, Ronald Lee Beatty, appeals from a directed verdict for the defendant, H. B. Owsley & Sons, Inc. (Owsley), in this personal injury action. Plaintiff, a material handler for Kaiser, alleged in his Complaint (1) that Owsley rented a large Manitowoc Model 4000 crane to Kaiser; (2) that Owsley's agent and employee, K. O. Thompson, Jr., operated the crane at Kaiser's Wilmington, North Carolina plant; and (3) that Owsley's negligent acts and omissions in the design and use of the crane caused a steel spreader bar attached to the crane to fall on, and inflict serious permanent injuries to, the plaintiff.

Owsley filed an Answer, admitting that it had rented the crane to Kaiser but denying that Thompson was operating the crane at the time of the injury and denying that Owsley was negligent in the use, design, inspection or operation of the crane. Owsley further alleged that the plaintiff was contributorily negligent; that Kaiser's negligence was the sole and proximate cause of plaintiff's injury; and that if Owsley were in any way negligent, then Kaiser's negligence joined and concurred with Owsley's negligence to produce plaintiff's injuries.[1]

Kaiser manufactures aluminum panels for assembly and installation in ocean-going vessels which carry natural gas. These panels vary in size from two-foot panels to fifty-foot panels which weigh over 100,000 pounds. The crane, owned by Owsley and leased to Kaiser, is used to move the panels from the plant to barges on the Cape Fear River.

On 23 September 1976 plaintiff's foreman, John Smith, instructed John Franks (a Kaiser employee), K. O. Thompson (the crane operator), and the plaintiff to move a particular panel back to the plant for repairs.[2] Franks gave hand signals to Thompson, and plaintiff got in position to attach the spreader bars to the panel. Plaintiff approached the spreader bars to make the attachment, and Thompson left the crane to get a tagline (a long rope used to keep a panel steady). Additionally, at that time, the cables attached to the spreader bars were slack; normally during this procedure the cables are taut. As plaintiff attempted to attach the spreader bars to the panel, and before he could touch the spreader bars, one of the spreader bars fell across his leg. Plaintiff was hospitalized for several months, was out of work for a year, and is unable to perform heavy lifting work which he performed prior to the accident.

1. Owsley also filed a third-party complaint against Kaiser. By consent of all the parties, the third-party complaint was severed from the plaintiff's action against Owsley. Kaiser's liability, if any, either to Owsley or to plaintiff under the Workers' Compensation Law may be determined at a later date.

2. To facilitate movement, the panels are attached to the crane by the use of two steel spreader bars, one spreader bar being placed on each side of a panel. The spreader bars are attached to the crane's cables. The spreader bars themselves have additional cables hanging from them which are used to attach the panel. Each spreader bar weighs approximately 1,000 pounds. A material handler is responsible for attaching the spreader bar cables to the panels.

Franklin L. Block for plaintiff appellant.

Anderson, Broadfoot, Anderson, Johnson & Anderson, by Henry L. Anderson, Jr., for defendant appellee.

BECTON, Judge.

I

The questions presented by plaintiff's second assignment of error are (1) whether the evidence shows negligence by Owsley[3]; and (2) whether the evidence shows plaintiff was contributorily negligent as a matter of law. The standard is so well known that it needs no citation: A defendant's motion for a directed verdict made under Rule 50(a) of the Rules of Civil Procedure presents the question of whether the evidence is sufficient to go to the jury. All of the plaintiff's evidence must be taken as true, and the plaintiff must be given the benefit of every reasonable inference which may be drawn from the evidence. Moreover, all contradictions, conflicts and inconsistencies must be resolved in plaintiff's favor. With this standard in mind, we address the parties' contentions concerning (1) agency, (2) negligence, and (3) contributory negligence.

AGENCY

[1] Owsley admits that it rented the Manitowoc Model 4000 crane to Kaiser; that K. O. Thompson, Jr. was the operator of the crane on 23 September 1976; that on 23 September 1976, Thompson was employed by, and received his salary from, Owsley[4]; and that Owsley "is an expert in the field of work requiring cranes and its operators are experts in the performance of their duties in

3. Agency—that is, whether Thompson as the operator of the crane was the employee-agent of Owsley—is subsumed in this first question.

4. Owsley had consistently argued that Thompson was their employee "only in the limited sense . . ." and that Thompson was actually an agent of Kaiser. Specifically, in its Amended Answer to Interrogatory No. 2 propounded by plaintiff, Owsley said:

> 2. Yes. At said time the operator, K. O. Thompson, Jr. received a salary and/or wages from H. B. Owsley & Sons, Inc. and was in a status of "employee" only for the purposes of receiving his salary directly from H. B. Owsley & Sons, Inc. but was not the agent of H. B. Owsley & Sons, Inc., but was the agent of Kaiser Aluminum & Chemical Sales, Inc., a corporation, and

the operation of cranes. . . ." Owsley argues, however, that it did not directly control or supervise Thompson. The fact that Thompson was sent to the Kaiser plant several months prior to the plaintiff's injuries and the fact that Owsley did not come to Kaiser directly to supervise Thompson's work merely begin the inquiry. A servant can have two masters, a general employer and a special employer. The power of control is the real test of liability:

> When a general employer lends an employee to a special employer, the special employer becomes liable for workman's compensation only if (a) the employee has made a contract of hire, express or implied, with the special employer; (b) the work being done is essentially that of the special employer; and (c) the special employer has the right to control the details of the work.

1C A. Larson, Workmen's Compensation Law, § 48 (1980).

The North Carolina Supreme Court has gone further than Professor Larson and has held a general employer liable even when the special employer controlled the details of the work *and* the manner of doing the work.

> A servant of one employer does not become the servant of another for whom the work is performed merely because the latter points out to the servant the work to be done, or supervises the performance thereof, or designates the place and time for such performance, or gives the servant signals calling him into activity, or gives him directions as to the details of the work *and the manner of doing it.* (Emphasis added.)

Weaver v. Bennett, 259 N.C. 16, 25, 129 S.E. 2d 610, 616 (1963); 57 C.J.S. *Master and Servant* § 566 (1948). *See also Moody v. Kersey,* 270 N.C. 614, 155 S.E. 2d 215 (1967). Consequently, the fact that Kaiser instructed Thompson when to lift panels, how to lift

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the term "employee" as used herein is used only in the limited sense as one whose contract or relationship with H. B. Owsley & Sons, Inc. was the receipt of salary from same, but at the time herein involved said operator was under the direct control, direction and employment of Kaiser Aluminum and Chemical Sales, Inc., and H. B. Owsley & Sons, Inc. had no control, discretion or supervision of said operator whatsoever.

panels, and where and how to place them is not enough, standing alone, to make Thompson an employee of Kaiser.

It is significant that Owsley had the power to hire and fire Thompson, that Thompson was a specialist—a skilled crane operator—and that Oswley was in the business of renting heavy equipment and people to operate the equipment. We quote relevant portions of Restatement (Second) of Agency § 227, Comment c (1958):

> [A] continuation of the general employment is indicated by the fact that the general employer can properly substitute another servant at any time, that the time of the new employment is short, and that the lent servant has the skill of a specialist.
>
> A continuance of the general employment is also indicated in the operation of a machine where the general employer rents the machine and a servant to operate it, particularly if the instrumentality is of considerable value. . . . [T]he fact that the general employer is in the business of renting machines and men is relevant, since in such case there is more likely to be an intent to retain control over the instrumentality.

We find the language in *Mature v. Angelo*, 373 Pa. 593, 97 A. 2d 59 (1953), which was specifically approved by the North Carolina Supreme Court in *Weaver v. Bennett*, compelling:

> 4. Where one is engaged in the business of renting out trucks, automobiles, cranes, or any other machine, and furnishes a driver or operator as part of the hiring, there is a factual presumption that the operator remains in the employ of his original master, and, unless that presumption is overcome by evidence that the borrowing employer in fact assumes control of the employe's manner of performing the work, the servant remains in the service of his original employer.
>
> 5. Facts which indicate that the servant remains the employe of his original master are, among others, that the latter has the right to select the employe to be loaned and to discharge him at any time and send another in his place, that the lent servant has the skill of a technician or specialist which the performance of the work requires, that the hiring

is at a rate by the day or hour, and that the employment is for no definite period.

6. The mere fact that the person to whom a machine and its operator are supplied points out to the operator from time to time the work to be done and the place where it is to be performed does not in any way militate against the continuance of the relation of employe and employer between the operator and his original master.

259 N.C. at 28-29, 129 S.E. 2d at 618-19. *See also Moody v. Kersey;* 1C A. Larson, *supra*, at § 48.30. In the case at bar, we find Thompson to be the agent of Owsley as a matter of law. Having found agency, we now address the negligence issue.

NEGLIGENCE

[2] To withstand the motion for a directed verdict on the negligence issue, plaintiff's evidence, when taken in the light most favorable to him, must show (1) a failure on the part of Owsley to exercise proper care in the performance of a legal duty which Owsley owed the plaintiff, and (2) that such negligent breach of duty was a proximate cause of plaintiff's injury. *See Moody v. Kersey.*

Owsley contends that the spreader bar which fell on the plaintiff was not part of the crane; that neither Owsley nor Thompson owned or maintained the spreader bar; that the crane, itself, did not cause the injuries; that the crane was turned off at the time plaintiff was injured; and that Thompson was not at or near the crane at the time plaintiff was injured. Based on these contentions, we are not persuaded that Owsley is entitled to a directed verdict. Owsley's agent, Thompson, clearly had a duty to exercise a degree of care commensurate with the dangerous character of the job being performed. "Negligence is the failure to exercise that degree of care for others' safety which a reasonably prudent man under like circumstances would exercise." *Moody v. Kersey,* 270 N.C. at 619, 155 S.E. 2d at 219. Significantly, Owsley admitted that its operators (including Thompson) were "expert in the performance of their duties in the operations of cranes." Due to the extremely dangerous nature of the job being performed, Thompson is held to high degree of care in taking all necessary steps to avoid injury to those working around him. Again, *Moody*

v. Kersey is instructive: "[A person] in control of machinery being used in a hazardous operation . . . was obliged to exercise a degree of care commensurate with the dangerous character of the operation." 270 N.C. at 620, 155 S.E. 2d at 220.

The plaintiff put on ample evidence from which the jury could have found that Owsley's agent negligently failed to take the slack out of the cables, allowing one of the spreader bars to be balanced precariously and to fall on the plaintiff. Simply put, the jury could have found that if the slack had been taken out—if the cables had been taut—the spreader bar would not have fallen.[5]

CONTRIBUTORY NEGLIGENCE

[3] Citing the often-quoted rule set forth in *Presnell v. Payne*, 272 N.C. 11, 13, 157 S.E. 2d 601, 602 (1967)—"one who has capacity to understand and avoid a known danger and fails to take advantage of that opportunity, and injury results, . . . is chargeable with contributory negligence which will bar recovery"—and setting forth every reasonable inference tending to support its position, Owsley claims plaintiff was contributorily negligent as a matter of law. Again, we are not persuaded; the case law simply will not support Owsley's position. The plaintiff's evidence indicated that he was unable to determine from his location how much slack there was in the cables and that he was unable to determine by observation how precariously balanced the spreader bar was on the panel. Moreover, the plaintiff did nothing to contribute to Owsley's agent leaving excessive slack in the cables. All contradictions, discrepancies or contra-inferences should be resolved by the jury. In order for a directed verdict to be granted for Owsley on the grounds of contributory negligence, it is required that the plaintiff establish his own negligence so clearly by his own evidence that no other reasonable inference or conclusion can be drawn therefrom. *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976). At the very least, there is an inference that plaintiff was in no position fully to appreciate his own peril.

5. Had the answers to interrogatories 5, 6 and 9 been admitted, the case for the plaintiff would have been substantially strengthened. In those answers, Owsley admitted that "the modified and changed spreader bar was used in a dangerous condition." We discuss the court's decision to exclude answers to these interrogatories in Part II, *infra*.

> [C]onduct [of the plaintiff] on this occasion "must be judged in the light of the general principle that the law does not require a person to shape his behavior by circumstances of which he is justifiably ignorant, and the resultant particular rule that a plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger of injury which his conduct involves."

Clark v. Roberts, 263 N.C. 336, 343, 139 S.E. 2d 593, 597 (1965).

In this case, we find no negligence on the part of the plaintiff which contributed to his injury as a matter of law. Plaintiff was standing where he had a right to be and, in fact, needed to stand in order to perform the duties which Owsley knew the plaintiff had to perform.

II

[4] In addition to denying its negligence and alleging plaintiff's contributory negligence, Owsley alleged in its Answer that Kaiser's negligence was the sole and proximate cause of plaintiff's injury. On the same day Owsley filed its Answer, it also filed a third-party complaint against Kaiser specifically alleging, among other things, that Kaiser used a properly designed spreader bar in an improper manner knowing that the spreader bar could or would endanger, or was likely to endanger, the plaintiff. Kaiser filed a reply to the third-party complaint, specifically moving to strike the averments of negligence. Contemporaneously with its reply, Kaiser filed its first set of interrogatories to Owsley, asking in paragraphs 5, 6 and 9 that Owsley "state specifically each respect in which" Owsley contends Kaiser was negligent. Owsley's combined answer to interrogatories 5 and 6 and its answer to interrogatory 9 follow:

> 5. 6. Kaiser modified, disassembled and changed a properly designed and safe spreader bar so that the *modified and changed spreader bar was used in a dangerous condition* and thereafter ordered and directed the plaintiff to work in the area of the *improperly used spreader bar* and failed to adequately instruct the plaintiff of the dangerous condition and position of the improperly used spreader bar at the time the plaintiff sustained his injuries and further *failed to adequate-*

ly secure the spreader bar in order that it could not drop or fall on the plaintiff or otherwise injure the plaintiff and further directed the plaintiff to go from a place of safety to a place of danger, to-wit, *where the improperly used spreader bar* was located and further forgot an essential tool of use in handling the panels and therefore had to send the plaintiff to the area of and under the *improperly used spreader bar.* (Emphasis added.)

9. Kaiser had disassembled and modified the original spreader bar as designed and manufactured by the defendant and third-party plaintiff and as originally sold to and purchased by Condec, by deleting all cross bars or cross braces and further directed and ordered said spreader bars to be left without support in a precarious position on the panel, unattended.

At trial, plaintiff contended (1) that Owsley's agent was negligent in failing to take the slack out of the cables, and (2) that Owsley's agent was negligent in failing to inform Kaiser that the removal of the "cross bars or cross braces" left the spreader bars without support and made them inherently dangerous. Consequently, plaintiff sought to introduce into evidence Owsley's answers to interrogatories 5, 6 and 9.[6]

Plaintiff's first assignment of error is that the trial court erred in excluding from evidence Owsley's answers to interrogatories 5, 6 and 9. The admission of these answers is governed by Rule 33(b) of the North Carolina Rules of Civil Procedure:

[b] Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory in-

6. Owsley objected to the tender. Owsley argued in its brief that "the questions and answers were tantamount to allegations on issues raised on the pleadings between the third-party plaintiff and the third-party defendant, which case had been totally severed from this proceeding and [that] allegations and conclusions of law and fact could not be construed as being substantive evidence in the case at bar."

volves an opinion or contention that relates to fact or the application of law to fact, . . .

We agree with the plaintiff that the answers to interrogatories should not have been excluded, although we reach our conclusion on a different basis from that assigned by plaintiff.[7] Plaintiff was seeking "to charge [Owsley] with knowledge or notice of the facts declared"—for example, the inherently dangerous condition of spreader bars without supporting cross braces—"or to show that [Owsley, as an expert] believed them to be true" and failed to act. 2 Stansbury, N.C. Evidence 2d, § 167 (Brandis revision 1973). Plaintiff was not, in this case, seeking to prove that Kaiser was negligent. If statements are offered, as were statements in this case, for any purpose other than to prove the truth of the matter asserted, they are not objectionable as hearsay.[8] 1 Stansbury, *supra*, at § 138.

The order granting defendant Owsley's motion for directed verdict is reversed, and the case is remanded to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

Judge MARTIN (Robert M.) and Judge WHICHARD concur.

7. Plaintiff argues, based on Rule 33(b) of the Federal Rules of Civil Procedure and on the Federal Rules of Evidence, that although "answers to interrogatories are hearsay and inadmissible at the trial unless they fall within some recognized exception to the hearsay rule, the answers "are admissible under the exception to the hearsay rule of 'an admission of the party opponent'." We note that under Federal Rule of Evidence 801, a statement is *not* hearsay if it is an admission by a party-opponent.

8. "As to admissions by an individual party himself, whether they should be classified as non-hearsay or as hearsay exceptionally admissible seems to the present writer to be an ultimately profitless, if intellectually stimulating, debate. A court is likely to admit the same evidence, whatever its theory may be." 2 Stansbury, *supra*, at § 167n.14.

BARBARA LARKINS WARD TYSON v. NORTH CAROLINA NATIONAL BANK

No. 803SC776

(Filed 21 July 1981)

1. **Limitation of Actions § 4— breach of fiduciary duty in administration of estate—applicable statute of limitations**

The ten-year statute of limitations provided in G.S. 1-56 applied to plaintiff's claim for damages for breach of fiduciary duty in the administration of her deceased husband's estate, and plaintiff's action was therefore timely where her husband died 28 September 1968, defendant submitted its final account as executor on 14 September 1972, and plaintiff's complaint was filed 11 July 1979.

2. **Executors and Administrators § 39— breach of fiduciary duty—summary judgment for executor proper**

In plaintiff's action to recover for defendant's alleged breach of various fiduciary duties as executor of the estate of plaintiff's husband, the trial court properly entered summary judgment for defendant, though defendant failed to include the family residence in the estate of the husband until two years after his death because defendant believed the home had been held by plaintiff and her husband as tenants by the entirety, since the debts of the estate, not including taxes and expenses of administration, totaled slightly more than $82,000; decedent's will directed that these debts be paid out of the principal of the estate; the residence, appraised at $52,500, commercial property, appraised at $8,500, and a tobacco farm, appraised at $74,940, were the only readily marketable properties in the estate; sale of the residence and the commercial property would have raised only $61,000; defendant was not required to disregard the direction in the will to pay the debts out of the principal of the estate in the performance of its duties; the alternative of mortgaging the tobacco farm and other alternatives suggested by plaintiff were not reasonably available to defendant; and under these facts, defendant's negligence, if any, in failing initially to include the residence in the estate was not the proximate cause of the injuries of which plaintiff complained.

3. **Executors and Administrators § 5.3— executor as creditor—no conflict of interest**

No conflict of interest is created by the mere fact that the executor of the estate also occupied the status of creditor. G.S. 28A-4-1(b)(4).

Judge CLARK dissenting.

APPEAL by plaintiff from *Rouse, Judge.* Judgment filed 10 June 1980 in Superior Court, PITT County. Heard in the Court of Appeals 4 March 1981.

Plaintiff's complaint, filed 11 July 1979, alleged that defendant breached various fiduciary duties in carrying out its duties as executor of her husband's will. Defendant's answer admitted that it stood in a fiduciary relationship to the plaintiff, but denied it was negligent or otherwise breached any fiduciary duty owed to plaintiff, and raised the statute of limitations.

The facts are as follows: Plaintiff's husband died on 28 September 1968, and, under the terms of his will, defendant NCNB's predecessor, State National Bank, was named Executor of the estate and Trustee of two trusts created under the will.

At the time of his death decedent owned real estate which included a tobacco farm, two commercial lots on Cotanche Street in Greenville, North Carolina, three residential lots and an undivided one-half interest in eighteen residential lots. Decedent also owned the family residence, which was not included as an asset of the estate because the defendant erroneously assumed that the home was owned by the decedent and plaintiff as tenants by the entireties. The total appraised value of all the real estate was approximately $234,000.

As the will directed the defendant to pay the decedent's debts out of the principal of his estate, and the personal property in the estate was inadequate to pay the debts, the defendant had three appraisers make formal appraisals of all property in the estate and, subsequently, with the court's permission, sold the tobacco farm, the only income-producing property in the estate, and the Cotanche Street property. The tobacco farm was purchased by the plaintiff, as guardian for her children, with funds from their separate estates pursuant to a special proceeding on 12 November 1969. Approximately one year later, when plaintiff attempted to sell the residence, it was discovered that defendant had been its sole owner, and that it should have been included as an asset of the estate.

As a result of invasion of the principal from time to time to provide support for the plaintiff, the value of the trust assets had decreased from $245,000 at the end of 1973, to $95,000 as of 1 January 1978.

On 19 September 1979 defendant filed a motion for summary judgment along with supporting affidavits. Plaintiff moved for

partial summary judgment on 8 April 1980. After considering the pleadings, affidavits and other materials, the trial court denied plaintiff's motion and entered summary judgment in favor of the defendant. Plaintiff appeals.

Susan H. Lewis and Donald Beskind for plaintiff appellant.

Helms, Mulliss & Johnston, by Nancy Black Norelli and E. Osborne Ayscue, Jr., for defendant appellee.

ARNOLD, Judge.

Plaintiff's only assignment of error is that the trial court erred in granting defendant's motion for summary judgment.

In general, summary judgment is appropriate where the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c); *Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 268 S.E. 2d 190 (1980); *Durham v. Vine*, 40 N.C. App. 564, 253 S.E. 2d 316 (1979).

[1] The initial question before the Court is whether plaintiff's cause of action is barred by the running of the statute of limitations. The pleadings show that plaintiff's husband died 28 September 1968, and defendant submitted its final account as executor on 14 September 1972. The defendant argues that the three-year statute of limitations provided in G.S. 1-52 (1) applies to this action rather than the ten-year catch-all statute of limitations urged by plaintiff. We disagree.

The claim involved herein for damages for breach of fiduciary duty in the administration of plaintiff's deceased husband's estate is distinguishable from the claims involved in the cases cited by defendant. We find therefore that, as no other statute limits an action of this nature, the ten-year statute provided in G.S. 1-56 applies, and plaintiff's action is timely.

As to the substantive issues involved in this appeal, it is well-established that on a motion for summary judgment, the burden of establishing the absence of any genuine issue of material fact is on the moving party. This burden can be met by showing the nonexistence of an essential element of plaintiff's

cause of action, or by showing through discovery that plaintiff cannot provide evidence to support an essential element of his claim. *Thomasville v. Lease-Afex, Inc., supra; Durham v. Vine, supra.* If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial, or must provide an excuse for not making such a showing. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

[2] A review of the record reveals that certain facts are not in dispute. The parties agree that defendant stood in a fiduciary relationship to plaintiff while serving as executor of her late husband's estate, and that the family residence was not included in the estate until late 1970 because the defendant believed it had been held by plaintiff and her husband as tenants by the entirety. Plaintiff does not dispute that her husband's will provided that his debts be paid out of the principal of his estate, that his debts, not including taxes and expenses of administration, totalled eighty-two thousand two hundred sixty-eight dollars ($82,268.00), that upon appraisal in February 1969 the residence and lot were valued at $52,500, the Cotanche Street property was valued at $8,500, and the tobacco farm was valued at $74,940. Further, plaintiff does not dispute that no other real property in the estate was readily marketable. With permission of the court, defendant sold the tobacco farm and the Cotanche Street property to pay the estate's debts in December 1969. Plaintiff purchased the tobacco farm as guardian for her children. In late 1970, when plaintiff attempted to sell the homeplace, it was discovered that decedent had owned the house individually. The house was then sold for $60,000.

Conceding defendant's negligence in failing to include the homeplace, the parties disagree only as to whether the homeplace would have been sold rather than the tobacco farm if the residence had been included in the estate.

Plaintiff argues that summary judgment in favor of defendant was improper since defendant's evidence that the homeplace would not have been sold in any event because it was occupied by the widow and three minor children is not competent, and even if properly considered, it merely raises a material factual issue and the need to test the credibility of defendant's witness on cross-

examination. Plaintiff further argues that an inference must be drawn that the sale of the house and a small mortgage on the tobacco farm would have satisfied all creditors and prevented the damage to plaintiff from the sale of the tobacco farm. Therefore, in plaintiff's view, the question of the reasonableness of defendant's actions was a question for the jury.

Defendant argues that it met its burden in regard to its summary judgment motion. It presented the affidavit of Mr. B. B. Suggs, a trust officer whose duties included supervising the trust officer who administered the estate of James Harvey Ward, Jr., concerning defendant's practices with regard to selling family homes, and, since eight months passed between the filing of defendant's motion and the entering of the court order thereon, defendant argues plaintiff had ample time in which to conduct discovery to test Mr. Suggs' credibility.

Defendant further argues that the uncontradicted evidence shows that the will directed payment of debts out of principal; that the debts totalled more than the combined value of all readily marketable property other than the tobacco farm; and that plaintiff's failure to introduce any contradictory evidence warranted the entry of summary judgment in its favor.

Disregarding the question of whether it would have been reasonable for defendant Bank not to sell the homeplace because of the widow and children, and the question of Mr. Suggs' credibility, the undisputed facts show that the debts of the estate, not including taxes and expenses of administration, totalled slightly more than $82,000. The decedent's will directed that these debts be paid out of the principal of the estate. The residence appraised at $52,500, the Cotanche Street property appraised at $8,500, and the tobacco farm appraised at $74,940, were the only readily marketable properties in the estate. Simple mathematics indicates that the sale of the residence and the Cotanche Street property would have raised only $61,000. Plaintiff's argument that she is entitled to an inference that defendant could have avoided selling the farm by mortgaging it to raise the difference is without merit. Decedent's will had directed defendant to pay the debts out of the principal of the estate. While in an unusual case an executor might be required to disregard such a direction in the proper performance of its duties, the facts of this

case do not warrant such an inference. The alternative of mortgaging the farm, therefore, as well as the other alternatives suggested by plaintiff, were not reasonably available to the defendant.

Under these facts, the defendant's negligence, if any, in failing to initially include the residence in the estate, was not the proximate cause of the injuries of which plaintiff complains. Defendant has, therefore, met its burden of proving that an essential element of plaintiff's claim is nonexistent and, therefore, we find that granting summary judgment for the defendant on the negligence claim was proper.

Plaintiff's first and second alternative claims for relief are that defendant breached its fiduciary duty by not settling the estate with as little sacrifice as was reasonable under the circumstances, and by failing to take reasonable action to retain income-producing property. Plaintiff argues that summary judgment was improper because it was for the jury to decide whether defendant, had it included the residence in the estate, breached its duty by selling the tobacco farm. We disagree. As previously pointed out, selling the house rather than the farm would not have raised sufficient funds to pay off the debts of the estate. There is no evidence in the record to support an inference that selling the farm was unreasonable and, therefore, summary judgment was appropriate on these two claims.

Plaintiff's third alternative claim for relief is that defendant breached its fiduciary obligation of loyalty by selling the tobacco farm. The undisputed facts pertinent to this claim are as follows: The decedent was substantially indebted to defendant prior to the execution of the will naming the defendant as executor, and this indebtedness was disclosed by defendant in the petition to sell the farm, to which the plaintiff, as guardian of her children, filed a verified answer.

[3] No conflict of interest is created by the mere fact that the executor of the estate also occupied the status of creditor. See G.S. 28A-4-1(b)(4). Furthermore, a review of the record reveals no evidence of any use by defendant of its powers as executor that would constitute a breach of its fiduciary duty of loyalty.

Accordingly, we find that the trial court properly granted defendant's motion for summary judgment as to all of plaintiff's claims and the judgment is therefore

Affirmed.

Judge MARTIN (Harry C.) concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

The defendant having breached its fiduciary duty in failing to include the homeplace as an asset of the estate, the question is whether the defendant has carried its burden of showing on its motion for summary judgment that its breach did not result in a loss to the plaintiff. Because of such breach this asset was not considered by the defendant in determining whether the farm, the only income producing asset, should be sold to pay debts.

The majority decision relies primarily on the provision that the debts of the estate be paid out of the principal of the estate and that the sale of the farm was necessary because the value of the homeplace and other assets were insufficient to pay the debts.

I find it difficult to accept the proposition that this provision so restricted the duty of the executor-trustee to the plaintiff and other beneficiaries. Defendant sold the only income producing asset of the estate. Soon thereafter the homeplace was sold, at which time it was discovered that the homeplace was an asset of the estate.

In my opinion the defendant has not established at this stage of the proceeding that its breach did not result in a loss to plaintiff. I vote to reverse.

STATE OF NORTH CAROLINA v. ALEEN ESTES WALDEN

No. 8110SC18

(Filed 21 July 1981)

1. **Criminal Law § 91— charge dismissed—subsequent arrest warrant issued—no violation of Speedy Trial Act**

Defendant's trial began within the 120-day limitation of the Speedy Trial Act where the State first proceeded against defendant by warrant dated 12 December 1979; that warrant charged defendant with misdemeanor child abuse on 8 December 1979; the charge was dismissed on 25 April 1980; a second warrant for defendant's arrest was issued on 3 April 1980; pursuant to this warrant defendant was indicted on 28 April 1980 for the 9 December 1979 assault upon her son; the evidence was uncontradicted that there were two separate assaults on 8 December and 9 December 1979, and there was nothing to indicate a plan or scheme of extended abuse of defendant's son; and defendant's trial began on 25 August 1980, which was within the 120-day limitation of the Speedy Trial Act.

2. **Criminal Law § 9.3; Parent and Child § 2.2— aiding and abetting child abuse—sufficiency of evidence**

In a prosecution of defendant for aiding and abetting another in his assault on defendant's one year old child where the only evidence for the State tended to show that, during the assault, defendant did absolutely nothing, the totality of the circumstances warranted the inference by the jury that defendant knew her silent presence during the beating inflicted upon her son would be regarded by the principal as encouragement and support, particularly in light of testimony that defendant had witnessed prior beatings by the principal, indicating that defendant was aware of the severity of his treatment of her children; that defendant had never interfered in the past; that defendant had herself beaten her children in the principal's presence; and that defendant lied and instructed her children to lie to conceal the principal's complicity in the assault.

3. **Criminal Law § 9.4— aiding and abetting child abuse—instructions improper**

In a prosecution of defendant for aiding and abetting a principal in the assault on defendant's one year old child, the trial court erred in instructing the jury that they could convict defendant if they found "that she was present with the reasonable opportunity and duty to prevent the crime and failed to take reasonable steps to do so," since the instruction allowed the jury to convict defendant if they found that she failed to exercise her parental duty to protect her child, but the indictment did not charge her with breach of her parental duty, but with assault.

APPEAL by defendant from *Farmer, Judge.* Judgment entered 27 August 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 30 April 1981.

On 28 April 1980, defendant was indicted under G.S. 14-32 as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 9th day of December, 1979, in Wake County Aleen Estes Walden unlawfully and wilfully and feloniously assault Lamont Walden, age one year, with a certain deadly weapon, to wit: a leather belt with a metal buckle, inflicting serious bodiyly [*sic*] injuries, not resulting in death, upon the said Lamont Walden, to wit: numerous cuts and bruises causing severe blood loss and requiring hospitalization."

Lamont Walden is defendant's son. Defendant was convicted by a jury and sentenced to 5-10 years imprisonment.

The State's evidence was as follows: Three of defendant's children, aged 7, 8, and 10, testified that Bishop Hoskins, a friend of defendant's, beat Lamont with a belt on Sunday, 9 December 1979. Defendant was in the room when Lamont was being beaten but did not try to help Lamont. Defendant told the two oldest children to testify that their father beat them, or else they would never see her again. Lamont, who was one year old, was taken to the hospital by a social worker. He was hospitalized for over a week with severe injuries, including loss of blood. In the doctor's opinion, the injuries were caused by hard blows with a linear object.

The defendant's evidence tended to show that she loved all of her children and would not hurt them. The defendant's estranged husband came to the apartment and beat Lamont despite her efforts to prevent him. Bishop Hoskins never beat her children.

Attorney General Edmisten by Assistant Attorney General Christopher P. Brewer for the State.

Brenton D. Adams for defendant appellant.

CLARK, Judge.

[1] The State first proceeded against defendant by warrant dated 12 December 1979. That warrant charged defendant with misdemeanor child abuse on 8 December 1979. The charge was dismissed on 25 April 1980. A second warrant for defendant's ar-

rest was issued on 3 April 1980. It was pursuant to this second warrant that defendant was indicted for the 9 December 1979 assault upon her son. The case came on for trial on 25 August 1980. Defendant moved to dismiss the case under G.S. 15A-701(a1) which requires that defendant go to trial within 120 days of her arrest, criminal summons, waiver of indictment, or indictment. Subdivision (3) of the statute further provides that when a charge is dismissed and the defendant is later charged again "with the same offense or an offense based upon 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" the trial must take place within 120 days of the original charge. Defendant argues that the misdemeanor child abuse on 8 December and the felonious assault on 9 December were part of the same series of acts or transactions connected together or constituting parts of a single scheme or plan. We cannot agree.

Evidence at trial tended to show that a witness heard a child crying from around 9:00 p.m. until 11:00 or 11:30 p.m. on the night of 8 December, and that he heard what sounded like a younger child "screaming" and "hollering" the next morning at about 10:00 a.m. These appear to have been two different incidents. Neither side offered evidence at trial that would suggest that these were connected incidents. To the contrary, the State's evidence was that the beating on Sunday morning, 9 December, came as an immediate reprisal for Lamont's failure to help unpack some clothes. The evidence is uncontradicted that there were two separate assaults on 8 December and 9 December 1979. There was nothing to indicate a plan or scheme of extended abuse of Lamont Walden, but simply a vicious temper which was independently triggered on 9 December and resulted in an assault immediately thereafter. Under these circumstances we fail to see how the institution of an action against defendant based upon an apparently unrelated beating, inflicted on the day before the beating which is the subject of the instant indictment, should begin the running of the Speedy Trial Act's 120-day-limitation. The State had 120 days from 28 April 1980 to bring defendant to trial. Her trial began on 25 August 1980, which was within this period.

[2] Defendant was charged and convicted under G.S. 14-32 as a principal in the second degree in that she aided and abetted Bishop Hoskins in his assault on young Lamont Walden. The only

evidence for the State tended to show that during the assault defendant did absolutely nothing. She did not hinder his actions, but neither did she help. The cases are abundant to the effect that, at least under ordinary circumstances, defendant could not be found guilty of assault on a theory of aiding and abetting for merely standing idly by while another committed the assault.

> "[O]ne who is present and sees that a felony is about being committed and does in no manner interfere, does not thereby participate in the felony committed. Every person may, upon such an occasion, interfere to prevent, if he can, the perpetration of so high a crime; but he is not bound to do so at the peril, otherwise, of partaking of the guilt. It is necessary, in order to have that effect, that he should do or say something showing his consent to the felonious purpose and contributing to its execution, as an aider and abettor."

State v. Hildreth, 31 N.C. (9 Ire.) 440, 444, 51 Am. Dec. 369, 371 (1849) (Ruffin, C.J.).

> "In the case of *S. v. Ham*, 238 N.C. 94, 76 S.E. 2d 346, this Court, in substance, held that in order to render one who does not actually participate in the commission of the 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 or perpetrators of the crime, or by his conduct made it known to such perpetrator or perpetrators that he was standing by to render assistance when and if it should become necessary.
>
> In *S. v. Birchfield*, 235 N.C. 410, 70 S.E. 2d 5, Ervin, J., speaking for the Court, said: 'The mere presence of a person at the scene of a crime at the time of its commission does not make him a prinicpal in the second degree; and this is so even though he makes no effort to prevent the crime, or even though he may silently approve of the crime, or even though he may secretly intend to assist the perpetrator in the commission of the crime in case his aid becomes necessary to its consummation. *S. v Hart*, 186 N.C. 582, 120 S.E. 345; *S. v. Hildreth*, 31 N.C. 440, 51 Am. D. 369.' See also *S. v. Burgess*, 245 N.C. 304, 96 S.E. 2d 54 and *S. v. Banks*, 242 N.C. 304, 87 S.E. 2d 558."

State v. Bruton, 264 N.C. 488, 498, 142 S.E. 2d 169, 176 (1965) (Denny, C.J.).

A well-noted exception to the rule that a bystander may not be convicted for her mere presence at the crime scene is stated thus: " '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 encouraging.' " *State v. Jarrell*, 141 N.C. 722, 725, 53 S.E. 127, 128, 8 Ann. Cas. 438, 439 (1906). *See also State v. Birchfield*, 235 N.C. 410, 70 S.E. 2d 5 (1952); *State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182 (1973); *In re Rich*, 49 N.C. App. 165, 270 S.E. 2d 500 (1980); 1 Wharton's Criminal Law (12 Ed.) § 246 (1932).

Because defendant's state of mind is in issue, and a defendant's mental processes are seldom provable by direct evidence, it is the rule in this jurisdiction that "the guilt of an accused as an aider and abettor may be establishd by circumstantial evidence." *State v. Redfern*, 246 N.C. 293, 297, 98 S.E. 2d 322, 326 (1957). In determining whether a person is guilty as a principal in the second degree, evidence of his relationship to the actual perpetrator, of motive tempting him to assist in the crime, his presence at the scene, and his conduct before and after the crime are circumstances to be considered. *State v. Birchfield*, 235 N.C. 410, 70 S.E. 2d 5 (1952).

Defendant in this case was more than a mere bystander and more than the mother of the assault victim. There was also evidence that she was very "close" to Hoskins, the perpetrator of the assault, and that he exerted a strong influence over her. The evidence further showed that Hoskins had beaten defendant's children in her presence before, that in the instant case he beat Lamont for an extended period of time, that during this assault defendant had responded to her son's anguished cries by telling him to hush, and that defendant had beaten her children in the past with a lamp cord in Hoskins' presence.

In addition to the above facts, there is the testimony of defendant at trial that it was not Hoskins, but her former husband who beat little Lamont and that she tried to protect the child, but was herself struck when she sought to interfere. This testimony was obviously not believed by the jury and could reasonably be regarded by the jury as tending "to reflect the

mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate herself," *State v. Redfern*, 246 N.C. at 297-98, 98 S.E. 2d at 326, and her friend Hoskins as well.

We believe the totality of the circumstances warrants the inference by the jury that defendant knew her silent presence during the beating inflicted upon her son would be regarded by Hoskins as encouragement and support, particularly in light of the testimony that she had witnessed prior beatings by Hoskins (indicating that she was aware of the severity of his treatment of the children); that she had never interfered in the past; that she had herself beaten the children in Hoskins' presence; and that she lied and instructed her children to lie to conceal Hoskins' complicity in the assault.

[3] The Judge's instruction, however, went beyond the scope of the law just explained. The Judge instructed as follows:

> "So I charge that if you find from the evidence beyond a reasonable doubt, that on or about December 9th, 1979, Bishop Hoskins committed assault with a deadly weapon inflicting serious injury on Lamont Walden, that is that Bishop Hoskins intentionally hit Lamont Walden with a belt and that the belt was a deadly weapon, thereby inflicting serious injury upon Lamont Walden; and that the defendant was present at the time the crime was committed and did nothing and that in so doing the defendant knowingly advised, instigated, encouraged or aided Bishop Hoskins to commit that crime; or that she was present with the reasonable opportunity and duty to prevent the crime and failed to take reasonable steps to do so; it would be your duty to return a verdict of guilty of assault with a deadly weapon, inflicting serious injury."

In addition to the well-established ground just discussed, the jury was instructed to convict defendant if they found "that she was present with the reasonable opportunity and duty to prevent the crime and failed to take reasonable steps to do so."

This case was tried on a theory of aiding and abetting. The judge charged the jury on the theory of aiding and abetting. We have, however, been unable to discover any law to the effect that failure to prevent a crime by one who is present with the

reasonable opportunity and duty to prevent it constitutes aiding and abetting.

A correct instruction would have been that these circumstances could be considered by the jury as bearing on the communication to the perpetrator of defendant's encouragement and support. Both parties knew that the assault victim was defendant's son. The jury could infer from this mutual knowledge that defendant knew that Hoskins would view her refusal to perform her parental duty to protect her child as indicative of her support and encouragement of his actions. Unfortunately, this is not how the charge reads, and not how we think the jury would understand it.

As it appears in the record, the charge allowed the jury to find defendant guilty of assault with a deadly weapon if they found that she was present at the time of the assault and failed to exercise her parental duty to protect her child. The indictment did not charge her with breach of her parental duty, but with assault. Under the law of this State she could only be convicted of assault if she aided and abetted the perpetrator of the offense. The law makes no reference to the failure to perform a legal duty, but rather requires that defendant in some way communicate her encouragement to the perpetrator. The fact that defendant failed to perform her parental duty was relevant as one circumstance that the jury could consider in determining the issue of whether defendant knew that her presence would be regarded by the perpetrator as encouragement or support, but the jury's finding on this question of fact should not have been made dispositive of the case. The issue of defendant's state of mind should have been left to the jury to determine based upon *all* of the relevant circumstances. Defendant is entitled to a new trial in which the significance of her breach of her parental duty is properly explained as it relates to the issue of defendant's state of mind at the time of the crime.

We must order a new trial for error in the instructions to the jury, but we feel it appropriate to add that we find no error in admitting into evidence prior beatings of the child by defendant, which was relevant to show defendant's state of mind and her support to the perpetrator. Nor do we find error in admitting the opinion evidence of the physician since his examination of Lamont

on 10 December 1979 gave him sufficient foundation upon which to base his opinion of how the wounds occurred and when they were inflicted.

New trial.

Judges VAUGHN and WELLS concur.

GARLAND RAY BRIGGS AND JOHN CLIFFORD SMITH v. MID-STATE OIL COMPANY

No. 8019SC1095

(Filed 21 July 1981)

1. **Appeal and Error § 6.2— judgment on fewer than all claims—appeal not premature**

Where plaintiffs alleged as their first claim for relief that defendant had breached its contract to provide severance pay and, as a second claim for relief, that defendant had made fraudulent inducements and misrepresentations concerning severance pay and that plaintiffs had been damaged thereby, plaintiffs' appeal from the trial court's entry of summary judgment for defendant on plaintiffs' second claim was not premature, since, if summary judgment as to the alleged fraud by defendant were improperly granted, plaintiffs had a "substantial right" to have this claim for relief tried at the same time at which the claim for relief based on breach of contract was tried.

2. **Fraud § 12— fraudulent representations by employer—summary judgment for employer proper**

In an action to recover for fraudulent inducements and misrepresentations allegedly made by defendant employer concerning severance pay, trial court properly entered summary judgment for defendant where the evidence tended to show that plaintiffs' jobs were terminable at will; at most a promise of severance pay by defendant may have caused plaintiffs to forego looking for or accepting new jobs; but there was neither particular allegation nor specific evidence that either plaintiff gave up either one of these actions or anything else as a result of the alleged severance pay program and there was thus no allegation or proof that plaintiffs relied in any way on any alleged misrepresentation of existing fact made with intent to deceive.

APPEAL by plaintiffs from *Albright, Judge.* Judgment entered 17 June 1980, in Superior Court, ROWAN County. Heard in the Court of Appeals 6 May 1981.

Plaintiffs, both former employees of defendant, instituted this lawsuit to recover damages they allegedly incurred when the defendant terminated their employment without providing severance pay. From the pleadings, it appears that, on or about 1 July 1977, Mid-State Oil Company merged with a number of oil companies with the surviving company retaining the name of Mid-State Oil Company. At the time of the merger, organizational changes were made, operations were restructured, and jobs were eliminated. Defendant initiated a severance pay benefit program to cover those persons whose jobs had to be terminated during the merger period.

According to the deposition of defendant's general manager, at the time the severance pay program was explained to its employees, there was an organizational chart that showed which jobs were to be eliminated. In defendant's Salisbury, North Carolina office, out of which the plaintiffs operated, there was to be a reduction in staff of two, neither one of whom was a plaintiff herein. Plaintiffs alleged that the severance pay benefits were generally promised to all employees when jobs were terminated as a result of the merger.

The jobs held by plaintiffs Smith and Briggs were terminated on 17 January 1978, and 10 April 1978, respectively. Neither employee received severance pay.

In their complaint against defendant, plaintiffs alleged, as their first claim for relief, that defendant had breached its contract to provide severance pay. As a second claim for relief, plaintiffs asserted that defendant had made fraudulent inducements and misrepresentations concerning severance pay and that, as a result of these inducements, plaintiffs had been damaged. They sought both compensatory and punitive damages.

Defendant filed a motion to dismiss the second claim for relief and a motion to strike plaintiffs' reference to punitive damages, in its second claim for relief and their prayer for punitive damages. At the hearing on the motion, the trial court reviewed depositions of both the plaintiffs and of defendant's general manager. After concluding that defendant gave plaintiffs proper notice that it was converting its motion to dismiss to a motion for summary judgment, the court found that, as to plaintiffs' second claim for relief, there was no genuine issue of material

fact and defendant was entitled to judgment as a matter of law. The court also allowed defendant's motion to strike plaintiffs' prayer for punitive damages which it found to be "inextricably dependent upon the viability of the second claim for relief . . . ."

From this judgment, plaintiffs appealed.

Ketner and Rankin by Robert S. Rankin, Jr., and David B. Post, for plaintiff appellants.

Hudson, Petree, Stockton, Stockton & Robinson, by Norwood Robinson and F. Joseph Treacy, Jr., for defendant appellee.

CLARK, Judge.

[1] The first issue this Court must deal with is whether plaintiffs' appeal at this time is premature. Defendant asserts that it is premature because no substantial right of plaintiffs was affected, G.S. 1-277, because there was no judgment on all of the claims, and because the trial court did not enter a final judgment, as required by G.S. 1A-1, Rule 54(b), by determining that there is no just reason for delay. Because of the Supreme Court opinion in *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976), we are compelled to reject defendant's argument.

G.S. 1A-1, Rule 54(b) allows the trial court, in cases involving multiple claims, to enter final judgment as to one or more but fewer than all the claims "only if there is no just reason for delay and it is so determined in the judgment." Defendant correctly notes that the trial judge below failed to make this determination. In construing this statutory requirement in *Oestreicher*, however, the Supreme Court emphasized the following portion of Rule 54(b):

> "In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise *except as expressly provided by these rules or other statutes.*

290 N.C. at 121-22, 225 S.E. 2d at 800. (Emphasis added). The Supreme Court concluded that the rule does not restrict the right

of appeal provided by G.S. 1-277 (and G.S. 7A-27(d)). G.S. 1-277 allows appeal from any judicial order or determination which affects a substantial right. The Supreme Court in *Oestreicher* allowed an appeal from partial summary judgment where the trial court had allowed summary judgment as to a claim for relief in which plaintiff sought punitive damages for fraudulent acts alleged in the first claim for relief, for which there was no summary judgment. Additionally, the trial court had granted summary judgment as to the third claim for relief which alleged anticipatory breach of contract and which arose from the same contract on which the first two claims for relief were based. The court concluded:

> "The causes of action that the plaintiff allege [*sic*] are related to each other. He seeks punitive damages in the second cause because of the alleged misconduct of defendant in the first cause of action. [The trial judge] required plaintiff to try his first cause of action, relating to the alleged fraudulent failure of the defendant to pay proper rental. To require him possibly later to try the second cause of action for punitive damages would involve an indiscriminate use of judicial manpower and be destructive of the rights of both plaintiff and defendant. Common sense tells us that the same judge and jury that hears the claim on the alleged fraudulent breach of contract should hear the punitive damage claim based thereon. The third cause of action alleged an anticipatory breach of contract. This arose from the same lease contract that gave birth to the first and second causes. By the same token, the same judge and jury should hear the third cause along with the first and second ones, assuming the plaintiff's cause is not subject to summary judgment.
>
> We believe that a 'substantial right' is involved here. If the causes of action were not subject to summary judgment, plaintiff had a substantial right to have all three causes tried at the same time by the same judge and jury."

290 N.C. at 130, 225 S.E. 2d at 805.

This definition of "substantial right" is a broad one and applies to the situation before us. If summary judgment as to the alleged fraud by defendant were improperly granted, plaintiffs have a "substantial right" to have this claim for relief tried at the

same time at which the claim for relief based on breach of contract is tried. The appeal, therefore, is not premature.

[2] The sole substantial question presented by this appeal is whether the trial court properly granted summary judgment as to plaintiffs' second claim for relief. Upon a motion for summary judgment, the duty of the trial judge is to determine whether there is a genuine issue of material fact which should be tried by a jury. *Lambert v. Power Co.*, 32 N.C. App. 169, 231 S.E. 2d 31, *disc. review denied*, 292 N.C. 265, 233 S.E. 2d 392 (1977). The moving party must make it absolutely clear that he is entitled to judgment as a matter of law. *Id.* A defending party may show as a matter of law that he is entitled to summary judgment by establishing that there is no genuine issue of material fact concerning an essential element of the plaintiff's claim for relief and that the plaintiff cannot prove the existence of that element. *Best v. Perry*, 41 N.C. App. 107, 254 S.E. 2d 281 (1979). In *Russo v. Mountain High, Inc.*, 38 N.C. App. 159, 247 S.E. 2d 654 (1978), this Court stated:

> "Clearly, if the defendant moving for summary judgment in a fraud case presents material which effectively negates even one of the essential elements of fraud, summary judgment in defendant's favor should be allowed. It is not necessary that defendant's material negate *all* of the essential elements . . . ."

Id. at 162, 247 S.E. 2d at 656. Hence, in a case involving a claim for relief based on fraud, summary judgment is proper where there is no genuine issue of material fact with regard to an essential element of fraud, negating that element as a matter of law.

The essential elements of actionable fraud are well-established: There must be a knowing misrepresentation of existing fact, made with intent to deceive, which the other party reasonably relies on to his deception and detriment. *Moore v. Trust Co.*, 30 N.C. App. 390, 226 S.E. 2d 833 (1976). Under the provisions of G.S. 1A-1, Rule 9(b), the complaining party is required to state with particularity the circumstances constituting fraud.

In the case at bar, the plaintiffs' second claim for relief reads as follows:

"Second Claim for Relief

13. Plaintiffs reallege and incorporate herein by reference the allegations contained in paragraphs 1 through 12 of this complaint.

14. At the time defendant induced the plaintiff's [*sic*] to continue their employment with defendant, defendant knew that there would be a reduction in business as a result of curtailed and modified operations, that there would be a continued reduction of employees, and that it would provide severance pay to only certain selected employees, which did not include the plaintiffs, rather than to all employees remaining with the company as it had stated.

15. That at the time plaintiffs' employment was terminated, defendant advised plaintiffs that the terminations were due to lack of work. However, defendant continues to have positions for home fuel oil delivery drivers in their Salisbury operation, and have hired persons not previously with the company to fill such positions, but plaintiff Briggs was never offered his position back. In addition, defendant continued the employment of a tank transport driver with less experience and seniority than plaintiff Smith and has employed independent tank-truck drivers to transport oil to defendant's bulk plant which is the job that plaintiff Smith had held.

16. The actions of defendant were taken with the intent to avoid payment of severance pay to the plaintiffs as well as the payment of other accrued benefits based upon their seniority with the company.

17. As a result of the fraudulent inducements and misrepresentations of defendant, plaintiffs Briggs and Smith have suffered disruptions in their lives, loss of income, and other expenses, all of which has damaged them in the amounts in excess of $5,063.00 and $5,394.40, respectively, to be proved at trial. In addition, plaintiffs are entitled to punitive damages in the amount of $8,000.00 each."

According to the pleadings and to the depositions, both plaintiffs were employed for an indefinite period of time. Plaintiff

Briggs in his deposition stated that "[w]hen I went to work for Mid-State Oil in 1962 I did not have a written employment contract. My understanding at that time was that I was employed there for as long as they needed me, indefinitely." Similarly plaintiff Smith in his deposition stated that "[t]here was no agreement, either written or oral, as to the terms or length of my employment with Mid-State. The length of my employment was indefinite." It is clear that the jobs of the two men were terminable at the will of either individual or of the defendant, irrespective of the quality of performance by the other party. *See Still v. Lance,* 279 N.C. 254, 182 S.E. 2d 403 (1971).

The evidence, viewed in the light most favorable to plaintiffs, *Brice v. Moore,* 30 N.C. App. 365, 226 S.E. 2d 882 (1976), established this fact situation: at the time of the merger requiring reorganization, plaintiffs were promised that, if their jobs were terminated, they would receive severance pay calculated on the basis of years of employment. Plaintiffs did nothing. When their jobs were terminated, as was possible with or without cause, they were denied severance pay. Both plaintiffs thereafter found jobs.

Plaintiffs failed to allege in their complaint and failed to show in the depositions which were before the trial court, that they had relied in any way on any alleged misrepresentation of existing fact made with intent to deceive. The allegation contained in paragraph 14 of the complaint does not alter the status of plaintiffs' employment. Their jobs were terminable at will; at most a promise of severance pay may have caused them to forego looking for, or accepting, a new job. There is, however, neither particular allegation nor specific evidence that either plaintiff gave up either one of these actions or anything else as a result of the alleged severance pay program.

It is unnecessary for this Court to discuss the other elements of actionable fraud since, as stated earlier, a moving party is entitled to summary judgment when he can establish that there is no genuine issue of material fact concerning an essential element of plaintiff's claim for relief and that plaintiff cannot prove the existence of the element. While we recognize the distinct possibility that there are other elements about which there were no genuine issues of material fact, this Court finds that there was no genuine issue of material fact as to plaintiffs' lack of reliance on defend-

ant's alleged misrepresentations. Summary judgment on the claim for relief based on fraud was, therefore, properly allowed; it follows that the motion to strike plaintiffs' prayer for punitive damages based on fraud was also properly allowed.

The judgment below is, therefore,

Affirmed.

Judges MARTIN (Robert M.) and HILL concur.

TOWN OF SPRING HOPE, A MUNICIPAL CORPORATION v. BEN T. BISSETTE

No. 807DC1016

(Filed 21 July 1981)

Municipal Corporations § 4.4— construction of water and sewer facilities—setting of rates to recoup costs

Where the cost of necessary new facilities constructed to serve a municipality's customers are known or are predictable, rates calculated to begin recoupment of those costs are not unlawful or illegal merely because the new facilities have not yet been put into actual use, and the test is not whether any particular customer has directly benefited from the use of a particular component of the utility plant, but whether the municipal authority has acted arbitrarily in establishing its rates.

Judge CLARK dissenting.

APPEAL by plaintiff from *Ezzell, Judge.* Judgment entered 15 July 1980 in District Court, NASH County. Heard in the Court of Appeals 28 April 1981.

Plaintiff brought this action to recover charges for sewer services furnished by plaintiff to defendant's launderette for the period of 25 June 1979 through 31 August 1979, in the sum of $306.00. Defendant answered, denying the indebtedness and alleging that the sewer charges sought to be recovered by plaintiff were unjust and illegal. The matter was heard by the trial court, without a jury. Based upon his findings of fact and conclusions of law, the trial court entered judgment for defendant from which plaintiff has appealed.

Valentine, Adams & Lamar, by I. T. Valentine, Jr., for plaintiff-appellant.

Ben T. Bissette, defendant-appellee, pro se.

WELLS, Judge.

To put this matter in proper factual context, we quote the trial court's findings of fact in their entirety.

> 1. The Town is a municipal corporation situated in Nash County, North Carolina, and was organized and exists under and by virtue of the laws of the State of North Carolina.
>
> 2. The plaintiff, a municipality, is authorized to operate a water and sewer system for the benefit of its citizens and persons outside of the corporate limits of the Town who pay a rate set by the municipality for these services.
>
> 3. Prior to July 1, 1979, it became necessary for the Plaintiff Town to improve and update its water and sewer system, particularly its waste water disposal facilities to meet federal and state guidelines and requirements and this necessitated a considerable outlay of capital.
>
> 4. Construction was commenced prior to July 1, 1979, on a new waste water treatment facility which was not completed and placed in operation until December, 1979.
>
> 5. The plaintiff increased its water and sewer rates to help pay for the new water treatment facility. The rates were increased effective July 1, 1979, and the defendant was sent a bill for $413.00 covering the period from June 25th through August 31, 1979.
>
> 6. While the defendant was engaged in the business of operating a launderette in the Town of Spring Hope during the time covered by the bill and receiving water from the Town and using the Town's sewer system, the new waste water disposal facility had not been completed and was not in operation during any of the time covered by the bill presented to him and, in fact, was not completed until December, 1979.

7. While the defendant was a user of the water-sewer system during the period covered by this bill, he was not a user of the new plant facility or new waste water treatment facility as the same was not in operation during the period of time covered by his bill.

Upon these findings of fact, the trial court entered the following pertinent conclusion of law:

3. The Town has complied with all laws in connection with the increase of rates, but since the increase in rates was made necessary to finance new waste water treatment facilities and since the defendant was not a user of the new waste water facility during the time covered by the bill, he is not required to pay the sewer portion of the bill.

Plaintiff made no exceptions to the trial court's findings of fact, nor does it dispute them in its brief. The sole question before us, therefore, is whether these findings support the court's conclusions of law and the judgment. *Employers Insurance v. Hall*, 49 N.C. App. 179, 180, 270 S.E. 2d 617, 618 (1980); *Russell v. Taylor*, 37 N.C. App. 520, 524, 246 S.E. 2d 569, 572 (1978).

The setting of rates and charges for water and sewer services furnished by a municipality to its customers is a proprietary function, subject only to limitations imposed upon such action by statute or contractual obligation assumed in such actions. *See Aviation, Inc. v. Airport Authority*, 288 N.C. 98, 102-103, 215 S.E. 2d 552, 555 (1975); *see also Construction Co. v. Raleigh*, 230 N.C. 365, 53 S.E. 2d 165 (1949). The statutory grant of authority to municipalities in North Carolina to set rates and charges for water and sewer services is contained in G.S. 160A-314(a), as follows:

A city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise. Schedules of rents, rates, fees, charges, and penalties may vary according to classes of service, and different schedules may be adopted for services provided outside the corporate limits of the city.

Under this broad, unfettered grant of authority, the setting of such rates and charges is a matter for the judgment and discretion of municipal authorities, not to be invalidated by the courts

absent some showing of arbitrary or discriminatory action. The great weight of authority is to the effect that in the setting of such rates and charges, a municipal body may include not only operating expenses and depreciation, but also capital cost associated with actual or anticipated growth or improvement of the facilities required for the furnishing of such services. *See generally* Annot., 61 A.L.R. 3d 1236 (1975); 12 McQuillin, Municipal Corporations, § 35.37C., at 488 (3d Ed. 1970); C. Rhyne, Municipal Law § 23-7, 500-501 (1957); 3 Yokley, Municipal Corporations § 503, at 214-19 (1958). We concur in this position, and hold that where, as is the case here, the cost of necessary new facilities constructed to serve the municipality's customers are known or are predictable, rates calculated to begin recoupment of those costs are not unlawful or illegal merely because the new facilities have not yet been put into actual use. The test is not whether any particular customer has directly benefited from the use of a discrete or particular component of the utility plant, but whether the municipal authority has acted arbitrarily in establishing its rates.

There is no showing of arbitrary action in the case now before us and we hold that the trial court entered its judgment under a misapprehension of applicable law.

Although the findings of fact by the trial court are not as detailed as the evidence would permit, defendant does not contest the correctness of the level of his bill, only its legality, and we therefore hold that the findings by the trial court are sufficient to require entry of judgment for plaintiff for the unpaid portion of defendant's water and sewer bill.

The judgment of the trial court is reversed and this matter is remanded to the trial court for entry of judgment in favor of the plaintiff.

Reversed and remanded.

Judge VAUGHN concurs.

Judge CLARK dissents.

CLARK, Judge, dissenting:

Municipal action fixing rates which a municipality will charge for services it renders is a proprietary, as opposed to a governmental, function of local government. *Aviation, Inc. v. Airport Authority*, 288 N.C. 98, 215 S.E. 2d 552 (1975). I agree with the majority that, in determining the rates it will charge for performance of a proprietary function, the governing board of a municipality "acts as does the board of directors of a private corporation owning and operating a like facility, subject only to limitations imposed upon it by statute or by contractual obligations assumed by it." *Id.* at 103, 215 S.E. 2d at 555. I disagree, however, that, the statute allowing imposition of water and sewer rates, G.S. 160A-314(a), is an unfettered grant of authority allowing a municipality to charge for services not yet furnished by the municipality.

As I construe G.S. 160A-314(a), the authority of a municipality to fix rates for water and sewer services is limited to charges for services which are actually being furnished. In this interpretation, I have attempted to construe strictly and precisely the legislative wording of the statute. While a municipality has discretion to establish rates for services furnished, it does not have the authority to charge for services "to be furnished." Contrast with G.S. 160A-314(a) the parallel grant of authority to water and sewer authorities to fix rates, G.S. 162A-9, which reads, in pertinent part:

> "Each authority shall fix, and may revise from time to time, reasonable rates, fees and other charges for the use of and for the services furnished *or to be furnished* by any water system or sewer system or parts thereof owned or operated by such authority." [Emphasis added.]

To protect against possible abuses of this broad grant of power, the legislature directed water and sewer authorities to hold all moneys received pursuant to their statutory authority as trust funds to be applied solely as provided by statute. G.S. 162A-11. There is no comparable statute in the article granting municipalities the power to set water and sewer rates. Additionally, plaintiff's attempt to analogize its ability to charge in advance for services to be rendered by facilities under construction, to the ability of public utility companies to charge in advance for serv-

ices to be rendered by facilities under construction, further emphasizes its lack of statutory authority to charge for future services. Pursuant to the provisions of G.S. 62-133(b)(1), the North Carolina Utilities Commission, in establishing rates for public utilities, has the explicit authority to consider "reasonable and prudent expenditures for construction work *in progress* . . . ." [Emphasis added.]

I believe that these two statutes accentuate the statutory restrictions placed upon municipalities in setting water and sewer rates. Had the General Assembly intended that municipalities be able to establish rates for services to be furnished, it could very easily have expressed this intention. The General Assembly having clearly expressed its will, the courts of this State are without power to interpolate or superimpose conditions which are not called for in the statute. *See, e.g., Board of Architecture v. Lee*, 264 N.C. 602, 142 S.E. 2d 643 (1965).

In concluding that municipalities have no power to establish rates to pay for construction of new, unused facilities, I am not unmindful of the dilemma this ruling poses for local governments. I believe, however, that the legislative scheme grants towns and cities the ability to finance new construction of water and sewage disposal systems through the levying of special assessments. *See* G.S. 160A-216(3), (4). It is noteworthy that plaintiff argued in the present case as though the increase in rates were an assessment. The increase, however, was not an assessment. The nature of the charge was not that of an assessment. " 'It is the majority rule that sewer service charges are neither taxes nor assessments, but are tolls or rents for benefits received by the user of the sewer system . . . .' " *Covington v. Rockingham*, 266 N.C. 507, 511-12, 146 S.E. 2d 420, 423 (1966), quoting Rhyne, MUNICIPAL LAW, *Sewers and Drains*, § 20-5, p. 462, et seq. Furthermore, the procedure for establishing an assessment was not followed by plaintiff.

Throughout the litigation of the case *sub judice*, the position of the plaintiff was consistent: the increase in overall water and sewer charges was caused by the need to service the debt related to, and otherwise to pay for, the waste water treatment facility which was not at the time in use. Under North Carolina law, this increase was, therefore, improper.

I would affirm the judgment of the trial court.

FRED M. SIMMONS AND WIFE, EUNICE S. SIMMONS v. UNITED STATES OF AMERICA, ACTING THROUGH THE FARMERS HOME ADMINISTRATION, U.S. DEPARTMENT OF AGRICULTURE, JAMES O. BUCHANAN, TRUSTEE

No. 8127SC39

(Filed 21 July 1981)

Quieting Title § 1; Reformation of Instruments § 1.1— action to reform instrument —no jurisdiction in State court

Where plaintiffs sought to remove their homeplace from a deed of trust, alleging that they had included their homeplace only upon representations by the Government that a loan of $50,000 was forthcoming and that the loan was never made, the trial court properly concluded that plaintiffs' action was one to reform an instrument on the basis of a unilateral mistake based upon misrepresentation and that it was without jurisdiction to hear the action, and there was no merit to plaintiffs' argument that their action was one in the nature of an action to quiet title such that the court had jurisdiction over defendants pursuant to 28 U.S.C. § 2410(a).

Judge WELLS concurring in part and dissenting in part.

APPEAL by plaintiffs from *Howell, Judge.* Order entered 29 October 1980 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 4 June 1981.

Plaintiffs Fred M. Simmons and his wife Eunice S. Simmons instituted this civil action in a complaint filed 28 December 1977 which contained the following pertinent allegations: Plaintiffs made application to defendant United States of America acting through the Farmers Home Administration of the U.S. Department of Agriculture (hereinafter "the Government") for a loan of approximately $136,000 to finance the construction of an airport on a tract of land in Cleveland County owned by plaintiffs; as collateral for the loan, plaintiffs offered the said tract, containing 31.52 acres more or less, and hereinafter referred to as Tract I; the Government was "content and satisfied" with the collateral offered, but "upon further consideration," the Government informed plaintiffs that the loan limit was $100,000; the Government, however, assured plaintiffs that an additional loan of $50,000 for "purchase of equipment, maintenance, and operating capital" would be "forthcoming"; at the request of the local office of the Government, and because the additional loan was forthcoming, plaintiffs "agreed to also offer their home containing 2.4 acres, more or less," and hereinafter referred to as Tract II, as

additional collateral for the $100,000 loan; plaintiffs would not have included Tract II as collateral "if they had not been assured by the Government that such would facilitate the closing" of the additional $50,000 loan, and the Government "had not required inclusion of the 2.4 acres as a condition for making" the $100,000 loan; on 5 February 1976 plaintiffs signed a note in the principal amount of $100,000 secured by a deed of trust to defendant James O. Buchanan, Trustee covering Tract I and Tract II, and the loan proceeds were disbursed for construction of the airport; the Government assured plaintiffs as late as the summer of 1977 that the additional $50,000 loan would be forthcoming or else the Government would "subordinate its first mortgage to a private lender"; plaintiffs expended in excess of $20,000 for operating expenses "in reliance upon the Government's assurance" through its local office that the additional $50,000 loan would be forthcoming and could be approved by the local office, and that the $50,000 loan "in fact had been approved by that office"; the promised additional financing was never extended by the Government to plaintiffs; plaintiffs have not paid the installment due on 1 January 1977; on 1 December 1977, after notice to plaintiffs, a hearing was held before the Clerk of Superior Court for Cleveland County on the Government's request for authority to foreclose on the deed of trust, and after a result in its favor the Government notified plaintiffs of its intention to hold a foreclosure sale of both tracts on 29 December 1977.

Plaintiffs sought a "moratorium" for payment of the past due installment in order to have time to secure other financing and also sought a temporary restraining order and a preliminary injunction enjoining the foreclosure sale. In addition, plaintiffs averred that they are entitled to a "release" of Tract II from the deed of trust, and since the Government "did not perform the condition upon which such land was included in the Deed of Trust," and because of a "failure of consideration," plaintiffs are "entitled to have the cloud of such Deed of Trust removed from their title to the 2.4 acre homeplace and title thereto quieted." Plaintiffs further averred that the Government could be named a party pursuant to 28 U.S.C. § 2410.

A temporary restraining order enjoining the foreclosure sale was entered on 28 December 1977. On 25 January 1978, a consent order was entered providing that the temporary restraining order

would remain in effect "until the resolution of this action." The Government answered 6 March 1978, admitting that plaintiffs approached the Government for a $136,000 loan to construct an airport, that plaintiffs offered Tract I as collateral, that the $100,000 note and deed of trust were duly executed, and that the Government instituted foreclosure proceedings when plaintiffs defaulted on the note, but denying the other material allegations of the complaint. The Government also averred that the court was without jurisdiction in that "28 U.S.C. 2410 does not confer any jurisdiction to this court or any other court" and that the Government "has not otherwise waived its sovereign immunity." The Government further alleged that defendant James O. Buchanan, Trustee was acting in his capacity as an employee of the Government at all times alleged in the complaint, and thus was not a proper party.

On 22 October 1979, defendants moved to dismiss the complaint pursuant to G.S. § 1A-1, Rule 12(h)(3), for lack of jurisdiction over the subject matter. After a hearing, the court concluded as a matter of law that "this is an action to reform an instrument on the basis of alleged mutual mistake or on the basis of a unilateral mistake based upon misrepresentation" and that the court was therefore without jurisdiction. From an order dismissing their complaint, plaintiffs appealed.

Hamrick, Mauney, Flowers, Martin & Deaton, by W. Robinson Deaton, Jr., for the plaintiff appellants.

United States Attorney Harold M. Edwards by Assistant United States Attorney Jerry W. Miller; and Senior Attorney Lawrence B. Lee, Office of the General Counsel, United States Department of Agriculture, for the defendant appellee United States of America.

HEDRICK, Judge.

Plaintiffs assign error to the court's conclusions that the action was one to reform an instrument on the basis of a unilateral mistake based upon misrepresentation and that it was without jurisdiction to hear this action, and to the order entered thereon. Plaintiffs argue that their action was in the nature of an action to quiet title such that the court had jurisdiction over defendants pursuant to 28 U.S.C. § 2410(a). We do not agree.

28 U.S.C. § 2410(a) provides:

> Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court have jurisdiction of the subject matter—
>
> (1) to quiet title to,
>
> (2) to foreclose a mortgage or other lien upon,
>
> (3) to partition,
>
> (4) to condemn, or
>
> (5) of interpleader or in the nature of interpleader with respect to,
>
> real or personal property on which the United States has or claims a mortgage or other lien.

The United States, like all sovereigns, cannot be sued except so far as it has consented to be sued. *Finch v. Small Business Administration*, 252 N.C. 50, 112 S.E. 2d 737 (1960). *See also Hudson County Board of Chosen Freeholders v. Morales*, 581 F. 2d 379 (3d Cir. 1978). 28 U.S.C. § 2410 operates as a waiver of sovereign immunity and consequently, within its ambit, allows suits to be maintained against the United States. *Hudson County Board of Chosen Freeholders v. Morales, supra; Broadwell v. United States*, 234 F. Supp. 17 (E.D. N.C. 1964), *affirmed*, 343 F. 2d 470 (4th Cir.), *cert. denied*, 382 U.S. 825, 15 L.Ed. 2d 70, 86 S.Ct. 57 (1965).

Plaintiffs concede, and we agree, that the only applicable subsection of 28 U.S.C. § 2410 in the present case is subsection (1). In order for the superior court in this case to entertain plaintiffs' action, the following requirements must be met: plaintiffs' action must be a civil action to quiet title to certain real or personal property, the court must have jurisdiction of the subject matter, and the Government must have or claim a mortgage or other lien on the affected property. Obviously the Government has a "mortgage or other lien" on the property involved in this action. Also, defendants' contentions to the contrary, it would appear that the court would have subject matter jurisdiction of this action if it

were in fact a quiet title action. *See* G.S. §§ 41-10 and 7A-240, -243. Furthermore, the subject matter jurisdiction requirement has not been much of a barrier to maintaining actions in state courts. *See Smith v. United States*, 254 F. 2d 865 (6th Cir. 1958). We note in passing that defendants' contention that the Government can only be named as a third party under 28 U.S.C. § 2410 is not supported by the cases. *See* Annot., 5 L.Ed. 2d 867 (1961) at § 8. Also, defendants' contentions with respect to the necessity for "independent grounds for jurisdiction" in addition to Section 2410 are inapposite, since the cases cited in support thereof are addressed to actions arising under Section 2410 in *federal* courts, *see Wells v. Long*, 162 F. 2d 842 (9th Cir. 1947).

We cannot say, however, that plaintiffs' action is in the nature of an action to quiet title. Plaintiffs contend that their action is one to quiet title since they are seeking to remove a "cloud on the title" of plaintiffs to the second tract. Quiet title actions have been interpreted to include actions to remove a cloud on the title of a plaintiff under both federal law, *United States v. Cosen*, 286 F. 2d 453 (9th Cir. 1961) and under G.S. § 41-10, *York v. Newman*, 2 N.C. App. 484, 163 S.E. 2d 282 (1968). In *York v. Newman, supra*, this Court stated that a cloud on title is itself a title or encumbrance, apparently valid but in fact invalid. 65 Am. Jur. 2d Quieting Title § 9 defines a cloud on title as an outstanding instrument, record, claim, or encumbrance which is actually invalid or inoperative, but which may nevertheless impair the title to the property. In our view, no such "cloud on title" appears in the present case. Plaintiffs merely seek to release Tract II from the deed of trust; they do not contend that the deed of trust is in fact invalid. We agree with the trial court that the action was one to "reform an instrument on the basis of alleged mutual mistake or on the basis of a unilateral mistake based upon misrepresentation." We point out that plaintiffs had the opportunity to seek removal of Tract II from the deed of trust when the hearing was held on the Government's petition to commence foreclosure proceedings, but they failed to do so. We hold the trial court properly dismissed plaintiffs' action for want of jurisdiction over defendants.

Affirmed.

Judge MARTIN (Harry C.) concurs.

Judge WELLS concurs in part and dissents in part.

WELLS, Judge, concurring in part and dissenting in part:

I concur with the majority holding that if the case *sub judice* be an action to quiet title, 28 U.S.C. Sec. 2410(a)(1) would operate to waive the immunity of the United States to this civil action and to give the trial court jurisdiction.

I respectfully dissent from the majority holding that this action is not an action to quiet title. I conclude that it is an action to quiet title, *see Wells v. Clayton*, 236 N.C. 102, 72 S.E. 2d 16 (1952), and *Development Co., Inc. v. Phillips*, 278 N.C. 69, 178 S.E. 2d 813 (1971), and that the judgment of the trial court should be reversed.

IN THE MATTER OF THE WILL OF CLAUDIA HESTER WOMACK, DECEASED

No. 8017SC1168

(Filed 21 July 1981)

1. Wills § 1.3— mental capacity of testator

The law in N.C. presumes that every person has sufficient mental capacity to make a valid will, and those persons contesting the will have the burden of proving that the testator lacked the required mental capacity.

2. Wills § 1.3— mental capacity of testator—requirements

A person has sufficient testamentary capacity within the meaning of the law if he comprehends the natural objects of his bounty, understands the kind, nature, and extent of his property, knows the manner in which he desires his act to take effect, and realizes the effect his act will have upon his estate.

3. Wills § 22— lack of testamentary capacity—insufficiency of evidence

Caveators failed to present sufficient evidence of lack of testamentary capacity to survive the propounders' motions for directed verdict where their evidence indicated that testatrix was 89 years old, physically disabled, and dependent upon others to bring her food and take care of her daily hygiene; she was strong willed, proud, and knowledgeable of her family history; the only evidence as to testatrix's lack of understanding of the kind and extent of her property consisted of testimony that a year or two prior to her death she and the sister who managed their affairs were very concerned over the expense of keeping another sister in a nursing home and testimony by a second

cousin that testatrix did not know the nature and extent of her property; but on cross-examination the second cousin testified that she had never discussed testatrix's business affairs with her and had no way of knowing what testatrix knew about her property.

4. Wills § 21.4— undue influence—insufficiency of evidence

Caveators did not present sufficient evidence of undue influence to survive propounders' motions for directed verdict where caveators presented no evidence of mental weakness; testatrix lived in her own home and had frequent visitors; it was initially at her sister's request and then at her own request that propounders came to stay with her; while the propounders were not direct kin, they were not strangers but had known testatrix most of their lives; testatrix had no close surviving relatives, and more of her first and second cousins supported the will than contested it; the devise to propounders was not a gratuitous one, but was one conditioned upon the rendition of services by propounders; caveators testified that they knew testatrix had to have someone to stay with her but for various reasons none of them could do it; and caveators presented no evidence from which it could be inferred that propounders procured the execution of the will.

ON appeal by propounders from *DeRamus, Judge.* Judgment entered 7 August 1980 in Superior Court, CASWELL County. Heard in the Court of Appeals 26 May 1981.

The testatrix, Claudia Hester Womack, died on 9 February 1980, survived by five first cousins, twenty second cousins and one third cousin. She was the last survivor of a brother and three sisters, none of whom ever married. A paper writing dated 24 November 1979 purporting to be Miss Hester's last will and testament was admitted to probate in common form by the Clerk of Caswell County Superior Court. This paper writing left all of her estate to Willie and Frank Boswell, on the condition that they lived with her and cared for her for the remainder of her life. One of testatrix's first cousins, Floyd N. Strader, filed a caveat alleging that the paper writing was not a valid will because it contained patent and latent ambiguities and therefore was null and void for uncertainty. He further alleged that at the time the alleged will was executed the testatrix lacked testamentary capacity and was under undue influence. In this caveat proceeding, the propounders are Frank and Willie Boswell, the beneficiaries under the will, and three first cousins and five second counsins of the testatrix.

Propounders' motions for a directed verdict on the issues of testamentary capacity and undue influence, made at the close of the caveators' evidence and renewed at the close of all the

evidence, were denied by the trial court. The jury found the paper writing to have been executed by the testatrix in conformance with the requirements of the law for a valid last will and testament, but found that she lacked the necessary mental capacity to make and execute a valid will and that the paper writing was procured by undue influence. From a denial of their motion for judgment notwithstanding the verdict and entry of judgment in accordance with the verdict, the propounders appeal.

Gwyn, Gwyn & Morgan, by Julius J. Gwyn, for propounder appellants.

George B. Daniel and W. Osmond Smith, III for caveator appellees.

ARNOLD, Judge.

The issues to be determined on this appeal are whether the caveators presented sufficient evidence of lack of testamentary capacity and of undue influence exerted by the Boswells to withstand the propounders' motions for a directed verdict and for judgment notwithstanding the verdict.

[1] The law in North Carolina presumes that every person has sufficient mental capacity to make a valid will. *In re Will of Franks*, 231 N.C. 252, 56 S.E. 2d 668 (1949); 1 N. Wiggins, Wills and Administration of Estates in N.C. § 53 (1964). Those persons contesting the will, therefore, have the burden of proving that the testator lacked the required mental capacity. *In re Will of Brown*, 200 N.C. 440, 157 S.E. 420 (1931).

[2] A person has sufficient testamentary capacity within the meaning of the law if he (1) comprehends the natural objects of his bounty; (2) he understands the kind, nature, and extent of his property; (3) he knows the manner in which he desires his act to take effect; and (4) he realizes the effect his act will have upon his estate. It is sufficient for the caveators to negative only one of these essential elements. *In re Will of Rose*, 28 N.C. App. 38, 220 S.E. 2d 425 (1975), *disc. rev. denied* 289 N.C. 614, 223 S.E. 2d 396 (1976).

[3] The caveators rely on evidence that Miss Hester lacked an understanding of the natural objects of her bounty and of the kind, nature and extent of her property. Considering the evidence

in the light most favorable to the caveators and giving them the benefit of all reasonable inferences arising on the evidence, we find that they did not present sufficient evidence of lack of testamentary capacity to survive the propounders' motions for a directed verdict.

Caveators' evidence indicated that Miss Hester was 89 years old, physically disabled, and dependent upon others to bring her food and take care of her daily hygiene. She was described as strong-willed and proud and knowledgeable of the family history. Following her last surviving sister's death, she was grief-stricken and felt very strongly about staying in her own home. One of the relatives mentioned a nursing home to her shortly after her sister's death and several relatives were generally known to have discussed a nursing home. The record reflects that she enjoyed a good relationship with most of her relatives and that although they knew someone had to stay with her and take care of her, they were not able to do it because of other obligations.

The only evidence as to Miss Hester's lack of understanding of the kind and extent of her property consisted of testimony that a year or two prior to her death she and Miss Willie, the sister who managed their affairs, were very concerned over the expense of keeping another sister in a nursing home; Miss Hester seldom discussed business affairs; she had been confined to her home for several years and the opinion of Edith Chandler, a second cousin, that Miss Hester did not know the nature and extent of her property.

A nonexpert witness who has shown that he has had the opportunity to form a reasonably reliable appraisal of the mental powers of the testator may give his opinion as to whether the testator had sufficient mental capacity to understand the kind, nature and extent of his property. *In re Will of Tatum*, 233 N.C. 723, 726, 65 S.E. 2d 351, 353 (1951). Edith Chandler testified that she believed that Miss Hester knew there was property, but she did not think that Miss Hester had any business dealings about it. She further testified that Miss Hester "knew where the farm stretched out to" but "didn't understand the full value of the land." On cross-examination, however, she admitted that she had never discussed Miss Hester's business affairs with her and had no way of knowing what she knew about her property. In light of

this admission, it is doubtful that Mrs. Chandler's opinion should have been admitted. In any event, even considering this evidence, the caveators' evidence was insufficient to submit the issue of the testator's mental capacity to the jury.

[4] The propounders also argue that the caveators did not present sufficient evidence of undue influence to survive their motions for a directed verdict. To constitute undue influence within the meaning of the law, there must be more than mere influence or persuasion. For the influence to be undue,

> " 'there must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made.' "

In re Will of Andrews, 299 N.C. 52, 261 S.E. 2d 198 (1980), *quoting In re Will of Turnage*, 208 N.C. 130, 131, 179 S.E. 332, 333 (1935). The burden is on the caveator to show by the greater weight of the evidence that the execution of the will was procured by undue influence. *In re Will of Andrews, supra.*

Relying on *McNeill v. McNeill*, 223 N.C. 178, 25 S.E. 2d 615 (1943), the caveators contend that the evidence shows that Frank Boswell acted as Miss Hester's agent and as such he enjoyed a confidential relationship with her which raises a presumption of undue influence and shifts the burden to the propounders to show that no undue influence was asserted.

The evidence shows that just prior to Miss Willie's death Frank Boswell helped her with her bank accounts and other business affairs, and after her death he served as Miss Hester's personal representative at the inventory of Miss Willie's safe deposit box. In addition, the evidence shows that four days after Miss Hester's will was written she renounced the administration of Miss Willie's estate in favor of Frank Boswell. There was no evidence of procurement of the will by him. We find that this evidence is insufficient to show the existence of a confidential relationship and raise a presumption of undue influence.

The burden therefore remains on the caveators to show that the will was procured by undue influence. Factors to be considered include:

"1. Old age and physical and mental weakness;

2. that the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision;

3. that others have little or no opportunity to see him;

4. that the will is different from and revokes a prior will;

5. that it is made in favor of one with whom there are no ties of blood;

6. that it disinherits the natural objects of his bounty;

7. that the beneficiary has procured its execution."

In re Will of Mueller, 170 N.C. 28, 30, 86 S.E. 719, 720 (1915).

A *prima facie* case of undue influence consists of evidence presented by the caveators of a sufficient combination of facts, circumstances and inferences from which a jury could find that the testator's will is not the product of his free and unconstrained act, but rather that it is the result of an overpowering influence exerted on the testator sufficient to overcome his free will and to substitute another's will and wishes, so that the testator executes a will that he otherwise would not have executed. *In re Will of Andrews, supra.* When such evidence exists, the case must be submitted to the jury.

Examining the record in light of the seven factors previously listed as relevant to the issue of undue influence, we note that the caveators presented no evidence of mental weakness. Miss Hester lived in her own home and had frequent visitors. It was initially at her sister's request and then at her own request that the Boswells came to stay with her. While the Boswells were not direct kin, they were not strangers but had known the Womack sisters most of their lives. Miss Hester had no close surviving relatives and more of her first and second cousins support the will than contest it. Furthermore the devise was not a gratuitous one, but one conditioned upon the rendition of services by the Boswells. The caveators testified that they knew Miss Hester had

to have someone to stay with her but for various reasons, none of them could do it. They presented no evidence from which it could be inferred that the Boswells procured the execution of the will. We therefore find that the evidence presented at trial was insufficient to submit the question of undue influence to the jury.

The trial court erred in denying the propounders' motions for a directed verdict as to the issues of mental capacity and undue influence.

Reversed.

Judges VAUGHN and BECTON concur.

PATSEY McNEILL INGLE v. DONALD WILLIAM INGLE

No. 8019DC1158

(Filed 21 July 1981)

1. **Divorce and Alimony § 24.1— child support—insufficiency of findings**

Where the trial court failed to make findings as to the actual needs of the parties' minor child or the expenses of the parties, its order directing child support payments was erroneous.

2. **Divorce and Alimony § 25.4— child custody—award to father proper**

The trial court did not err in concluding that it would be in the best interest of the parties' minor child for her custody to be placed with defendant where, pursuant to the parties' separation agreement, plaintiff gave defendant custody of the child and agreed to assist with medical and dental bills on behalf of the child; the child had lived with defendant at all times since her birth and lived solely with defendant since the parties' separation; plaintiff rarely visited the child following the parties' separation; and plaintiff admitted that defendant had "done a good job of looking after the child since [their] separation."

3. **Divorce and Alimony §§ 24, 25— child custody and support**

The trial court did not err in ordering that defendant receive custody of the parties' child, that plaintiff receive specified visitation privileges, and that defendant, as custodial parent, be the final authority on decisions regarding the child; however, the trial court did err in ordering that defendant claim the child as a dependent for income tax purposes because plaintiff's payments would not constitute one-half the amount required to support the child, since there was no evidence to support such conclusion.

APPEAL by plaintiff from *Hammond, Judge.* Order entered 31 July 1980 in District Court, RANDOLPH County. Heard in the Court of Appeals 26 May 1981.

Plaintiff instituted this civil action against defendant by filing a complaint on 12 June 1980 seeking custody of the parties' minor child, child support and attorney's fees. In his answer and counterclaim, defendant alleged that in a prior separation agreement, dated 8 August 1979 and signed by the parties, the parties stated that they had separated on 5 August 1979 and that defendant would have the "exclusive care, custody, control, maintenance and tuition" of the minor child. Plaintiff further agreed to assist defendant with the purchase of the child's clothing and with any of the child's medical and dental bills. No specified amount of child support was indicated in this agreement. Defendant also sought an order awarding him custody of the minor child, child support, and attorney's fees.

At a hearing on 31 July 1980, the court considered both parties' requests for custody and child support and awarded defendant custody of the child. The court further ordered plaintiff to pay into the Office of the Clerk of Superior Court of Randolph County $25 per week as child support, two-thirds of all uninsured medical expenses incurred by the child, and one-half of any of the child's orthodontic expenses. Plaintiff was awarded detailed visitation privileges. Plaintiff appealed.

Ottway Burton, for plaintiff appellant.

Ivey and Mason, by William W. Ivey, for defendant appellee.

HEDRICK, Judge.

Plaintiff has brought forward all four of her assignments of error on appeal. By her first assignment of error, she argues that "[t]here were no circumstances existing in the evidence offered to justify the presiding judge to enter an order compelling the plaintiff-mother to provide the majority support for the child." This assignment of error is based upon exceptions to the following findings of fact made by the court:

> 3. That the plaintiff and defendant lived together as husband and wife until August 5, 1979, when the plaintiff left the family home of her own volition, leaving a note for the de-

fendant stating that he was to care for the minor child; thereafter the plaintiff and defendant entered into a separation agreement wherein the defendant received custody of Cheryl Kay Ingle, minor child born of the marriage between the plaintiff and defendant, and wherein the plaintiff agreed to assist with the support of the minor child.

4. That the minor child has lived with the defendant at all times since her birth and has lived solely with the defendant since August 5, 1979; that the defendant has been a good custodial parent, has provided care for the minor child at a day care center or with relatives while he works, and has kept the child clean and cared for.

5. That following the separation of the plaintiff and defendant, the plaintiff did not visit with the minor child for approximately eight weeks, and following that single visit, did not visit with the minor child for an additional six weeks; that the plaintiff and defendant have recently had problems regarding the plaintiff's visitation with the minor child.

6. That both the plaintiff and defendant are gainfully employed; that the plaintiff is employed at Walker Shoe Company and earned approximately $8,000.00 in 1979 and currently takes home $125.00 per week; that the defendant is employed at Dixie Furniture and earned in excess of $11,000.00 in 1979; that the defendant is not receiving full-time work at the present and in fact is working one-half time.

7. That the child has the normal needs of food, clothing, and shelter, and is required to have day care at least five days per week while the defendant is working; that the plaintiff has the ability to pay $25.00 per week for the support of her minor child, and in addition, is fully capable of assisting with the medical expenses incurred on behalf of the minor child.

8. . . . [I]t is in the best interest of the minor child for her custody to be placed with the defendant, subject to reasonable visitation rights of the plaintiff.

Before discussing these findings of fact, we note that the court specifically concluded in the order that plaintiff was not providing

one-half or more of the child's support. Plaintiff's argument that she is providing the majority of support, therefore, is groundless.

As to the excepted findings, Finding of Fact No. 3 is clearly supported by plaintiff's testimony and the separation agreement. Finding of Fact No. 4 is also supported by plaintiff's testimony. She specifically testified that the child had remained with defendant "at all times since the separation." She also admitted, "My husband has done a good job of looking after the child since our separation." The testimony of defendant more than amply supports Finding of Fact No. 5. Finding of Fact No. 6, concerning the parties' incomes, is adequately supported by the evidence of both parties. Defendant testified that he takes home about $117 a week after taxes as opposed to plaintiff's weekly take home pay of about $125.

[1] As to Finding of Fact No. 7, it is uncontested that defendant has incurred day care expenses. The record on appeal, however, is silent as to the amount of these expenses or as to any other expenses or needs of the child. G.S. § 50-13.4(c) provides:

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

Since the court failed to make findings as to the actual needs of the child or the expenses of the parties, its order directing support payments was erroneous. *Poston v. Poston*, 40 N.C. App. 210, 252 S.E. 2d 240 (1979). Moreover, even it the court had made such findings, the record contains insufficient evidence to support them, especially since defendant testified that with his present income he is capable of supporting himself and the child.

[2] By her second assignment of error, plaintiff contends that the court erroneously concluded that it would be in the best interest of the minor child for her custody to be placed with defendant and that plaintiff owes a duty of child support in the sum of $25 per week plus assistance with medical expenses. For the reasons stated above, we overrule the award of child support payments. The previously discussed findings of fact and evidence

do, however, support the court's award of custody to defendant. In the prior separation agreement plaintiff gave defendant custody of her child and agreed to assist with any medical and dental bills on behalf of the child. We concede that this Court is not bound by these provisions. In such a situation the Court shall retain its inherent as well as statutory authority to protect the interest and provide for the welfare of the minor. "The court may, of course, recognize and enforce the agreement of the parents when, in its opinion, the agreement is for the best interest of the child." 2 Lee, N.C. Family Law, § 189, p. 480 (4th Ed. 1980). "The question of custody is one addressed to the trial court and its decision will be upheld if supported by competent evidence. [Citations omitted]" *Roberts v. Short*, 6 N.C. App. 419, 422, 169 S.E. 2d 910, 913 (1969). Furthermore, the evidence and the court's findings of fact support defendant's continued custody of the child, especially since plaintiff admitted that defendant "has done a good job of looking out after the child since our separation."

[3] By her third assignment of error, plaintiff contends that the trial court erroneously ordered that defendant receive custody of the child; that plaintiff receive specified visitation privileges; that defendant claim the child as a dependent for income tax purposes since plaintiff's payments will not constitute one-half of the amount required to support the child; that defendant, as custodial parent, shall be the final authority on decisions regarding the child; and that plaintiff pay the costs in this matter. Plaintiff argues that the findings of fact and conclusions of law do not support the court's decision. We have already concluded that the evidence supports the custody award. In awarding visitation privileges to plaintiff, the court established the time, place and conditions under which these privileges would be exercised. The court awarded plaintiff liberal visitation rights and clearly did not abuse this judicial function. We are also of the view that the court did not abuse its discretion in ordering that defendant shall have the final authority on decisions regarding the child after consulting with plaintiff as far as practicable, *see In re Custody of Stancil*, 10 N.C. App. 545, 179 S.E. 2d 844 (1971), or in ordering plaintiff to pay costs.

We agree with plaintiff, however, that the court erroneously ordered that defendant was entitled to claim the child as a dependent for income tax purposes, since there was no evidence to

support the conclusion that plaintiff's child support payments constitute less that one-half the amount required to support the child. We reiterate that no evidence was presented as to the expenses incurred for the needs of the child.

Plaintiff finally assigns error to the signing and entry of the 31 July 1980 order since the order was based upon an invalid "Answer and Counterclaim" filed by defendant. She points out that she filed her complaint on 12 June 1980. She served a Notice of Temporary Order on 13 June 1980 informing defendant that a hearing on her custody and support requests would be conducted 7 July 1980. On 1 July 1980 defendant filed a motion requesting that this hearing be continued. A copy was mailed to plaintiff's attorney on the same date. Plaintiff contends in her brief that this motion was allowed and the hearing was reset for 31 July 1980. No order to this effect is in the record on appeal. On 30 July 1980 defendant filed and served his answer and counterclaim. On the following day the hearing was held before Judge Hammond. Plaintiff contends that no order extending the time to file answer was ever signed by a clerk or judge pursuant to Rule 6(b) of the Rules of Civil Procedure and that she never consented to a late filing of the answer. For these reasons, she argues, defendant's pleadings were invalid. We do not agree. Plaintiff impliedly consented to the late filing of defendant's answer and counterclaim since it appears from the record that plaintiff did not object to this late filing before the hearing nor did she request a continuance. She cannot raise this issue for the first time on appeal. This assignment of error is without merit.

The result is:

The portion of the order awarding defendant custody of the minor child is affirmed. That portion ordering plaintiff to pay weekly child support payments of $25 is vacated and remanded to the District Court of Randolph County with instructions that the court shall hear such competent evidence as the parties may offer and make such findings and conclusions relating to the expenses and needs of the child and any support payments by plaintiff as are appropriate.

Affirmed in part and vacated and remanded in part with directions.

Judges MARTIN (Harry C.) and WELLS concur.

CLEVELAND WEAKS CARETHERS v. JERRELL RAY BLAIR, ADMINISTRATOR OF THE ESTATE OF BILLY RAY BLAIR, DECEASED

No. 8021SC875

(Filed 21 July 1981)

1. **Executors and Administrators § 19.1— claim against estate—time for filing**

Plaintiff's claim for damages arising out of a collision with decedent's automobile, though not presented to the administrator within six months of the date of publication of general notice to creditors, was nevertheless not barred since the administrator did not mail plaintiff a personal notice concerning the presentment of claims. G.S. 28A-19-3 (Supp. 1977).

2. **Executors and Administrators § 6.1— automobile liability insurance policy—asset of estate**

Decedent's automobile liability insurance policy which was in effect at the time of decedent's accident with plaintiff was an undistributed asset of the estate within the meaning of G.S. 28A-14-3 (Supp. 1977), an "undistributed asset" simply being anything that remains after the administration of the estate and the disposition to the various beneficiaries are completed which is still accessible to the administrator for the satisfaction of debts or claims against the estate.

APPEAL by plaintiff from *Davis, Judge.* Judgment entered 12 June 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 31 March 1981.

Plaintiff filed a complaint seeking damages for personal injuries and property loss arising out of a collision with decedent's automobile. The court entered summary judgment in defendant's favor because plaintiff did not present his claim against the estate within the limitation period of G.S. 28A-14-1.

The facts pertinent to this appeal are as follows. On 13 December 1978, plaintiff filed a negligence claim to recover for injuries and property damage he incurred when he was struck in the rear by an automobile owned and operated by Billy Ray Blair on 24 June 1977, while he was riding his bicycle on a city street.

At the time of the accident, Blair's automobile was insured by a liability policy with coverage limits of $15,000 per person, $30,000 per accident, and $5,000 for property damage.

Blair, however, had died on 6 January 1978, and the time for creditors to file claims against his estate had expired on 23 July 1978. Blair's estate was closed, and all the assets thereof distributed, on 19 October 1978. Plaintiff filed a petition to reopen Blair's estate which was granted by order of the clerk on 22 February 1979. This order was based mainly upon the clerk's finding of fact that:

> "a Notice to creditors was published in this Estate and that said Notice expired on July 23, 1978. That the Petitioner herein, Cleveland Weaks Carethers, did not receive personal service of this Notice to Creditors and pursuant to N.C. G.S. 28A-14-3 is not barred from filing a claim against the decedent's estate."

Plaintiff subsequently filed an amended complaint substituting Jerrell Ray Blair, administrator of the estate of Billy Ray Blair, deceased, as defendant in the action, and the administrator accepted service of process on 6 March 1979.

The administrator denied all allegations respecting any negligence on the part of decedent in the 1977 accident and further answered that, since it was not presented against the estate within six months from the publication of notice to creditors as required by G.S. 28A-14-1, plaintiff's claim was "forever barred" under G.S. 28A-19-3. The administrator thereafter moved for summary judgment on this ground, and the court granted the motion on 11 June 1980. Plaintiff now appeals from the entry of that order.

Westmoreland and Sawyer, by Gordon A. Miller, for plaintiff appellant.

Hutchins, Tyndall, Bell, Davis and Pitt, by Richard Tyndall, for defendant appellee.

VAUGHN, Judge.

We note at the outset that the provisions of Chapter 28A, governing the time and manner in which a creditor must present

his claim to the estate to preserve a right to recovery, have been amended twice since 1973. We must apply those provisions which were in effect on the date of decedent's death, 6 January 1978. Both parties agree that, in the instant case, the controlling statutory version of Chapter 28A appears in the 1977 Supplement to Volume 2A of the General Statutes, and our review is accordingly limited to a consideration and interpretation of the requirements stated therein.

[1] On this record, it is undisputed that plaintiff failed to present his claim to the administrator within six months of the date of the publication of general notice to creditors, as required by G.S. 28A-14-1 (Supp. 1977). Plaintiff contends, however, that, since the administrator did not mail him a *personal* notice concerning the presentment of claims, his negligence action was not barred by G.S. 28A-19-3 (Supp. 1977). We agree.

[2] G.S. 28A-14-3 (Supp. 1977) plainly provides:

> "For a claim to be barred under the provisions of G.S. 28A-19-3, the personal representative or collector shall by certified or registered mail forward to the claimant a statement that the claim shall be barred unless presented in the time and manner set out in Article 19 of this Chapter. A claim not barred by G.S. 28A-19-3 because of the failure to mail the statement may be paid from any undistributed assets of the estate."

Thus, it is clear that, at the time this action was instituted, a creditor's claim against an estate could only be "forever barred" under G.S. 28A-19-3(a), when it was not timely filed within the limitations of G.S. 28A-14-1, if the administrator mailed a personal statement to the particular creditor, in addition to the general publication of notice to creditors. G.S. 28A-14-3, *supra.* Here, the administrator has not contended, nor has he offered uncontradicted proof tending to show, that this required announcement was duly sent to plaintiff.[1] In the absence of such notice, the claim was not barred, and the trial court erred in granting summary judgment in defendant's favor upon this ground. Upon his receipt

1. The defendant administrator admitted, in his answers to plaintiff's interrogatories, that he knew before decedent died that he had been involved in an accident with a man on a bicycle.

of a favorable judgment, plaintiff could seek recovery of damages out of the undistributed assets of decedent's estate. *Id.* This being so, the only remaining issue is whether decedent's automobile liability policy, which was in full force and effect when the accident occurred, constitutes an "undistributed asset." We hold that it does.

The general rule is that a deceased's potential right of exoneration under an insurance policy is an asset of his estate. *See,* Annot., 67 A.L.R. 2d 936 (1959). Our Supreme Court has adhered to this rule in several cases. In *Bank v. Hackney,* 266 N.C. 17, 145 S.E. 2d 352 (1965), the Court specifically stated that a decedent's automobile liability insurance policy was an asset of his estate. The Court reasoned that "[d]uring [decedent's] lifetime, it would protect him in respect of his personal liability and preserve his general estate from depletion; and, upon his death, such policy would constitute a valuable asset of his estate and safeguard the general assets of his estate for distribution to the beneficiaries." *Id.* at 22-23, 145 S.E. 2d at 357. The Court reiterated this view in the case of *In re Edmundson,* 273 N.C. 92, 159 S.E. 2d 509 (1968), where it held that such a policy was "unquestionably" an asset of decedent during her lifetime and an asset of her estate upon death, and that the potential right of the administrator of decedent's estate against the insurance company was a chose in action, an intangible asset. *Id.* at 95, 159 S.E. 2d at 511-12. In accordance with the rationale of the foregoing cases, the Court has also held that a hospital-expense policy with an insurance company is an asset. *Graham v. Insurance Co.,* 274 N.C. 115, 161 S.E. 2d 485 (1968). *See also In Re Scarborough,* 261 N.C. 565, 135 S.E. 2d 529 (1964) (holding that a cause of action for wrongful death is an asset of an estate).

This decisional authority compels us to conclude that the State Farm Mutual Automobile Insurance policy issued to the decedent, Billy Ray Blair, was indeed an asset of his estate. Moreover, we believe that this conclusion is mandated by G.S. 28A-15-1(a) (1975). That statute provides that: *"All* of the real and personal property, both legal and equitable, of a decedent shall be assets available for the discharge of debts and other claims against his estate in the absence of a statute expressly excluding any such property." (Emphasis added.) Automobile liability policies are not expressly excluded by any statute from being in-

cluded as an asset in an estate, and they are, therefore, resources available for the satisfaction of claims against the estate arising from decedent's ownership and operation of an automobile while he was alive. In sum, "[t]he correct principle is that all the chattels of the intestate are assets, if the administrator by reasonable diligence might have possessed himself of them." *Gray v. Swain*, 9 N.C. 15, 17 (1822).

Having first decided that decedent's automobile liability insurance policy was an asset of his estate, we further hold that this policy was an *undistributed* asset under G.S. 28A-14-3 (Supp. 1977), which the administrator could enforce for the payment of any subsequent judgment plaintiff might obtain upon a full trial of his negligence claim. An "undistributed asset" is simply anything that remains, after the administration of the estate and the disposition to the various beneficiaries are completed, which is still accessible to the administrator for the satisfaction of debts or claims against the estate. For purposes of this case, it is important to understand the general nature of the liability insurance policy. The sole function of such policies is to settle claims which are covered thereunder. Proceeds are, however, dispensed only in the event that a valid claim or judgment is established against the insured. It is, therefore, obvious that the potential right of an administrator to seek indemnification from a liability insurer is an asset which can only be distributed when a proper claim is presented against the estate involving decedent's operation of the insured automobile. Until that happens, the liability policy is an undistributed asset of the insured's estate.

An instructive case in this regard is *In Re Miles*, 262 N.C. 647, 138 S.E. 2d 487 (1964). There, the petitioner failed to present a claim for wrongful death, arising out of an automobile accident, against the estate within the six-month period required by former G.S. 28-113. The trial judge found as a fact that decedent possessed a policy of liability insurance at the time of the fatal accident. The Supreme Court stated the following with respect to petitioner's failure to file a timely claim against the estate in such circumstances:

> "By the provisions of G.S. 28-113, if a claim is not presented in six months, the representative is discharged as to assets paid. Even if this statute applies to a claim for unliquidated

> damages, which we do not concede, it would only bar petitioner's claim for damages for wrongful death as to assets paid out by appellant, and he could still assert his demand against undistributed assets of the estate. . . . In our opinion, failure of petitioner to file a claim for unliquidated damages with appellant does not bar his action, where he is seeking to recover damages for an alleged wrongful death of his intestate, and to collect it out of the automobile liability insurance policy issued to Miles, deceased."

Id. at 654-55, 138 S.E. 2d at 492-93. Thus, it was the Court's view that an automobile liability policy was an undistributed asset which could be used to satisfy a tardy claim against the estate. Our interpretation of what constitutes an undistributed asset for purposes of G.S. 28A-14-3 (Supp. 1977) is consistent with that view.[2]

In conclusion, it suffices to say that the defendant administrator's reliance on two decisions of this Court, *Baer v. Davis*, 47 N.C. App. 581, 267 S.E. 2d 581 (1980), and *Anderson v. Gooding*, 43 N.C. App. 611, 259 S.E. 2d 398 (1979), to support his contention that plaintiff's claim was absolutely barred because it was not filed within six months of the publication of general notice to creditors, is misplaced. Neither case involved an application of the provisions of Article 28A as they existed in 1978, which, of course, control the disposition of this case.[3]

In sum, we hold: (1) plaintiff's claim against the estate was not barred under G.S. 28A-19-3 (Supp. 1977) because the administrator did not mail a personal notice to him as required by G.S. 28A-14-3 (Supp. 1977); and (2) the decedent's automobile liability insurance policy, which was in effect at the time of the

2. We would also comment that G.S. 28A-19-3 (Cum. Supp. 1979), which is not applicable to this case, now expressly provides that a creditor's claim shall not be barred, even though it is not timely presented under G.S. 28A-14-1, "to the extent that the decedent or personal representative is protected by insurance coverage with respect to such claim, proceeding or judgment." G.S. 28A-19-3(i).

3. The *Baer* case is also irrelevant because it only involved an application of G.S. 28A-19-3(b)(2) which is not at issue here. It is also doubtful that any reasoning in the *Gooding* decision is authoritative in light of the Supreme Court's reversal thereof in 300 N.C. 170, 265 S.E. 2d 201 (1980).

accident, is an undistributed asset, within the meaning of G.S. 28A-14-3 (Supp. 1977), available for the payment of plaintiff's claim. For these reasons, the order of summary judgment is reversed.

Reversed.

Judges CLARK and WELLS concur.

JOSEPH H. ALLEN, JR., T/A SMITHFIELD AUTO SALES AND SMITHFIELD AUTO AND MOBILE HOME SALES, INC. v. AMERICAN SECURITY INSURANCE COMPANY, PETE COCHRAN, FAIR BLUFF MOTORS, INC., ADVANCED MOTORS, INC., AUTO SALES, INC., AND PLEASURE ROUTE MOTORS, INC.

No. 8011SC1098

(Filed 21 July 1981)

Automobiles § 6.5— wrecked vehicle—constructive total loss—no salvage vehicle—no fraud

An automobile purchased by plaintiff, who thought that it had never been wrecked when in fact it had suffered substantial damage in a collision, was not a "salvage vehicle" within the meaning of G.S. 20-109.1(a)(1), since defendant insurance company neither acquired title to nor obtained possession of the vehicle, nor did the company pay a total loss claim, but instead paid a "constructive total loss," that is, the value of the automobile before the collision less its salvage value and less $50 deductible under the terms of its policy. Therefore, defendant insurance company was not required to surrender evidence of title to the vehicle to the State so that the reissued certificate of title might reflect that the vehicle had been previously wrecked, and the trial court properly entered summary judgment for defendant insurance company, defendant appraiser who pronounced the vehicle a "constructive total loss," and defendant original owner of the vehicle.

APPEAL by plaintiff from *Brannon, Judge.* Judgments entered in open court 2 September 1980. Heard in the Court of Appeals 6 May 1981.

Taken in the light most favorable to plaintiff, the affidavits and answers to interrogatories would tend to establish the following facts if presented as evidence at trial: Prior to 26 January 1978, defendant Fair Bluff Motors, Inc., obtained possession of the

1978 Ford Thunderbird automobile, which is the subject matter of this lawsuit, along with a certificate of origin as evidence of Fair Bluff's ownership. The automobile was operated by the company as a demonstrator. On 26 January 1978 the automobile was involved in a collision. Fair Bluff Motors, Inc. subsequently filed a claim with its insurance carrier, defendant American Security Insurance Company. Pursuant to this claim, defendant American Security's local agent, the Carolina Agency, employed defendant George A. "Pete" Cochran trading as Cochran Appraisals to appraise the damage to the automobile in question arising out of the 26 January collision. Defendant Cochran appraised the automobile at a value, before the accident, of $6,300.00. He pronounced the vehicle a "constructive total loss." He estimated the salvage value of the automobile at $1,750.00 to $2,000.00. Based on defendant Cochran's appraisals, defendant American Security paid to defendant Fair Bluff Motors the sum of $4,450.00 representing the wholesale price of $6,300.00, less $1,800.00 as salvage value and less $50 deductible under the terms of the policy. Defendant Fair Bluff thereupon sold the automobile to Alton Fairfax, a buyer procured by Cochran. Fairfax apparently sold the automobile to defendant Advanced Motors, Inc., which in turn sold it to defendant Auto Sales, Inc. Auto Sales apparently sold the automobile to defendant Pleasure Route Motors, Inc., which sold it to plaintiff for $5,995.00 without disclosing to plaintiff that the automobile had been heavily damaged in a collision and subsequently repaired. Neither Pete Cochran nor American Security Insurance Company ever took title or possession of the automobile. Neither Cochran, American Security, nor Fair Bluff Motors, Inc., ever dealt in any way with plaintiff, nor made any representations as to the quality or fair market value of the automobile to plaintiff.

Plaintiff's complaint alleges that all of the defendants knew that the automobile was a heavily damaged vehicle not capable of being repaired to a good and merchantable condition and in fact was a total loss under G.S. 20-109.1, but nonetheless participated in the attempted repair of the vehicle; that several latent defects remained after the repairs; and that the incomplete repairs were made for the sole purpose of defrauding the ultimate purchaser of the vehicle. Plaintiff seeks $6,500.00 actual damages and $50,000.00 punitive damages.

Defendants Fair Bluff Motors, Inc., George A. "Pete" Cochran, and American Security Insurance Company moved for summary judgment. Plaintiff appeals from the granting of said motions.

L. Austin Stevens for plaintiff appellants.

Boyce, Mitchell, Burns & Smith by Lacy M. Presnell, III for American Security Insurance Company and Pete Cochran, defendant appellees.

Johnson, Patterson, Dilthey & Clay by Robert W. Sumner for defendant appellee, Fair Bluff Motors, Inc.

CLARK, Judge.

Plaintiff bases the single question presented on this appeal upon defendants' alleged circumvention of G.S. 20-109.1. That statute applies only to "salvage vehicles." The statute itself defines a wrecked automobile as a salvage vehicle whenever "an insurance company as a result of having paid a total loss claim acquires title to a vehicle, and obtains possession or control of a vehicle, for any cause other than theft . . . ." G.S. 20-109.1 (a)(1).

The automobile herein does not fit the statutory definition of salvage vehicle for two reasons. First, the insurance company neither acquired title nor obtained possession of the vehicle. Second, the company did not pay a total loss claim. The materials offered by defendants and uncontradicted by plaintiff, were that the automobile was a "constructive total loss." The value of the automobile before the collision was at least $6,300.00 and Fair Bluff's coverage was $50.00 deductible, yet the insurance company paid only $4,450.00 on the claim, not $6,250.00. It appears that American Security should have paid $6,250.00 (the value of the automobile, less the $50.00 deductible) had it paid a total loss claim. By not doing so, it clearly was not entitled to title or possession of the automobile. It would be inequitable to force Fair Bluff to sell its $6,300.00 automobile to its insurance company for $4,450.00; this surely was not the intent of the statute.

The term "constructive total loss" was explained in defendant American Security's answers to interrogatories and again in oral argument. It appears to be a term of art employed by insurance companies in describing wrecked vehicles in which the

cost of repairing the vehicle (including, where applicable, the cost of repairing latent defects as yet undiscovered but reasonably anticipated) added to the salvage value of the automobile exceeds the actual cash value of the vehicle prior to the collision. Simply stated, the vehicle is considered a constructive total loss any time repair becomes economically impractical. Under this definition a constructive total loss is something quite different from an actual total loss which is generally defined as occurring when cost of repairs exceeds the fair market value of the vehicle prior to the collision. *See* 7A Am. Jur. 2d, *Automobile Insurance* § 418, p. 49 (1980). It appears to us that the total loss referred to in G.S. 20-109.1 must be an *actual* total loss, since only if the insurance company pays the full pre-collision value of a vehicle can the vehicle's owner be expected to give up his rights in the vehicle, including his right to the proceeds from salvage of the vehicle. We think it unlikely that the legislature intended to force the owner of a wrecked vehicle to give up title and possession of his vehicle for less than its reasonable pre-collision value. We hold that G.S. 20-109.1 applies only to the payment of an actual total loss claim, and thus is inapplicable to the case *sub judice* where a substantially lower constructive total loss claim was paid.

Plaintiff argues that the purpose of the statute is to protect consumers from those who would repair wrecked vehicles and then sell them at the higher price of an unwrecked vehicle without disclosing to the buyer that the vehicle had ever been wrecked. Although this is a commendable goal, if such were the intent of the legislature in enacting G.S. 20-109.1, we can find no hint of such a broad purpose anywhere in the statute, either from its language or by implication. The statute appears to be directed only toward insurance companies who obtain salvage vehicles as a result of paying a total loss claim, repair them, and then sell them. The intent of the statute is to see that such insurance companies surrender their evidence of title to the State, so that the reissued certificate of title might reflect that the vehicle has been previously wrecked. The legislature may wish to consider legislation to insure that all owners of wrecked vehicles surrender their title certificates to the State for notification thereon of the amount of the claim paid as a result of the collision (since the consumer who buys a previously wrecked vehicle for the price of an unwrecked one doubtless does not care whether it was an in-

surance company, an automobile dealership, or an individual who bilked him); but until such time as this occurs, defendant Fair Bluff had no obligation to surrender its evidence of title to the State since it was not an insurance company, and defendant American Security had no obligation to surrender evidence of title to the State since it never received any and since it never paid a total loss claim within the meaning of G.S. 20-109.1.

In this case the uncontradicted facts appear to be that none of the defendants; neither the insurance company, nor the adjuster, nor the former owner; either knew that the vehicle would be repaired, or that it would be resold, or what price the seller would ask, or that the seller would fail to disclose the vehicle's previously wrecked condition. Under such circumstances plaintiff had no grounds for a suit against any of these three defendants unless he could convince us to read G.S. 20-109.1 so broadly as to include the insurance company in this case. He presumably hoped to then prove complicity on the parts of the other two defendants. The statute, however, cannot be so broadened as reasonably to include the facts of this case. The entry of summary judgment was proper.

Affirmed.

Judges MARTIN (Robert M.) and HILL concur.

VANITA B. STANBACK v. FRED J. STANBACK, JR.

No. 8019SC1222

(Filed 21 July 1981)

Divorce and Alimony § 18.16— agreement to pay attorneys' fees and taxes—summary judgment proper

In plaintiff's action to recover from defendant monies allegedly due plaintiff under a contract, the trial court properly entered summary judgment for defendant where the parties agreed that defendant would reimburse plaintiff for attorneys' fees incurred in the parties' divorce proceeding; defendant was to reimburse plaintiff for any additional federal or state income tax she might have to pay should the taxing authorities disallow plaintiff's deduction of the amount she paid her attorneys; the object of the agreement of the parties was to save plaintiff from tax liability for the attorneys' fees which defendant paid

her; the IRS resolved the tax problem presented by defendant's payment to plaintiff of plaintiff's attorneys' fees by allowing plaintiff to exclude the amount defendant paid her from her income and by disallowing her deduction for the same amount; and the result was that, for the amount of the attorneys' fees which defendant paid plaintiff, there was no tax liability and therefore no genuine issue as to the agreement of the parties.

APPEAL by plaintiff from *Wood, Judge.* Order entered 15 August 1980 in Superior Court, ROWAN County. Heard in the Court of Appeals 2 June 1981.

Plaintiff instituted this action to recover from defendant monies allegedly due plaintiff under a contract. That contract has been the subject of an opinion filed in this Court, *Stanback v. Stanback*, 37 N.C. App. 324, 246 S.E. 2d 74 (1978), and of an opinion of the Supreme Court, *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). As relevant to this appeal, plaintiff's complaint alleged that, by a separation agreement entered into in March 1968, defendant agreed to reimburse plaintiff for attorneys' fees which were to be set by the trial court which heard plaintiff's and defendant's divorce proceeding. At the same time, the parties made a supplementary agreement whereby defendant was to reimburse plaintiff for any additional federal or state income tax she might have to pay should the taxing authorities disallow plaintiff's deduction of the amount she paid her attorneys. This supplementary agreement was put in writing by a letter from defendant's counsel to counsel for plaintiff.

According to the complaint, the trial judge determined that $31,000.00 was a reasonable amount to be paid for the services rendered by plaintiff's attorneys during the divorce litigation between the parties. Defendant paid this amount to plaintiff according to their agreement, and plaintiff reported this as income, as well as a deduction, on her 1968 tax return. The Internal Revenue Service (I.R.S.), however, disallowed $28,500.00 of the deduction, and this disallowance increased plaintiff's 1968 tax liability by $13,371.10, plus interest from the due date. Although plaintiff made a valid effort to sustain the claim, she was unsuccessful. Her demands upon the defendant to reimburse her were refused, thereby causing plaintiff to suffer mental pain and anguish. Additionally, the Internal Revenue Service placed a lien upon plaintiff's house, thus causing further humiliation. Plaintiff also alleged that defendant's actions in breaching the contract were

"willful, malicious, calculated, deliberate, and purposeful," and plaintiff, therefore, sought punitive damages.

The dismissal, pursuant to Rule 12(b)(6), of other claims made by plaintiff was upheld by the Supreme Court in *Stanback v. Stanback, supra.* Subsequently, on 31 January 1980, plaintiff moved to amend her complaint to allege that Security Bank and Trust Company, from whom plaintiff had borrowed money in order to pay off the I.R.S. lien upon her home, had foreclosed their deed of trust on plaintiff's home. Plaintiff sought to add that the defendant had caused said foreclosure by his willful refusal to comply with his contractual obligations.

On 15 February 1980, plaintiff again moved to amend her complaint to increase her claim for punitive damages from $100,000 to $250,000. On 6 August 1980, defendant filed a motion for summary judgment. At the hearing on these motions, the following dialogue occurred between counsel for plaintiff and the court:

> COURT: The only thing I'm asking is has she been refunded this thirteen thousand, three hundred sixty-eight, thirty-nine and the twenty-nine hundred, eighty-nine dollars?
>
> MR. BRINKLEY: She has received refunds not in those exact amounts, but refunds which would cover—which would be in excess of those amounts because the refunds include interest from the date of the payment that she made—that payment was made, I think, in 1974.
>
> . . .
>
> MR. BRINKLEY: . . . They had not allowed the deduction of attorneys' fees. What they have said is that the thirty-one thousand dollars moving from Fred Stanback to Vanita Stanback is not income to her. So, she does not have to include that.

After considering the evidence adduced at the hearing, the motions, the depositions of the plaintiff and of the defendant, and numerous other exhibits, the trial court reaffirmed its earlier denial of plaintiff's motions to amend her complaint and granted defendant's motion for summary judgment. Plaintiff has appealed from that judgment.

Brinkley, Walser, McGirt, Miller & Smith, by Walter F. Brinkley and Benjamin G. Philpott, for plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by Norwood Robinson, George L. Little, Jr., and Robert E. Price, Jr., for defendant appellee.

HEDRICK, Judge.

Plaintiff assigns as error the trial court's granting of summary judgment in favor of the defendant.

Upon a motion for summary judgment, the duty of the court is to determine whether there is a genuine issue of material fact which should be tried by a jury. *Zimmerman v. Hogg & Allen, Professional Association*, 286 N.C. 24, 209 S.E. 2d 795 (1974). The moving party has the burden of establishing the absence of any triable issue, and this burden may be carried by the movant's showing that an essential element of the opposing party's claim is nonexistent. *Id.* The moving party must also show that he is entitled to judgment as a matter of law. *Id.*

In the present case, in order to recover for the alleged breach of contract, plaintiff had to prove that there was an enforceable agreement between the parties and that there was a breach of the agreement by defendant. The agreement between the parties was contained in a letter from defendant's attorney to the attorneys for plaintiff:

> We agree that if Vanita Stanback is unable to deduct the fees she is required to pay you during 1968 that Fred Stanback will pay to her through you the difference in the federal and state income tax that she is required to pay by virtue of being unable to make this deduction for attorneys' fees.

The meaning of this contract is determined by the intention of the parties, "which is ascertained by the subject matter of the contract, the language used, the purpose sought, and the situation of the parties at the time. [Citations omitted]" *Pike v. Trust Co.*, 274 N.C. 1, 11, 161 S.E. 2d 453, 462 (1968). From the entire agreement and the underlying circumstances of the agreement, it would appear that defendant was agreeing to assure plaintiff that she would suffer no additional tax as a result of his payment to

her of the $31,000 attorneys' fees. Plaintiff further verified this interpretation in a deposition which was before the court:

> [Plaintiff and her accountant] did what we were supposed to do, and my attorneys did what they were supposed to do. They and I were supposed to include $31,000 as taxable income on the return, and we did. . . .
>
> . . .
>
> I did understand I was to include the $31,000 in my tax return, and I did that.

The record shows that the I.R.S. resolved the tax problem presented by defendant's payment to plaintiff of plaintiff's attorneys' fees, by allowing plaintiff to exclude the $31,000.00 from income and by, of course, disallowing her deduction for the same amount. The result was that, for the $31,000.00 attorneys' fees which defendant paid plaintiff, there was no tax liability. We read this result as being the object of the agreement of the parties. There is, therefore, no genuine issue as to the agreement of the parties. Furthermore, since the result eventually obtained through I.R.S. matched the result intended by the parties, there was no issue of defendant's breach of the agreement. Summary judgment in favor of defendant on the issue of breach of contract was proper.

Plaintiff also assigns as error the court's granting of summary judgment on the issue of punitive damages. In her complaint, plaintiff alleged that defendant's conduct in breaching the contract was "willful, malicious, calculated, deliberate, and purposeful . . . ," and that, as a result of defendant's breach, plaintiff "had suffered great mental anguish and anxiety. . . ." Since we have already held that summary judgment was proper on the claim of breach of contract, it follows that an essential element of plaintiff's claim for punitive damages has been negated. The granting of summary judgment on that issue was, therefore, proper.

Given the conclusion we have reached in the foregoing assignment of error, we deem it unnecessary to discuss plaintiff's additional assignments of error relating to the court's denial of plaintiff's motions to amend her complaint. Neither of these

assignments of error affects this decision, and both are rendered moot by this opinion.

Summary judgment in favor of defendant is

Affirmed.

Judges MARTIN (Harry C.) and WELLS concur.

VERA H. QUICK v. W. B. QUICK

No. 8010DC865

(Filed 21 July 1981)

1. **Divorce and Alimony § 18.10— amount of alimony—findings not required**

Findings of fact are not required when the only issue for the court is the amount of alimony.

2. **Divorce and Alimony § 16.8— amount of alimony**

Where the evidence showed that the parties owned a house and lot as tenants in common which they offered for sale for $180,000, that they owned as tenants in common two store buildings, that defendant owned 2,900 of 3,000 outstanding shares of a realty company, that defendant's net worth was over $600,000, that defendant's net income at the time of the hearing on plaintiff's claim was $2,151 per month, and that plaintiff was the dependent spouse entitled to alimony, the trial court was required by G.S. 50-16.5(a) to enter an order for alimony which would enable the dependent spouse to live as the wife of a man with such an estate was entitled to live.

3. **Divorce and Alimony § 16.8— amount of alimony—consideration of dependent spouse's property**

There was no merit to defendant's contention that the trial court erred in failing to consider the value of plaintiff's estate in determining the amount of alimony to which she was entitled, though the court found the value of plaintiff's property to be unknown, since the court might take into account that a dependent spouse has property, although its value may not be precisely known, in considering the estates of both parties.

4. **Divorce and Alimony § 16.8— alimony award—depletion of estate not required**

There was no merit to defendant's contention that he would be required to deplete his estate in order to pay alimony awarded by the trial court.

5. **Divorce and Alimony § 16.8— size of supporting spouse's estate—evidence admissible**

Evidence of the financial status of a corporation in which defendant, who was the supporting spouse, owned more than 96% of the stock was relevant

and competent in determining the size of his estate for the purpose of setting the amount of alimony to which plaintiff was entitled.

6. Divorce and Alimony § 18.16— award of counsel fee proper

Where plaintiff testified that she had no income except the rental from her property and temporary alimony, all of which was required for living expenses, it was not error for the trial court to award counsel fees to plaintiff in her action for permanent alimony.

APPEAL by defendant from *Barnette, Judge.* Order entered 9 April 1980 in District Court, WAKE County. Heard in the Court of Appeals 31 March 1981.

Plaintiff instituted this action seeking permanent alimony. The parties stipulated that the plaintiff is a dependent spouse within the meaning of G.S. 50-16.1(3), that defendant is a supporting spouse within the meaning of G.S. 50-16.1(4), and that plaintiff has grounds for alimony as provided for in G.S. 50-16.2. The only issue before the court was the amount of alimony to which the plaintiff was entitled. The evidence showed that plaintiff and defendant were married in 1945 at which time they were both twenty years of age. At the time of their marriage, neither party possessed substantial financial resources.

The parties separated in 1978 and were divorced in 1979. At the time of the hearing, they owned a house and lot in Jacksonville, North Carolina, as tenants in common which they had offered for sale for $180,000.00. They also owned as tenants in common two store buildings in Jacksonville, North Carolina. The defendant owned 2,900 of 3,000 outstanding shares of Carmen Realty Co., Inc. Among the assets of Carmen Realty Co., Inc. was a certificate of deposit for $108,000.00; seven store buildings, two of which were rented, in Jacksonville, North Carolina; a parking lot; a vacant lot; and a one-half undivided interest in other real estate in Onslow County. On 28 October 1977, the defendant filed a financial statement with the First Citizens Bank and Trust Company which showed a combined net worth for defendant and Carmen Realty Co., Inc. of $1,179,511.38. On 12 September 1979, he filed a financial statement with the same bank which showed the combined net worth of defendant and Carmen Realty Co., Inc. to be $619,582.72.

The defendant's accountant testified the defendant had incomes of approximately $47,000.00 in 1978, $59,500.00 in 1979, and

projected an income for defendant of approximately $37,000.00 for 1980. The accountant testified the book value of Carmen Realty Co., Inc. after giving the buildings their depreciated value was approximately $174,000.00.

The court made findings of fact including a finding that the defendant's net income at the time of the hearing was $2,151.00 per month and his reasonable monthly living expenses were $3,800.00. The court also found that the defendant's stock in Carmen Realty Co., Inc. was worth approximately $174,000.00. The court found that the plaintiff needs $1,275.00 per month as permanent alimony and awarded her this amount. The court also awarded attorney fees to the plaintiff.

The defendant appealed.

Brenton D. Adams for plaintiff appellee.

Tharrington, Smith and Hargrove, by J. Harold Tharrington and Carlyn G. Poole, for defendant appellant.

WEBB, Judge.

[1, 2] We affirm the judgment of the district court. It was held in *Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975) that findings of fact are not required when the only issue for the court is the amount of alimony. The evidence in this case is that the defendant is a man of substantial wealth. The plaintiff has a small income. We believe that when the evidence shows an estate in the supporting spouse comparable to the defendant's estate, and the dependent spouse is entitled to alimony, G.S. 50-16.5(a) requires the court to enter an order for alimony which will enable the dependent spouse to live as the wife of a man with such an estate is entitled to live. *See Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980). The alimony awarded in this case was well within the discretion of the court.

[3] The defendant contends the district court erred in failing to consider the value of the plaintiff's estate. The court found the value of the plaintiff's property to be unknown. This does not mean the court did not consider the evidence as to the value of the plaintiff's property. There was evidence as to its value, but it was certainly not conclusive. The court may take into account that a dependent spouse has property, although its value may not

be precisely known, in considering the estates of both parties. We believe the court did so in this case.

[4] The defendant also contends the findings of fact show that the defendant will be required to deplete his estate in order to pay alimony. We do not believe the findings of fact should be so interpreted. We note that the court in finding that the value of the defendant's stock in Carmen Realty Co., Inc. is worth approximately $174,000.00, used the book value as testified to by the defendant's accountant. The corporation owns a certificate of deposit in the amount of $108,000.00. If the accountant's testimony as to the value is the correct value for the corporate assets, it means the total value of all other assets, including the extensive real estate assets in Onslow County, is $66,000.00. All the evidence is that the defendant is a man of substantial wealth. We believe this wealth can be invested so that it will produce an income sufficient for him to pay alimony without depleting his estate. *See Williams v. Williams, supra,* for a case involving estate depletion.

[5] The defendant also assigns error to the court's refusal to quash a subpoena *duces tecum.* The plaintiff subpoenaed and offered into evidence the records of Carmen Realty Co., Inc. pertaining to corporate income, cash flow, depreciation, expenses, financial statements, and assets of the corporation. One of the relevant factors in determining the amount of alimony is the estate of the defendant. We believe this evidence of the financial status of a corporation in which he owned more than 96 percent of the stock was relevant and competent in determining the size of his estate.

[6] The defendant also assigns error to the award of counsel fees to the plaintiff. In order for the dependent spouse to be awarded counsel fees, she must show that she needs such counsel fees to enable her, as a litigant, to meet her husband on substantially even terms by making it possible for her to employ adequate counsel. *McLeod v. McLeod,* 43 N.C. App. 66, 258 S.E. 2d 75, *disc. rev. denied,* 298 N.C. 807, 261 S.E. 2d 920 (1979). The plaintiff's testimony was that she had no income except the rental from her property and temporary alimony, all of which was required for living expenses. We hold that it was not error for the court to award counsel fees to the plaintiff.

Affirmed.

Judges HEDRICK and ARNOLD concur.

C. EDWARD GILLESPIE, PLAINTIFF v. DAVID DEWITT, DEFENDANT AND THIRD-PARTY PLAINTIFF v. DANIEL E. KELLY AND K & G HEALTH CARE INDUSTRIES, INC., THIRD-PARTY DEFENDANTS

No. 808SC810

(Filed 4 August 1981)

1. Guaranty § 1; Uniform Commercial Code § 28— guaranty agreement—no specified amount to be paid—no negotiable instrument

An agreement signed by defendant which guaranteed the payment of "any and all indebtedness, liabilities and obligations of every nature and kind of said Debtor . . . to the extent of $30,000" was not a negotiable instrument since it did not contain an unconditional promise to pay a sum certain but only established a ceiling on the amount of the guarantor's liability.

2. Guaranty § 1— guaranty of payment

An agreement in which defendant guaranteed the full and prompt payment to a bank at maturity and all times thereafter "of any and all indebtedness, liabilities and obligations of every nature and kind of said Debtor to said Bank, and every balance and part thereof, whether now owing or due, or which may hereafter, from time to time, be owing or due, and howsoever heretofore or hereafter created or arising or evidenced, to the extent of $30,000" created a guaranty of payment.

3. Guaranty § 1— guaranty of payment—consideration—future indebtedness

Although a guaranty of payment was independent of the transaction in which the principal debt was created, it was supported by consideration where it covered future as well as existing indebtedness.

4. Guaranty § 2— assignment of notes and guaranty—liability of guarantor on notes

Plaintiff did not extinguish defendant's liability on a guaranty of payment of a corporation's notes to a bank by giving his personal note to the bank in return for the bank's assignment to him of the notes and the guaranty of payment where the language of the guaranty showed that it was the intention of the parties that the guaranty be assignable, and where the uncontraverted evidence showed that plaintiff purchased the corporation's notes to protect collateral he had put up as security for the notes and that it was the intention of plaintiff and the bank that the transaction be a purchase of the notes and guaranty rather than payment of the notes.

5. Corporations § 25; Principal and Agent § 6.1— agent's execution of note—ratification by corporation

A corporation ratified its agent's appointment and authority to execute notes to a bank on its behalf by accepting the proceeds of the bank loans and making payments on the notes.

6. Guaranty § 2— guaranty of payment—assignment to accommodated party—action against guarantor

Although plaintiff was an accommodated party on a guaranty of payment of notes to a bank executed by defendant, the bank's assignment of the notes and guaranty agreement to plaintiff operated as a binding transfer of the title to the guaranty agreement as between the bank and plaintiff, and plaintiff succeeded to the rights of the bank against defendant under the guaranty agreement and could sue defendant to recover amounts owed by defendant under the agreement.

7. Guaranty § 1— guaranty of payment—right to grant extensions of notes

A guaranty stating that a bank was authorized to grant "extensions . . . with respect to any of the indebtedness, liabilities and obligations covered by this guaranty" was intended to give the bank the right to grant multiple extensions of any one of the principal debtor's notes to the bank or all of them without discharging defendant's liability as guarantor, and defendant waived any defense of discharge due to the extension of the notes by executing the guaranty containing such language.

8. Guaranty § 2— notice to holder to proceed against principal—meaning of principal

The statute which permits a guarantor to give written notice to the holder or owner of an obligation requiring him to use all reasonable diligence to recover against "the principal," G.S. 26-7(a), refers to the principal debtor on the indebtedness or obligations underlying the guaranty and not to a principal of the guaranty itself.

9. Interest § 2— action on guaranty—interest on notes from maturity and after judgment

Where a corporation's notes to a bank and defendant's guaranty of payment of the notes were assigned by the bank to plaintiff in return for plaintiff's payment of principal and interest due on the notes, defendant agreed in the guaranty to pay any indebtedness of the corporation to the bank, the notes specifically provided that interest should accrue on them at the rate of 9½% from maturity, and the trial court entered summary judgment for plaintiff in an action to recover upon defendant's guaranty of the notes, the trial court properly awarded plaintiff interest of 9½% from the time of maturity of the notes until the entry of summary judgment and the legal rate of interest of 6% from the time of entry of the judgment.

10. Attorneys at Law § 7.4— attorney fee provision of note—notice of intention to enforce

Plaintiff's notice to defendant of his intention to collect attorney's fees pursuant to the provisions of a note was timely although it was not received by defendant until four days after plaintiff's action on the note was initiated.

APPEAL by defendant, David DeWitt, from *Reid, Judge.* Judgment entered 3 July 1980 in Superior Court, WAYNE County. Heard in the Court of Appeals 11 March 1981.

On 22 December 1976, K & G Health Care Industries, Inc. (hereinafter K & G) executed a promissory note in the original principal amount of $16,000 to Peoples National Bank of Smithfield, North Carolina (hereinafter bank). Similarly, on 28 December 1976, K & G executed another promissory note to the bank in the original amount of $14,000. Both of these notes were signed for K & G by Daniel E. Kelly, third-party defendant. They were both endorsed on the back by plaintiff and Kelly. The notes were secured by collateral in the form of stocks and a debenture belonging to plaintiff. Both notes were renewed on several different occasions after their original date of maturity.

On 19 January 1977, defendant, who was a shareholder, officer, and director of K & G, executed a loan guaranty agreement with the bank. In this agreement defendant guaranteed the payment of K & G's indebtedness to the bank to the extent of $30,000.

K & G made payments on the two notes through 2 October 1978. At that time there remained outstanding a total principal balance on both notes of $20,673.11. No further payments were made by K & G after that date.

By letter dated 7 June 1979, defendant was notified by the bank that the notes had not been paid. Defendant responded by letter dated 19 June 1979 in which he informed the bank that he had signed the guaranty as guarantor of plaintiff and Kelly and as such he did not have an obligation to pay until the bank had exhausted all legal measures of obtaining payment against them.

In June or July 1979, the bank made demand on plaintiff for payment of the notes. On 7 September 1979, plaintiff paid to the bank the balance of the principal and interest due on the notes. Plaintiff borrowed $20,673.11 from the bank with which he paid the combined remaining principal balance on the original two notes. He paid the interest due on the two notes by personal check. At that time, both notes and defendant's guaranty agreement were assigned and delivered to plaintiff by the bank. Subsequently, and on 8 November 1979, plaintiff gave written notice of the bank's assignments to defendant.

Plaintiff filed his complaint in this action on 6 December 1980, seeking to recover from defendant $22,317.11, representing the total amount plaintiff had paid the bank for the two notes with interest, plus interest on that amount from 7 September 1979, basing his claim upon the written guaranty of K & G's indebtedness which defendant had given the bank on 19 January 1977.

By his answer defendant admitted having executed the written guaranty and that he refused to pay under that agreement, but denied that the sums referred to in the guaranty were past due or unpaid. He averred in defense that his obligation on the notes had been discharged by payment of the notes or by reacquisition by a prior party, or by both. Furthermore, he averred that his obligation on the notes had been discharged by the holder's alterations of the terms of the notes without his consent, by failure of the holder to take appropriate action against the principal, K & G, and against the securities held for the obligation, and by the impairment of recourse and collateral for the notes without defendant's consent. Defendant also alleged as a first counterclaim and setoff that plaintiff, as an endorser of the notes, was liable for a proportionate share of any amount for which the sureties on the note were liable. As a second counterclaim, defendant alleged that plaintiff entered into an agreement with defendant and Daniel Kelly under which he was to be indemnified for any loss he suffered by virtue of the guaranty he executed for K & G's indebtedness, and that by the terms of that agreement plaintiff was liable to defendant for any amount recovered by plaintiff from defendant under the guaranty.

In response to a court order entered 14 May 1980, in which the court found the third-party defendants, Kelly and K & G, to be necessary parties pursuant to G.S. 1A-1, Rules 19 and 20, defendant filed on that day a third-party complaint against those parties.

On 25 May 1980, plaintiff made a motion for summary judgment pursuant to G.S. 1A-1, Rule 56. The court considered the pleadings, the depositions of plaintiff and J. Newton Thrash, Jr., the exhibits, the affidavit of Daniel E. Kelly, and the legal memoranda and arguments of counsel for plaintiff and defendant. On 3 July 1980, the court allowed plaintiff's motion and entered

its judgment in which it found that no genuine issue of material fact existed. The court ordered defendant to pay plaintiff $24,269.98, representing the amount owing on the notes plus interest, and to pay plaintiff's counsel $3,477.81 in attorney's fees pursuant to G.S. 6-21.2. Defendant appealed from the court's entry of summary judgment.

Freeman, Edwards and Vinson, by George K. Freeman, Jr., for plaintiff appellee.

VanCamp, Gill and Crumpler, by James R. VanCamp and Douglas R. Gill, for defendant appellant.

MORRIS, Chief Judge.

Defendant's sole assignment of error is to the trial court's granting plaintiff's motion for summary judgment. G.S. 1A-1, Rule 56(c) specifies that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." We need not review again the familiar standards for this motion. For a comprehensive summary of the law with respect to Rule 56 see Justice Moore's opinion in *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). It is for us to determine whether the evidence before the trial court created a factual issue that was so essential that the party against whom it was resolved should not prevail, or if a factual issue existed of such a nature as to affect the outcome of the action, or if a factual issue existed of such a nature as to constitute a legal defense. If none of these "situations" existed, the trial court's allowance of plaintiff's motion was correct and will be affirmed.

[1] Several of defendant's arguments rely on and refer in part to the rules of the Uniform Commercial Code, G.S. 25-1-101 *et seq.* Defendant's references to the U.C.C. are misplaced in this instance. The law of contracts rather than the U.C.C. properly governs the qualities and effects of this guaranty contract. G.S. 25-3-104 sets out the requisite elements which a writing must "possess" in order to be negotiable and, thus, come within the scope of the rules and regulations of the U.C.C. To be a negotiable instrument a writing must be signed by the maker or

drawer, contain an unconditional promise or order to pay a sum certain in money, contain no other promise, order, obligation or power given by the maker or drawer except as authorized by G.S. Chapter 25, Article 3, be payable on demand or at a definite time, and be payable to order or to bearer. G.S. 25-3-104. The guaranty contract before us for consideration in this case does not fulfill all of these statutory requirements.

In a recent case analogous to the one before us, *Trust Co. v. Creasy*, 301 N.C. 44, 269 S.E. 2d 117 (1980), the Supreme Court, per Justice Britt, held that a guaranty agreement substantially similar to that in the case *sub judice* was not a negotiable instrument. The Court based its determination in *Creasy* upon the absence from the contract of guaranty of two of the elements of negotiability required by G.S. 25-3-104. The Court held that the guaranty agreement did not meet the requirement that it delineate "a sum certain in money." This was so because the document in question in *Creasy* called for a ceiling of $35,000 on the amount of the prinicipal debtor's indebtedness on which the guarantor agreed to be liable. The guaranty agreement did not specify the actual amount of liability within itself. Resort had to be made to external sources of information to determine the extent of the guarantor's actual liability. Justice Britt stated:

> For the requirement of a sum certain to be met, it is necessary that at the time of payment the holder is able to determine the amount which is then payable from the instrument itself, with any necessary computation, without any reference to an outside source. Official Comment, G.S. § 25-3-106 (1965); *Wattles v. Agelastos*, 27 Mich. App. 624, 183 N.W. 2d 906 (1970). It is necessary for a negotiable instrument to bear a definite sum so that subsequent holders may take and transfer the instrument without having to plumb the intricacies of the instrument's background. *Cobb Bank & Trust Co. v. American Mfr's. Mut. Ins. Co.*, 459 F. Supp. 328 (N.D. Ga. 1978). . . .
>
> Such an absence is enough by itself to foreclose any finding that the paper at issue is negotiable.

301 N.C. at 51, 269 S.E. 2d at 122. The guaranty agreement now before us resembles the document in *Creasy*. It is an instrument separate from any specific note, obligation or instrument which

evidences the principal debtor's indebtedness. It was not executed simultaneously with or attached to any such instrument. Nor does it refer to any specific instrument which evidences an obligation of the principal debtor. The guaranty agreement guarantees the payment of "any and all indebtedness, liabilities and obligations of every nature and kind of said Debtor . . . to the extent of $30,000." The guaranty does not specify the amount of liability that is to be paid. It only establishes a ceiling on the amount of the guarantor's liability.

For the reasons stated in *Creasy*, this instrument does not supply the requisite certainty in the amount or sum due. Therefore, it is not a negotiable instrument.

[2] The parties to this lawsuit do not contend that this instrument represents any form of agreement other than a contract of guaranty. The document is labeled "Loan Guaranty Agreement". However, labels are not necessarily binding. The substance of the transaction controls. *Thompson v. Soles*, 299 N.C. 484, 263 S.E. 2d 599 (1980); *In Re Will of Pendergrass*, 251 N.C. 737, 112 S.E. 2d 562 (1960).

> A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself liable in the first instance for such payment or performance. *Cowan v. Roberts*, 134 N.C. 415, 46 S.E. 979 (1904).

O'Grady v. Bank, 296 N.C. 212, 220, 250 S.E. 2d 587, 593 (1978). A guarantor's liability arises at the time of the default of the principal debtor on the obligation or obligations which the guaranty covers. *Milling Co. v. Wallace*, 242 N.C. 686, 89 S.E. 2d 413 (1955); *Trust Co. v. Clifton*, 203 N.C. 483, 166 S.E. 334 (1932). A guaranty of payment is an absolute promise by the guarantor to pay a debt at maturity if it is not paid by the principal debtor. This obligation is independent of the obligation of the principal debtor, "and the creditor's cause of action against the guarantor ripens immediately upon the failure of the principal debtor to pay the debt at maturity." *Investment Properties v. Norburn*, 281 N.C. 191, 195, 188 S.E. 2d 342, 345 (1972). The language of the agreement signed by defendant created an unconditional promise on defendant's part to pay the bank any sums due on the principal debtor's

(K & G's) indebtedness at maturity if not paid by the principal debtor. The guaranty agreement provides:

> We hereby jointly and severally guarantee the full and prompt payment to said Bank at maturity, and at all times thereafter, and also at the time hereinafter provided, of any and all indebtedness, liabilities and obligations of every nature and kind of said Debtor to said Bank, and every balance and part thereof, whether now owing or due, or which may hereafter, from time to time, be owing or due, and howsoever heretofore or hereafter created or arising or evidenced, to the extent of $30,000.

This language was sufficient to create a guaranty of payment.

The enforceability of the guarantor's promise is determined primarily by the law of contracts. However, a special law of guaranty has developed to answer specific problems inherent in guaranty agreements. *O'Grady v. Bank*, supra.

[3] Initially, we are confronted with the question of the validity of defendant's guaranty contract. Defendant contends that this guaranty contract was not based upon any consideration. "It is well-settled law in this State that in order for a contract to be enforceable it must be supported by consideration." *Investment Properties v. Norburn*, supra, at 195, 188 S.E. 2d at 345, and cases cited therein. It is unnecessary that the consideration be full or adequate. Any legal consideration will be sufficient to support the guaranty. *Cowan v. Roberts*, 134 N.C. 415, 46 S.E. 979 (1904).

Defendant suggests that the testimony of the bank officer, J. Newton Thrash, Jr., who administered the notes and guaranty in question created an issue as to whether the guaranty was entirely gratuitous or based upon consideration. The essence of Mr. Thrash's testimony was that defendant wanted to guarantee the two notes which were collateralized by plaintiff's securities and debenture so that plaintiff would not lose his collateral or have to pay the notes. This was being done so that defendant and third-party defendant Kelly could persuade plaintiff to sell them his interest in K & G. Mr. Thrash testified that, "the guaranty itself did not enter into the original decision to loan the money, because the loan was made prior to the guaranty being executed." He also stated: "I am of the opinion that the bank did not require that

guaranty for any purpose in connection with these notes. We obviously were holding collateral sufficient to cover both of these notes, and Dr. DeWitt's guaranty really didn't add anything to our positon at that point."

The guaranty contract was between defendant-guarantor and the bank-obligee. Consideration for this contract passed between these two parties and not between the guarantor and some third-party, here plaintiff. Mr. Thrash's testimony indicates that his bank did not solicit or need the extra security for these two notes. The reason defendant executed this guaranty was to procure plaintiff's ownership interest in K & G.

When the guaranty contract is shown to have been executed as a part of a transaction which created the guaranteed debt, it is not essential to recovery on the guaranty that the guaranty shall have been supported by consideration other than the principal debt. 38 Am. Jr. 2d, Guaranty, § 44, p. 1047. The extension of credit by the obligee under the guaranty contract supplies consideration for both the principal debt and the guaranty. Here the guaranty was not entered into as part of the transaction which included the creation of the principal debt. This guaranty was executed after the original debt was incurred, and there is no evidence that it was part of the agreement in which the principal debt was incurred. When the guaranty is independent of the transaction in which the principal debt was created, it should be supported by consideration which is independent of the principal debt. 38 Am. Jur. 2d, Guaranty, § 45, pp. 1047-48.

Going no further, it would seem that defendant's contentions were correct and that the subsequent guaranty contract was not supported by independent consideration running from the obligee to the guarantor. However, when the guaranty which is separate from the original indebtedness covers *future* as well as existing indebtedness, there is consideration for the guaranty apart from the principal indebtedness which was previously in existence. *See, Gibbs v. American National Bank of Jacksonville,* 155 So. 2d 651 (1963), *cert. discharged,* 170 So. 2d 821 (1964) and cases cited therein. By agreeing to guarantee future advances of credit the guarantor exposed himself to liability on indebtedness which the principal debtor might possibly incur in the future to the extent of the $30,000 limit. The guaranty contract executed by defendant

stated that defendant guaranteed, "any and all indebtedness, liabilities and obligations of every nature and kind of said Debtor to said Bank, and every balance and part thereof, whether now owing or due, *or which may hereafter, from time to time, be owing or due, and howsoever heretofore or hereafter created or arising or evidenced. . .*" (Emphasis added.) Therefore, in this instance this guaranty contract was based upon consideration in the form of the guarantor's agreement to pay upon maturity and upon the principal debtor's default on any indebtedness, liability or obligation extended by the bank to the principal debtor in the future. The guaranty agreement is clear on this point and there is no issue of fact.

No other issues relative to the formation of a valid contract of guaranty were raised in the pretrial proceedings or on appeal. After examining the record and attached exhibits, we are not aware of any issue as to the remaining elements necessary to the existence of a valid contract. Therefore, we now turn to the procedural and interpretive aspects of the proper enforcement of this contract.

[4] Defendant argues for several reasons that this guaranty is not enforceable by plaintiff to whom it and the notes were assigned. First, defendant argues that the "obligations under the guaranty is [sic] conditioned upon nonpayment of a note covered by a guaranty, but uncontroverted facts do not establish that the condition precedent of nonpayment of such a note has occurred." Defendant contends that plaintiff, by giving his personal note in return for the bank's assignment of the K & G notes and guaranty to him, paid off the notes and in so doing extinguished his liability on the guaranty. Defendant insists that his theory gives rise to a question of fact as to whether the K & G notes were paid or whether they were merely purchased by plaintiff.

We disagree. There was no factual issue as to whether plaintiff purchased or paid the notes by giving the bank his own personal note in return for the assignment to him of the K & G notes and defendant's guaranty. The uncontroverted evidence shows that plaintiff purchased the K & G notes to protect his collateral which he had put up as security for the K & G notes. He had no intention to extinguish them.

The bank's assignment of the K & G notes and defendant's guaranty to plaintiff was valid. The rights of the obligee to a guaranty contract may be assigned under the principles of general contract law. 3 Williston, Contracts 3d ed. § 404 *et seq.* The guaranty agreement in the case *sub judice* provides:

> This guaranty shall be binding upon the undersigned jointly and severally, and upon the heirs, legal representatives and *assigns* of the undersigned, and each of them, respectively, and shall inure to the benefit of said Bank, its successors, legal representatives and *assigns.* (Emphasis added.)

This language reveals that it was the intention of the parties to this guaranty that it be assignable. This clearly negates any issue as to whether the guaranty was originally agreed to on the basis of the guarantor's personal confidence in the obligee which would indicate that the guaranty was not intended to be assignable.

An assignment operates as a valid transfer of the title of a chose in action. *Lipe v. Bank,* 236 N.C. 328, 72 S.E. 2d 759 (1952). The assignee becomes the real party in interest who may maintain an action thereon in his own name. *Overton v. Tarkington,* 249 N.C. 340, 106 S.E. 2d 717 (1959); *Cadillac-Pontiac Co. v. Norburn,* 230 N.C. 23, 51 S.E. 2d 916 (1949). The assignee acquires such right, title and interest as the assignor had. *Cf. Holloway v. Bank,* 211 N.C. 227, 189 S.E. 789 (1937). Therefore, in the instant case plaintiff as the assignee of the guaranty took title to that contract. He acquired the rights, title and interest to the guaranty and may maintain an action thereon in his own name.

The evidence shows that plaintiff intended to purchase the notes when he took assignment of them. The uncontradicted evidence shows that plaintiff was forced to give the bank his personal note and take assignment of the K & G notes and of defendant's guaranty in return. Plaintiff had to do this to protect the collateral, which was his own personal property, he had put up to secure K & G's debt. It is clear from the evidence that had plaintiff not purchased the notes the bank would have resorted to his collateral for payment. At this time plaintiff no longer had any interest in K & G, and he did not take assignment of these notes to aid the company. Furthermore, the assignment itself is substantial evidence that it was the intention of the parties that plaintiff purchase the notes rather than extinguish them. Had it been their

intention merely to extinguish the notes they would have simply cancelled the documents or destroyed them. Instead the uncancelled notes were endorsed by the bank's representative and given to plaintiff. The parties executed a written assignment of the guaranty agreement and the indebtedness covered thereby to plaintiff. The assignment provides that the bank "does hereby sell, assign, transfer and set over unto C. Edward Gillespie this guaranty and any and all choses in action and right of suit and collections thereon." This language indicates that it was the parties' intention that the transaction be a purchase of the notes and guaranty by plaintiff rather than payment.

Defendant contends that the transfer of the notes and assignment of the guaranty are not conclusive of the fact that the transaction constituted a sale rather than payment of the notes. In support of this argument defendant relies on *Insurance Co. v. McCraw*, 215 N.C. 105, 1 S.E. 2d 369 (1939), in which the Supreme Court stated:

> Whether a stranger to a note, who takes it up, buys it or extinguishes it, depends, ordinarily, on the circumstances surrounding the transaction. *Wilcoxon v. Logan*, 91 N.C., 449.

215 N.C. at 108, 1 S.E 2d at 371. This rule of law is certainly still valid. However, where all of the evidence before the court on the motion for summary judgment indicated that the parties' intent was that the notes and guaranty were being purchased rather than paid, there could be but one conclusion. Thus, there was no issue of fact. We find no evidence in the record to contradict that which shows the transaction to have been a purchase and assignment of the notes and guaranty. Therefore, we conclude that this transaction was a purchase and assignment of the notes and guaranty by and to plaintiff.

[5] Defendant argues that the written guaranty contract on which plaintiff bases this action covered only the indebtedness or obligations of K & G to the bank, but that uncontroverted evidence did not establish that the unpaid notes were those of K & G. He bases this contention on what he claims to be an issue of fact as to whether the notes were properly executed by third-party defendant Daniel E. Kelly for K & G. Defendant asserts that there was also a question as to whether Kelly was authorized to sign the notes as agent of K & G.

The notes were signed:

K & G Health Care Industries, Inc.
By, Daniel E. Kelly (Seal).

Where there is plenary evidence that the principal ratified the contract of its agent, objection to the admission of evidence of the contract on the ground that the authority of the agent to make the contract had not been shown, is untenable. *Turner v. Chevrolet Co.*, 209 N.C. 587, 183 S.E. 742 (1936), *see also Investment Properties v. Allen*, 283 N.C. 277, 196 S.E. 2d 262 (1973). "The appointment of an agent and the scope of his authority may be established by conduct as well as by words of the principal. (Citation omitted.)" *Investment Properties v. Allen*, 13 N.C. App. 406, 408, 185 S.E. 2d 711, 713 (1972), *reversed on other grounds*, 283 N.C. 277, 196 S.E. 2d 262 (1973). In this instance the uncontroverted evidence of the conduct of the principal, K & G, established that the principal ratified both the appointment and the authorization of the purported agent, Kelly, to execute these notes on K & G's behalf. The evidence shows that for over a year the principal, K & G, made payment of the principal and interest due on the notes, substantially reducing the amount due on them. Since there was no evidence produced to indicate otherwise, we think that this was ample evidence from which the court could conclude without question that the principal, K & G, had ratified both the fact of Kelly's agency relationship and the extent of his authority to act on its behalf in this matter. The principal, K & G, ratified and accepted its liability on these notes by accepting the benefits of the loan and making payments on its indebtedness. We conclude that there was no issue of fact as to the principal's, K & G's, liability on these notes. Therefore, the indebtedness on these notes was covered by the guaranty agreement between defendant and the bank.

[6] Defendant assigns error to what he terms the failure of "uncontroverted evidence . . . to establish an unusual situation in which an endorser who acquires a note by payment has recourse against a subsequent guarantor." Defendant insists that there was a material factual issue as to the reason that he executed this guaranty. He contends that his reason for executing the guaranty was material due to what he calls the "well-established principle that an accommodation party cannot be liable to the party accom-

modated." Defendant alleges that he presented materials for the court's consideration which tended to show that his guaranty was an accommodation of K & G, of Kelly, and of plaintiff. Thus, he reasons that by executing the guaranty upon which plaintiff was an endorser he accommodated plaintiff. Specifically, he argues that an endorser who acquires a note by payment does not have recourse against a subsequent guarantor. Therefore, plaintiff, one of the parties accommodated, may not now turn and sue defendant, the accommodation party. Defendant insists that this rule makes material the issue of whether by signing the guaranty he accommodated plaintiff.

We disagree. It is a general rule that an accommodation party is not liable to the party accommodated. 11 Am. Jur. 2d, Bills and Notes, § 546, p. 609; *see Bank v. Hinton*, 216 N.C. 159, 4 S.E. 2d 332 (1939). However, in view of the facts of this case, it is immaterial whether plaintiff was one of the accommodated parties. Defendant does not contend, and the undisputed facts reveal, that the bank was not the party accommodated by the guaranty agreement. The guaranty was executed by defendant ostensibly to guarantee the payment of K & G's obligations and indebtednesses to the bank. It is elementary that the bank could proceed to enforce the guaranty agreement upon K & G's default on the payments of its indebtedness to the bank and force defendant to pay those debts. It has already been established that the guaranty agreement was properly assigned by the bank to plaintiff. The assignment operated as a binding transfer of the title to the guaranty agreement as between the bank and plaintiff. *See Lipe v. Bank*, 236 N.C. 328, 72 S.E. 2d 759 (1952). The assignee of a nonnegotiable instrument such as this guaranty acquires the rights possessed by the assignor, and stands in the shoes of the latter. 6 Am. Jur. 2d, Assignments, § 102, p. 282. By taking the assignment of the guaranty agreement from the bank, plaintiff succeeded to the rights of the bank against defendant under the guaranty agreement. Plaintiff, as assignee of the guaranty, may sue the defendant-guarantor to recover the amounts owing by defendant under the agreement. Thus, the question of defendant's reason for executing the guaranty becomes immaterial. This assignment of error is overruled.

[7] Defendant claims that there are material questions as to whether he has been discharged from liability under the guaranty

by the acts or omissions of the holder of the guaranty. First, defendant argues that there was an issue as to whether he had available to him the defense of being discharged from liability on the guaranty, because the time of maturity of the two notes upon which this action is based had been extended several times. We do not think that there was any issue of fact as to the unavailability of the defense of discharge due to the extension of the notes to defendant. The guaranty contract expressly states:

> Authority and consent are hereby expressly given said Bank from time to time, and without any notice to the undersigned, to give and make such *extensions*, renewals, indulgences, settlements and compromises as it may deem proper with respect to any of the indebtedness, liabilities and obligations covered by this guaranty, including the taking or releasing of security and surrendering of documents. (Emphasis added.)

By executing the guaranty containing this language defendant clearly waived any defense of discharge due to the extension of the notes. However, defendant claims that the parties' intention as to the meaning to be given the word "extensions" is ambiguous. He contends: "The use of that word could be interpreted to mean that the bank could grant more than one extension by extending several notes or other indebtedness one time each. It also could be interpreted to mean that the bank could grant multiple extensions of each separate indebtedness." Only the latter interpretation would justify the bank in having extended the two notes several times each.

The construction of a contract is a matter of law for the courts when the language is plain and unambiguous. *Kent Corporation v. Winston-Salem*, 272 N.C. 395, 158 S.E. 2d 563 (1968); *Rhoades v. Rhoades*, 44 N.C. App. 43, 260 S.E. 2d 151 (1979). We think the language of the guaranty is unambiguous with respect to the interpretation which the parties intended to give the word "extensions". The guaranty states that the bank is authorized to grant "extensions . . . with respect to any of the indebtedness, liabilities and obligations covered by this guaranty." The word "extensions" must be read in context with this immediately succeeding language. It becomes obvious from this language that the parties' intention was that the bank could grant multiple exten-

sions of any one of K & G's obligations or of all of them without discharging defendant's liability as guarantor.

[8] Second, defendant contends that the evidence does not conclusively establish that the bank properly proceeded against all of the obligors on the notes in response to defendant-guarantor's notice to the bank to proceed against the obligors. Defendant asserts that under G.S. 26-7 a guarantor may "demand that the holder of a note use reasonable diligence first to recover against previous obligors and to proceed to realize upon securities he holds for the obligation." Defendant insists that there is a factual issue as to who the principals of the guaranty agreement were. Defendant reasons that this issue was material, because without a determination of who the principles to the guaranty were, it cannot be determined whether the defendant's notice in fact informed the bank to proceed against the principals. Thus, defendant argues there is an issue as to whether he was discharged on his guaranty by failure of the bank to proceed in response to the notice given.

G.S. 26-7(a) provides:

> After any note, bill, bond, or other obligation becomes due and payable, any surety, indorser, or guarantor thereof may give written notice to the holder or owner of the obligation requiring him to use all reasonable diligence to recover against the principal and to proceed to realize upon any securities which he holds for the obligation.

There was no factual dispute as to which party in this case represented the party designated in the statute as the "principal". Obviously, when the statute refers to the "principal" it refers to the principal debtor on the obligation being enforced, here K & G. Defendant argues that the evidence suggests the possibility of finding that K & G, Kelly, plaintiff, or a combination of them were the "principals of the defendant's guaranty". G.S. 26-7 does not refer to the "principal of the . . . guaranty" as defendant suggests, but rather it clearly refers to the principal debtor on the indebtedness or obligations underlying the guaranty. Therefore, in this case K & G was the principal to which the statute refers.

Finally, defendant assigns error to the portion of the court's judgment in which it awarded interest and attorney's fees to plaintiff.

[9] First, defendant maintains that the court erred in awarding plaintiff interest at the rate of "9%" from the time plaintiff acquired the notes until the time of the rendering of summary judgment for plaintiff. Defendant claims instead that the court properly should have awarded interest under G.S. 24-5 at the legal rate of 6% as specified in G.S. 24-1 during this period. We disagree. The court ordered defendant to pay plaintiff interest at the approximate rate of 9% from the time of the default until the date of the entry of judgment and thereafter interest was to be accumulated at the "legal rate", meaning the 6% rate specified in G.S. 24-1. Defendant agreed in the guaranty to be liable for "any and all indebtedness, liabilities and obligations of every nature and kind of said Debtor to said Bank." Both of the notes in question state:

> Interest shall be computed on the basis of a 60 day year for the actual number of days in the interest period and interest shall accrue after maturity or demand, until paid, at the rate stated.

The interest rate stated in the note was 9½% per annum. By the language of the guaranty defendant contracted to pay any indebtedness, no matter its origin, of K & G to the bank. The notes specifically state that interest should accrue on them at the rate of 9½% from maturity. Hence, defendant guaranteed to the bank payment of interest on the notes at the rate of 9½% from the date of their maturity. This is what the court ordered. As the purchaser of the notes and assignee of the notes and guaranty plaintiff acquired the rights, title and interest thereto possessed by the bank-assignor. *See Holloway v. Bank*, 211 N.C. 227, 189 S.E. 789 (1937). This would include the right to interest on the amount due on the notes from maturity at the rate of 9½%. Thus, the court's award of interest at this rate was correct. G.S. 24-5 requires that "the principal sum due on all . . . contracts shall bear interest from the time of rendering judgment thereon until it is paid and satisfied." The statute supports the validity of the court's award of interest to plaintiff at the "legal rate" from the time of the entry of judgment.

[10] Second, defendant insists that the court erred by ordering him to pay plaintiff's counsel attorney's fees in the sum of $3,477.81. Defendant takes the position that this was erroneous because he received improper notice of intent to collect attorney's fees as required by G.S. 6-21.2. Defendant maintains that he did not receive notice of plaintiff's intention to demand attorney's fees until well after this action was filed and that this untimely notice was in conflict with the policy of the statute.

G.S. 6-21.2(5) requires the holder of a note to notify the maker or party sought to be held on the obligation that the provisions of the obligation relative to attorney's fees shall be enforced. Such notice should be given "after maturity of the obligation by default or otherwise." This Court has held in the past that G.S. 6-21.2(5) sets no time limit on the giving of the required notice. *Trust Co. v. Larson*, 22 N.C. App. 371, 206 S.E. 2d 775, *cert. denied*, 286 N.C. 214, 209 S.E. 2d 315 (1974); *see Binning's, Inc. v. Construction Co.*, 9 N.C. App. 569, 177 S.E. 2d 1 (1970). Therefore, we hold that plaintiff's notice to defendant of his intention to collect attorney's fees was proper despite the fact that it was not received by defendant until four days after the action was initiated.

We have carefully examined the record in this case and have found no material issues of fact with regard to any of the questions raised by defendant or with regard to any of the salient aspects of defendant's liability on the obligations of K & G under the written guaranty. Plaintiff did establish by credible and uncontroverted evidence, for the most part in the form of documents, all of the facts necessary to entitle him to judgment against defendant. Therefore, the court's entry of summary judgment for plaintiff and its orders with regard to payments to be made by defendant thereunder is

Affirmed.

Judges MARTIN (Robert M.) and WHICHARD concur.

ROBERT MICHAEL FUNGAROLI v. JUDITH DIANE FUNGAROLI

No. 8021DC902

(Filed 4 August 1981)

1. Trial § 3.2— hearing on attorney's fees—continuance properly denied

The trial court in a protracted domestic dispute did not abuse its discretion in denying plaintiff's motion for continuance where defendant filed a motion for attorney's fees and served affidavits in support of the motion; plaintiff filed no response whatever; neither party appeared in person at the hearing but, by their consent, the motion was heard in chambers with their counsel present; at that time plaintiff's counsel orally moved for a continuance, contending that he was entitled to cross-examine defendant about the sufficiency of her assets and income to pay her own legal fees; and plaintiff did not demonstrate any prejudice from the denial of the continuance by showing how his in-court examination of defendant would have produced a different result at the hearing.

2. Divorce and Alimony § 18.16— attorney's services on appeal—award of fees proper

An award of attorney's fees for services performed on appeal should ordinarily be granted, provided the general statutory requirements for such an award are duly met, especially where the appeal is taken by the supporting spouse.

3. Divorce and Alimony § 18.16— award of attorney's fees—sufficiency of evidence

The trial court did not err in awarding legal fees to defendant's counsel where there was ample evidence in the record, which was not contradicted by plaintiff, for the trial court to find that defendant, who was unemployed and without income of any source, did not have the economic means to defray the legal expenses arising out of plaintiff's multiple appeals from orders of the district court and decisions of the Court of Appeals.

4. Constitutional Law § 26.6; Divorce and Alimony § 28— annulment decree obtained in Virginia—no full faith and credit

The decree of a Virginia court annulling the marriage between the parties was not entitled to full faith and credit where plaintiff fraudulently procured the annulment in that he had affirmed the validity of the marriage from the outset of litigation in N.C. and had sought a divorce from bed and board in this State; while his claim for divorce from bed and board was still pending in N.C., plaintiff sought relief in a Virginia court on a basis inconsistent with that which he had previously maintained, to wit, that his marriage to defendant was null and void from its inception; and plaintiff received the annulment in Virginia on the grounds that defendant had fraudulently concealed her two prior marriages and the existence of her mental illness, but plaintiff was in fact aware of the marriages and the mental illness.

5. Courts § 21.4; Constitutional Law § 26.6— validity of marriage—conflict of laws—no full faith and credit to Virginia annulment

The validity of a marriage is determined by the law of the state with the most significant relationship to the spouses and the marriage, and a marriage valid where contracted is valid everywhere; therefore, a Virginia court erred in applying its own laws rather than that of N.C. in determining the validity of the parties' marriage, and the Virginia decree of annulment was not entitled to full faith and credit where the parties were married in this State, cohabited here, and their child was born here, plaintiff commenced this action for child custody and later filed a claim for divorce in N.C. courts, and prior to the date of the Virginia decree of annulment the courts of this State had entered several final orders awarding custody of the parties' child and alimony pendente lite to defendant.

APPEAL by plaintiff and cross-appeal by defendant from *Freeman* and *Harrill, Judges*. Orders entered 17 and 29 July 1980 in District Court, FORSYTH County. Heard in the Court of Appeals 2 April 1981.

The history of this litigation is as follows. This is plaintiff's third appeal to this Court from decrees of the Forsyth County District Court concerning the provision of support and award of custody of the minor child to defendant. To date, plaintiff has paid no alimony whatever, has not relinquished custody of the minor child to defendant, and has generally refused to comply with any of the orders of the District Court. In *Fungaroli v. Fungaroli* (I), the Court affirmed the trial judge's order requiring plaintiff to pay defendant alimony pendente lite and holding him in contempt for violation of a visitation order. 40 N.C. App. 397, 252 S.E. 2d 849, *appeal dismissed*, 297 N.C. 452, 256 S.E. 2d 805 (1979); *probable jurisdiction noted*, 444 U.S. 1031, 100 S.Ct. 700, 62 L.Ed. 2d 666, *appeal dismissed*, 446 U.S. 930, 100 S.Ct. 2144, 64 L.Ed. 2d 783 (1980). In *Fungaroli v. Fungaroli* (II), the Court affirmed the trial court's order transferring custody of the minor child to defendant. 43 N.C. App. 227, 258 S.E. 2d 497, *review denied*, 298 N.C. 805, 262 S.E. 2d 1 (1979). *See also Fungaroli v. Fungaroli* (III), 51 N.C. App. 363, 276 S.E. 2d 521 (1981), in which the wife, in a separate action, filed a complaint alleging that the husband, acting in concert with the child's paternal grandparents, removed the child from North Carolina to defeat her right to custody. There, the Court affirmed the denial of the grandfather's motion to dismiss for lack of personal jurisdiction because the trial court's finding under the long-arm statute, that he participated in

the wrongful removal of the child, was supported by competent evidence. In the instant appeal, plaintiff contests Judge Freeman's order of 17 July 1980 in which he awarded attorney's fees to defendant's counsel and that portion of Judge Harrill's order of 29 July 1980 ordering him to pay the amounts of alimony pendente lite which had accrued between the date of the original order until the date of the entry of an annulment decree by the Circuit Court of Fairfax County, Virginia on 17 April 1979. Defendant cross-assigns as error Judge Harrill's dismissal of her claims for permanent alimony and alimony pendente lite beyond the date of the entry of the Virginia annulment.

Further relevant facts, as gleaned from all of the records filed in the appeals between these two parties, shall be incorporated in the opinion below.

Morrow and Reavis, by John F. Morrow, for plaintiff appellant.

Badgett, Calaway, Phillips, Davis, Stephens, Peed and Brown, by B. Ervin Brown II, for defendant appellee.

VAUGHN, Judge.

Plaintiff first challenges the propriety of Judge Freeman's order granting attorney's fees to defendant's counsel. We hold that the judge acted properly in conducting the hearing on this motion and did not abuse his discretion in making the award and that the findings upon which the award was based were duly supported by sufficient competent evidence in the record.

[1] Plaintiff's first assignment of error, in this regard, is that the judge abused his discretion in denying his motion to continue the hearing on attorney's fees. It is well settled that a motion for continuance is not favored and that it should only be granted when the party seeking it demonstrates sufficient grounds for delay which will further the ends of substantial justice. *Fungaroli v. Fungaroli, supra,* 40 N.C. App. 397, 400, 252 S.E. 2d 849, 851. Plaintiff has not met this burden here. Defendant filed the motion for attorney's fees on 17 June 1980 and served affidavits in support of the motion upon plaintiff prior to the day of the hearing. Plaintiff, however, filed no response whatever, in the form of a reply or opposing affidavits, to the motion. Neither party ap-

peared in person at the hearing held on 17 July 1980, but, by their consent, the motion was heard in chambers with their counsel present. Plaintiff's counsel, at that time, orally moved for a continuance contending that he was entitled to cross-examine defendant about the sufficiency of her assets and income to pay her own legal fees. In such circumstances, we cannot say, as a matter of law, that Judge Freeman abused his discretion in denying a last minute motion for further delay, in this protracted domestic dispute, where both parties appeared through counsel and agreed that the hearing should be heard in chambers. Moreover, on this record, plaintiff cannot demonstrate any prejudice from the denial of the continuance, *i.e.*, by showing how his in-court examination of defendant would have produced a different result at the hearing, where he did not present any evidence to rebut defendant's affidavits supporting her entitlement to an award of attorney's fees. The assignment of error is overruled.

Plaintiff's assignments of error, two through six, attack the award of attorney's fees on the grounds that the legal conclusions were erroneous and the findings were not supported by the evidence. These assignments of error lack merit and are overruled.

[2] At the outset, we hold that Judge Freeman correctly concluded that an award of attorney's fees for services performed on appeal should ordinarily be granted, provided the general statutory requirements for such an award are duly met, especially where the appeal is taken by the supporting spouse. This appears to be the majority rule, and there is nothing in our statutory or case law that would suggest that a dependent spouse in North Carolina is entitled to meet the supporting spouse on equal footing, in terms of adequate and suitable legal representation, at the trial level only. *See Clark v. Clark*, 301 N.C. 123, 136, 271 S.E. 2d 58, 67 (1980); G.S. 50-13.6 and 50-16.4; 24 Am. Jur. 2d Divorce and Separation § 591 (1966). In sum, an award of counsel fees is appropriate whenever it is shown that the spouse is, in fact, dependent, is entitled to the relief demanded, and is without sufficient means whereon to subsist during the prosecution and defray the necessary expenses thereof. *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980).

[3] In the instant case, Judge Freeman concluded, as a matter of law, that defendant had met the foregoing requirements for entry of the award. His conclusions in this respect were based, in part, upon the following findings:

> "7. That during the entire pendency of this action, up to and including the entry of this Order, the defendant has been without sufficient means to subsist during the prosecution or defense of this suit and to defray the necessary expenses thereof, and has been entirely dependent upon the plaintiff, Robert Michael Fungaroli, for her support.
>
> 8. That at all times subsequent to the entry of this Court's Order on March 1, 1978, up to and including the present date, it has clearly appeared from the evidence that the defendant is entitled to the relief demanded in the action.
>
> 9. That because of the defendant's failure to pay any temporary alimony pursuant to the March 1, 1978 Order herein, and especially that the defendant's refusal to pay said temporary alimony on and after the decision of the United States Supreme Court, the Court concludes as a fact that the plaintiff herein has proceeded throughout in bad faith, and with a blatant disregard for the lawful Orders of the Courts of this State, as well as the United States Supreme Court.
>
> 10. That counsel for defendant, at each stage of the litigation herein, up to and including the present date, has been called upon to render legal services to the defendant which have included the research and preparation of briefs often involving complicated questions of procedure and constitutional law; that the constitutional question presented for ultimate review by the United States Supreme Court required counsel for defendant to utilize skills of an extraordinary nature, and that copies of the briefs submitted to the Court, along with the transcript of oral argument, make it clear to this Court that the representation provided to defendant in the United States Supreme Court was superior in every way. The Court further finds as a fact that the time expended by counsel for defendant in representation in this Court, the North Carolina Court of Appeals, and the United States Supreme Court, was more than reasonable in light of the task required."

These findings unquestionably authorized the award. Plaintiff, however, excepted to finding number seven, *supra*, contending that it was not supported by evidence in the record. We disagree.

The trial judge's findings are, of course, conclusive and binding on appeal if they are substantiated by any competent evidence. *Seders v. Powell, Comr. of Motor Vehicles*, 298 N.C. 453, 259 S.E. 2d 544 (1979); *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E. 2d 521, 524 (1981). Here, the record before Judge Freeman included defendant's answer and counterclaim, filed 28 February 1978, in which she alleged that plaintiff had not provided her with any subsistence and that she was presently unemployed, without income from any source. In addition, the record included Judge Tash's prior order of 1 March 1978 awarding defendant alimony pendente lite. In that order, the court found:

> "That the defendant is presently unemployed and has been unemployed each and every day subsequent to her hospitalization which commenced on December 21, 1977, and ended on February 16, 1978; that the defendant has no income from any source whatsoever at the present time, and has no residence of her own other than that being presently provided on a temporary basis by her relatives.
>
> . . . .
>
> That at no time subsequent to December 21, 1977, has the plaintiff provided the defendant with any subsistence in any form."

Defendant also introduced an affidavit showing that she had been employed for one year with an average gross weekly pay of $143.47 and that this employment terminated 15 May 1980. Defendant further presented evidence that she had been allowed to proceed in forma pauperis in plaintiff's appeal before the United States Supreme Court. [We also note that defendant was permitted to proceed in forma pauperis in the instant appeal by order of this Court on 31 July 1980.] Viewed in this light, we are compelled to hold that there was indeed ample evidence in the record, which was not contradicted by plaintiff at the hearing or otherwise, for Judge Freeman to find that defendant did not have the economic means to defray the legal expenses arising out of plain-

tiff's multiple appeals from orders of the District Court and decisions of this Court. We, therefore, affirm the order entered 17 July 1980 awarding legal fees to defendant's counsel.

[4] The threshold issue, with respect to plaintiff's remaining assignments of error and defendant's cross-assignment of error, is whether Judge Harrill correctly concluded that the 17 April 1979 decree of a Virginia court, annulling a marriage duly contracted in North Carolina, was entitled to full faith and credit under Art. IV, § 1 of the United States Constitution. A full examination of the following facts and circumstances of this lengthy litigation persuades us that our courts are not bound to give effect to the Virginia annulment; consequently, the trial court erred in granting partial summary judgment in plaintiff's favor on this basis.

First, it is necessary to understand what had transpired in this action in *our* judicial system before the Virginia court entered the decree of annulment. The Fungaroli dispute began when plaintiff filed a complaint in the Forsyth County District Court on 21 December 1977 requesting that he be awarded the care, custody and control of the minor child born of his marriage to defendant. Temporary custody of the child was awarded to plaintiff in an ex parte order on the same day. In his complaint, plaintiff alleged that the parties were lawfully married in Forsyth County, North Carolina, in 1977. In her answer, filed on 28 February 1978, defendant also stated that the parties were lawfully married in 1977. She sought a custody award in her favor and the recovery of alimony pendente lite and reasonable attorney's fees. The court subsequently entered an order on 1 March 1978 granting defendant's request for alimony pendente lite. That order was based, in part, upon the conclusion of law that plaintiff was the supporting spouse and defendant was a dependent spouse within G.S. 50-16.1(3) and (4). Plaintiff appealed from that order and argued, among other things, that the trial judge had failed to find the existence of a marital relationship between the parties. This Court responded to this contention as follows: "Both plaintiff and defendant allege they are married to each other. This is a judicially established fact and is not required to be stated by the court." *Fungaroli v. Fungaroli*, 40 N.C. App. 397, 399, 252 S.E. 2d 849, 850 (filed 20 March 1979). On 7 March 1978, the District Court held a show cause hearing upon defendant's motion that plaintiff had failed to comply with a prior

visitation order. The court found that "the plaintiff has fled to the state of Virginia for the sole purpose of obstructing the order of this Court dated February 18, 1978," adjudged plaintiff to be in civil and criminal contempt, and issued an order for his arrest. Plaintiff then filed a reply to defendant's counterclaim on 15 March 1978 in which he again alleged that the parties were lawfully married and sought, among other things, a divorce from bed and board from defendant. On 2 June 1978, the District Court awarded permanent custody of the child to plaintiff. In that order, the judge specifically found that the parties were lawfully married on 3 March 1977. On 8 August 1978, the District Court found that there had been a material and significant change in circumstances affecting the best interest, health and welfare of the child and ordered plaintiff to transfer custody of the child to defendant and not remove him from the State of North Carolina. Plaintiff has never complied with that order. All of the foregoing occurred before 17 April 1979.

Second, it is necessary to understand the circumstances under which the Virginia decree of annulment was entered. Sometime in 1978, while his action for child custody and divorce from bed and board was still pending in North Carolina, plaintiff instituted an action in the Circuit Court of Fairfax County, Virginia, for an annulment of the parties' marriage. That court applied Virginia law to ascertain the validity of the marriage and granted the annulment based upon its findings that

> "the Defendant knowingly and with intent to deceive concealed from the Complainant knowledge of her pre-existing schizophrenic mental condition and her prior involuntary mental commitments, her two prior marriages and divorces and the role that her mental condition played in the deterioration of such prior marriages; that in reliance upon such concealment, the Complainant entered into marriage with the Defendant; that had the Complainant been informed of the Defendant['s] mental condition and its effect upon her prior marriages, he would not have entered into marriage with her; that such fraudulent concealment goes to the essentials or fundamentals of the marital relationship and deprives the marriage contract of the intelligent consent necessary to its validity."

On 25 February 1980, the Supreme Court of Virginia refused defendant's petition for appeal from the annulment decree because it found "no reversible error in the judgment complained of." The record does not disclose what evidence was presented to the Virginia lower court, and, as a consequence, we do not know whether that court was fully apprised of the nature of the proceedings that had already been conducted, as well as those that were still pending, in the courts of this State.[1]

The thrust of the full faith and credit clause is that the courts of one state must honor and give effect to valid final judgments entered by the courts of a sister state, the policy being that issues or causes already fully litigated between the same parties should not be reexamined or decided anew. Nonetheless, the final judgment of another jurisdiction may be collaterally attacked upon three grounds: (1) lack of jurisdiction; (2) fraud in the procurement; or (3) that it is against public policy. *Howland v. Stitzer*, 231 N.C. 528, 58 S.E. 2d 104 (1950); *McGinnis v. McGinnis*, 44 N.C. App. 381, 261 S.E. 2d 491 (1980). The Virginia decree of annulment is subject to attack on two of these grounds.

First, this record supports the conclusion that plaintiff fraudulently procured the annulment in Virginia. In our courts, plaintiff had affirmed the validity of the marriage from the outset of the litigation and had filed a reply for a divorce from bed and board. Indeed, there had been specific findings in orders of the Forsyth County District Court that these parties were lawfully married under the laws of this State and that plaintiff was a supporting spouse and defendant the dependent spouse for purposes of an award of alimony pendente lite to defendant. Nonetheless, while his claim for a divorce from bed and board was still pending in North Carolina, plaintiff sought relief in a Virginia court on a basis inconsistent with that which he had previously maintained,

1. It is also not clear whether defendant made a general or limited appearance in the Virginia courts for the purpose of contesting the annulment action. The judgment of the Virginia Circuit Court simply states that both parties were "properly" before it. Defendant, however, in an affidavit filed with the Forsyth County District Court, says that she "did not testify at the hearing on the annulment inasmuch as my Virginia attorney [Fairfax Legal Aid Society, Inc.] advised me that it would be unnecessary inasmuch as under North Carolina law there existed no grounds for annulment. I never made any appearance whatsoever, except through counsel, in the Virginia Court."

to wit, that his marriage to defendant was null and void from its inception. Specifically, plaintiff received an annulment in Virginia on the grounds that defendant had fraudulently concealed her two prior marriages and the existence of her mental illness. It is obvious that plaintiff procured this decree in his favor through fraud or perjury where: (1) the marriage license issued by the registrar of Forsyth County, signed by both parties, discloses on its face that defendant had been married twice before, with both unions ending in divorce; and (2) plaintiff affirmed his prior knowledge of defendant's mental illness by alleging in his original complaint filed in the Forsyth County District Court on 21 December 1977 that "[d]efendant has had a mental illness which has recurred frequently in the past 4 to 5 years."[2]

Second, and more importantly, under the circumstances of this case, it would violate a strong public policy of the State of North Carolina to accord full faith and credit to the Virginia decree where, after repeatedly confirming the validity of his marriage in his own pleadings before our courts, and while he continued blatantly to disregard the lawful orders of our courts, plaintiff instituted an out-of-state action for an annulment, with this litigation, which he commenced, still pending here. In North Carolina, the situs of the marriage, plaintiff first said one thing, that he was entitled to a divorce from his lawfully wedded wife, but, in Virginia, he later said something entirely different, that he was entitled to an annulment from his wife because they were not lawfully wedded. Plaintiff's reason for changing his tune is manifest: only a marital dissolution by annulment would absolutely extinguish the defendant wife's rights to permanent alimony.

[5] Moreover, this North Carolina marriage was annulled in Virginia on grounds not recognized in this State. *See* G.S. 51-3; 1 Lee, N.C. Family Law § 17 (4th ed. 1979). The general conflicts rule is that the validity of a marriage is determined by the law of the state with the most significant relationship to the spouses and the marriage and that a marriage valid where contracted is valid everywhere. Restatement (Second) Conflicts of Laws § 283 (1971). North Carolina has the most significant and substantial relation-

2. Defendant also filed an affidavit in this cause on 22 July 1980, stating that she revealed her mental condition and two previous involuntary commitments to plaintiff in December 1975, prior to their marriage in 1977.

ship to this marriage and subsequent marital dispute. The parties were married here, cohabited here, and their child was also born here. Plaintiff commenced this action for child custody and later filed a claim for divorce, in our courts. Prior to 17 April 1979, the date the Virginia court entered the decree of annulment, the courts of this State had entered several final orders awarding custody of the child and alimony pendente lite to defendant. In these circumstances, the Virginia court unquestionably erred in applying its own law, rather than that of North Carolina, to determine the validity of the marriage.[3] Moreover, a recent decision of the United States Supreme Court persuades us that the Virginia court's choice of its own law in this case was arbitrary, fundamentally unfair and violated the Due Process and Full Faith and Credit clauses of the Federal Constitution.[4] *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed. 2d 521 (1981).

For the foregoing reasons, we hold that Judge Harrill incorrectly concluded that the Virginia decree of annulment was entitled to full faith and credit by the courts of North Carolina. The portions of his 29 July 1980 order granting plaintiff's motion for summary judgment and dismissing defendant's claims for permanent alimony and alimony pendente lite beyond 16 April 1979 on the basis of that decree are, therefore, reversed, and this cause is remanded for the resolution of the remaining issues, raised by the pleadings, which are still pending in the Forsyth County District Court.

Our disposition of the issue concerning the effect of the Virginia decree renders any discussion of plaintiff's remaining assignments of error unnecessary.

The order of 17 July 1980, awarding attorney's fees to defendant's counsel, is affirmed.

3. We also seriously question whether the Virginia court correctly applied its own law in granting this annulment. *See, e.g., Sanderson v. Sanderson*, 212 Va. 537, 186 S.E. 2d 84 (1972), where the Virginia Supreme Court held that misrepresentation as to prior marital status is not grounds for an annulment in that state.

4. It occurs to us, in addition, that these same constitutional principles would seem to have required the Virginia court to give effect to the parties' admissions in their pleadings, filed in our courts, that they were lawfully married, as well as the findings in various Forsyth County District Court orders which were necessarily based upon the existence of a valid marriage in North Carolina. *See Fungaroli v. Fungaroli, supra*, 40 N.C. App. at 399, 252 S.E. 2d at 850.

The order of 29 July 1980 is reversed to the extent it accorded full faith and credit to the out-of-state decree in dismissing defendant's claims for permanent alimony and alimony pendente lite.

Affirmed in part; reversed in part.

Judges CLARK and WELLS concur.

STATE OF NORTH CAROLINA v. CHESTER O. SUTTON

No. 811SC95

(Filed 4 August 1981)

1. Embezzlement § 1— elements of the crime

The elements of embezzlement are: (1) defendant must be the agent of the prosecutor; (2) by the terms of his employment he must receive the property of his principal; (3) he must receive the property in the course of his employment; and (4) he must convert the property to his own use knowing it not to be his own.

2. Embezzlement § 6— sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of embezzlement of money where it tended to show that defendant was the assistant manager of a fast food restaurant; defendant operated the restaurant cash register on certain dates so that it would develop a cash surplus; defendant did not report any surplus to the manager and failed to note a surplus on his work sheets; and food inventory was leaving the restaurant without being accounted for, since the jury could reasonably infer from such evidence that defendant sold the missing inventory, generating a secret surplus, and that this surplus was going into defendant's pocket.

3. Embezzlement § 6— sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of embezzlement of uniform and meal maintenance coupons where it tended to show that defendant was the assistant manager of a fast food restaurant; defendant was authorized to issue himself one coupon per day worked; defendant issued to himself more than one coupon per day worked; and no one authorized him to issue more than one.

4. Embezzlement § 5— defendant's monthly payments—relevancy

Evidence of defendant's monthly payments which tended to show that defendant was living far above the standard to be expected of one earning $265 a week was relevant in this embezzlement prosecution to establish motive.

5. Embezzlement § 5— large cash transactions by defendant—relevancy

Three large cash transactions by defendant in April were not too remote to be relevant to establish his guilt of embezzlement in the preceding November, December, and January where the amount of cash involved was grossly disproportionate to defendant's apparent ability to amass such wealth.

6. Criminal Law § 126.1— method of polling jury

In this prosecution of defendant upon five charges of embezzlement, the procedure used to poll the jury substantially complied with the requirements of G.S. 15A-1238 where the clerk stated separately to each juror that such juror had returned a verdict of guilty as to Issue No. 1, guilty as to Issue No. 2, guilty as to Issue No. 3, guilty as to Issue No. 4, and guilty as to Issue No. 5, and the clerk then asked each juror whether that was his verdict and whether he still assented thereto.

APPEAL by defendant from *Reid, Judge.* Judgment entered 5 September 1980 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 27 May 1981.

Defendant was tried on five separate bills of indictment. Three of the indictments allege, respectively, that defendant embezzled certain money in the form of U.S. coin and currency on 17, 19, and 22 January 1980. The other two indictments charge defendant with embezzling Hardee's Food Systems Restaurant Uniform and Meal Maintenance Coupons in the months of November and December 1979. Defendant appeals from an adverse verdict and a judgment imposing a prison term of not less than one nor more than two years and requiring that defendant make restitution to Hardee's Food Systems in the amount of $1,429.10.

STATE'S EVIDENCE

Defendant was an assistant manager at Hardee's in Elizabeth City. His duties were to be in charge of a shift. This included helping the cash register operators to take orders and ring up sales during peak rush periods. He was also required to count the receipts at the end of a shift, to check those receipts against the cash register tapes to assure that there were sufficient receipts to cover the sales reflected on the tapes, and to deposit the receipts.

The manager and five other witnesses (four Hardee's employees and one customer) testified that they had observed defendant improperly operate the cash register he was using on

one or more of the following three days: 17 January 1980, 19 January 1980, 22 January 1980. The witnesses testified that defendant would take an order from a customer and ring up a subtotal, he would write this amount down on a pad, he would then ring up the tax on the sale, he would add these two figures by hand, and finally he would strike the "print," or "no sale," or "clear" button on the cash register so that the sale was never totaled and the receipt of the cash for the sale was never reflected on the cash register tape. He would open the cash register drawer to deposit the money received from the sale by use of a key or by striking the "no sale" button. In this manner the register would take in more cash during a shift than would be reflected on the cash register tape.

In addition to their function as cash registers, the registers also functioned as computers, keeping a running account of the inventory going out of the store. The manager testified that in the month of January 1980 there had been severe inventory shortages; that is, the inventory was being depleted substantially more rapidly than the computer records indicated. He testified that he checked the cash register tape for the register which defendant operated on 19 January 1980 and found items on the tape which were never totaled so that they would not appear as depletions of inventory. Comparing these items with the shortages in actual inventory that occurred that day, the manager found that "they were almost identical."

The manager testified that defendant did not report any cash surplus to him, that defendant did not have permission from Hardee's to operate the machine in the manner described, and that he did not have permission to fail to report a cash surplus or to retain such surplus for himself. He testified that the excessive inventory shortages had occurred during the last half of 1979 and during January of 1980, that these shortages amounted to approximately a thousand dollars a month, and that the shortages had ceased immediately upon termination of defendant's employment.

The testimony of three employees of various lending institutions indicated defendant was committed to the following monthly payments: $263.97 for a 1978 Lincoln Continental, $222.83 for a 1979 Dodge van, $121.41 for a 1975 GMC pickup truck, $324.00 for his home, all of which were titled in defendant's name alone, or

jointly with his wife. Defendant also paid $402.10 semi-annually in automobile insurance premiums. There was also testimony that in April of 1980, defendant purchased an official check from the First Union National Bank in the amount of $6,000 and paid for it with sixty $100 bills; that he deposited $14,840.81 in his account at Wachovia Bank in April, $14,000 of which was deposited in cash in $100 bills; and that defendant purchased a store in April 1980 for $16,000 by check. Defendant made $265 a week as assistant manager at Hardee's.

The Hardee's manager testified that each employee is allowed one Uniform and Meal Maintenance Coupon for each day worked and that the coupons could be used like money by employees to defray the cost of cleaning their uniforms or to obtain free meals. As an assistant manager defendant was authorized to issue the coupons. Defendant worked thirteen days between 11 November and 29 November 1979 and during that time issued himself eighteen coupons. He worked twenty-seven days in December 1979 and issued himself thirty coupons. No one authorized defendant to issue himself more than one coupon per day.

DEFENDANT'S EVIDENCE

Defendant testified in his own behalf that he had an excellent employment record and that he had had no trouble with Hardee's Food Systems until he filed charges of racial discrimination against the company with the Equal Employment Opportunity Commission in 1979. He never improperly operated the cash register. Other employees came up short on their receipts. Other people were assisting him with his monthly expenses and the payments on his home and various motor vehicles. These others included his wife, who was engaged in full-time and part-time employment; his parents; and his wife's parents. The loan against his 1975 GMC pickup was an accommodation for a friend who had not been in town long enough to establish credit and the $121.41 a month payment was being made by the friend. Defendant admitted that if the cash register had been used in the manner the State's witnesses described, it would create a cash surplus and an inventory shortage.

With regard to the Uniform and Meal Maintenance Coupons, defendant explained that there had been a temporary shortage of

the coupons in May and June of 1979 and that he had not gotten around to paying himself back for coupons he had missed during this period until November and December of 1979. He admitted the coupons had been restored in the latter part of June or early July, but said he failed to issue himself the back coupons at that time although he supposed he could have.

Defendant also presented the testimony of five other Hardee's employees to the cumulative effect that defendant was a good employee, that they never saw defendant improperly operate the cash register, that defendant was not the only person with access to the cash registers or the tapes, and that the cash registers had malfunctioned on more than one occasion in the past.

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

Whitted, Jordan & Matthewson by Louis Jordan and Reginald Kenan for defendant appellant.

CLARK, Judge.

Defendant's attorney violated Rule 28(b)(3) of the North Carolina Rules of Appellate Procedure which requires that exceptions and assignments of error be set out after each question argued in appellant's brief. Although we elect to reach the merits of defendant's case as authorized under Rule 2, we note that defendant, by not referring us to the point in the record where the alleged error occurred, has placed upon this Court the responsibility of searching the record for the exceptions and assignments of error upon which he bases his argument. Defendant will not be heard to protest that a particular argument was addressed to certain objections, exceptions, or assignments of error not attributed to that argument by this Court, since defendant was afforded the opportunity in his brief to direct our attention anywhere in the record he wished, but chose not to do so.

[1] Defendant first argues that his motions to dismiss at the close of the State's evidence, at the close of all evidence, and after the verdict should have been granted because the State failed to offer substantial evidence of each material element of embezzlement. *See State v. Seufert*, 49 N.C. App. 524, 271 S.E. 2d 756

(1980). The elements of embezzlement are as follows: (1) defendant must be the agent of the prosecutor; (2) by the terms of his employment he must receive the property of his principal; (3) he must receive the property in the course of his employment; and (4) he must convert the property to his own use knowing it not to be his own. *State v. Ellis*, 33 N.C. App. 667, 236 S.E. 2d 299, *cert. denied*, 293 N.C. 255, 236 S.E. 2d 708 (1977); *State v. Buzzelli*, 11 N.C. App. 52, 180 S.E. 2d 472, *cert. denied*, 279 N.C. 350, 182 S.E. 2d 583 (1971); *see State v. Helsabeck*, 258 N.C. 107, 128 S.E. 2d 205 (1962). Defendant argues that the fourth element of embezzlement is not supported by substantial evidence. We disagree.

[2] The State presented evidence that defendant improperly operated the cash register so that it would develop a cash surplus for the days for which he was indicted, but that he did not report any surplusage to the manager and he failed to note a surplus on the work sheets. There was also evidence that inventory was leaving the store unaccounted for. From this evidence the jury could reasonably infer that defendant sold this missing inventory, generating a secret surplus, and that this surplus was going into defendant's pocket. This is certainly more than a scintilla of evidence that defendant converted the money to his own use and thus satisfies the substantial evidence test. *See State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979); *see also, State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684, *cert. denied*, 439 U.S. 830, 58 L.Ed. 2d 124, 99 S.Ct. 107 (1978). It goes without saying that the jury could permissibly infer that defendant knew that money he received in payment for Hardee's inventory was not his own.

It was not necessary for the State to establish defendant's control and possession of the property to the exclusion of all others. *State v. Barbour*, 43 N.C. App. 143, 258 S.E. 2d 475 (1979).

Defendant argues that there is a fatal variance between the indictment and the State's proof. The sufficiency of the indictments is not challenged. Defendant's argument is merely a meritless restatement of his argument that his motions to dismiss should have been granted for lack of substantial evidence.

[3] Defendant argues that his motions to dismiss should have been granted as to the indictments for embezzling coupons, because the State failed to offer evidence that he wrongfully took the coupons with fraudulent intent. On this issue the evidence

taken in the light most favorable to the State tended to show that the store had run out of coupons only once before November and December of 1979 and that those back coupons were restored to the employees no later than the first of July 1979. The State also presented evidence tending to show that upon first being confronted with his issuance to himself of unauthorized coupons, defendant said nothing about paying himself back for coupons he had missed in the past, but claimed he was entitled to the coupons because he had worked double shifts on some of the days in November and December 1979. When confronted with time sheets for those months which belied his statement, defendant admitted that he had not worked double shifts.

The evidence was that defendant was authorized to issue himself one coupon per day worked, that he issued more than one coupon per day worked, and that no one ever authorized him to issue more than one. This evidence permitted the inference that defendant knew he was exceeding his authority when he issued himself extra coupons to which he was not entitled. Our holding then is in substantial accord with the holding of this Court in *State v. Barbour*, 43 N.C. App. 143, 258 S.E. 2d 475 (1979):

> "We hold the trial court did not err in denying defendant's motions for dismissal. The test to be applied in ruling on a motion to dismiss is whether there is 'substantial evidence of all material elements of the offense to withstand the motion to dismiss.' *State v. Stephens*, 244 N.C. 380, 383, 93 S.E. 2d 431, 433 (1956). Such a motion requires consideration of the evidence in the light most favorable to the state; the state is entitled to every reasonable inference which may be drawn from the evidence. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). The substantial evidence may be circumstantial or direct, or both. *State v. Stephens, supra.* The court is not required to find that the evidence excludes every reasonable hypothesis of innocence in denying a defendant's motion to dismiss. To do so would constitute the presiding judge the trier of facts. Substantial evidence of every material element of the crime charged is required before the court can submit the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. *Id.*

* * * *

> Although it is a basic tenet of our criminal law system that proof of guilt beyond a reasonable doubt is required before the jury can convict, once the trial court finds that substantial evidence exists to take the case to the jury, 'it is *solely* for the jury to determine whether the facts taken singly or in combination satisfy them beyond a reasonable doubt that the defendant is in fact guilty.' *State v. Smith*, 40 N.C. App. 72, 79-80, 252 S.E. 2d 535, 540 (1979). The jury returned a verdict of guilty in this case, and there is no reason for this Court to reverse that verdict."

Id. at 147-49, 258 S.E. 2d at 478-79.

[4] Defendant argues that evidence of his monthly payments was irrelevant and highly prejudicial. We hold that evidence which tended to show that defendant was living far and away above the standard to be expected of one earning $265 a week was relevant to establish motive. *See* 1 Stansbury's N.C. Evidence § 83 (Brandis rev. 1973) and cases cited therein.

[5] Defendant argues that evidence of three large cash transactions in April was not relevant to prove his guilt of embezzlement in the preceding November, December, and January. We disagree. That defendant possessed extensive unexplained wealth would appear relevant to the issue of whether he had taken money from Hardee's. *See* Annot., 91 A.L.R. 2d 1046, 1056 (1963). The fact that these transactions took place over two months after defendant's employment was terminated might somewhat diminish their probative value; however, in light of defendant's income of less than $14,000, in light of the large sums of money involved in the three transactions ($20,000 in $100 bills and a check for $16,000), and in light of the restaurant manager's statement that the shortages had averaged around $1,000 a month from sometime prior to August 1979 until February 1, 1980, we are unable to say that the passage of two short months rendered the transaction so remote as to be devoid of any probative force. Defendant's reliance on *obiter dictum* in *State v. Buzzelli*, 11 N.C. App. 52, 180 S.E. 2d 472, *cert. denied*, 279 N.C. 350, 182 S.E. 2d 583 (1971), is misplaced for the reason that that case involved a substantially smaller transaction occurring almost seven months after the alleged embezzlement. As the size of the fund embezzled

and of the unexplained wealth increase, their probative force increases as well. While lapse of time serves to diminish that probative force, it will not totally vitiate it where as here the unexplained wealth is so grossly disproportionate to the defendant's apparent ability to amass such wealth. This testimony was relevant and properly admitted. The jury was free to consider the remoteness of the transactions as bearing on the weight it wished to attach to the evidence.

Defendant next argues that the court properly allowed a State's witness to testify from records and to introduce certain exhibits without laying the proper foundation. In these assignments, defendant contends that the trial court should not have permitted a private investigator to testify from reports written by him. Defendant contends that the Court allowed the witness to refresh his recollection even though he had not indicated a loss of memory. Defendant concedes that trial counsel did not object to the State's attempt to refresh the recollection of its witness or to the lack of a proper foundation for the introduction of the records. The Defendant's failure to object in either instance constitutes a waiver and the Court properly submitted the evidence to the jury for its consideration. 1 Stansbury's North Carolina Evidence § 27 (Brandis rev. 1973).

[6] In his final argument defendant contends that the Clerk improperly polled the jury. The record indicates that the Clerk stated separately to each juror that that juror had returned a verdict of guilty as to Issue No. 1, guilty as to Issue No. 2, guilty as to Issue No. 3, guilty as to Issue No. 4, and guilty as to Issue No. 5. He then asked that juror whether that was his verdict, to which the juror assented, and whether he still assented thereto, to which the juror replied in the affirmative. This procedure was repeated twelve different times, the only variation was that with the first two jurors the Clerk identified separately each of the five issues as "embezzling money" or "embezzling coupons." Thereafter, with the other ten jurors he denominated the charges only as Issues No. 1, No. 2, No. 3, No. 4 and No. 5. "The important thing is that all jurors clearly indicate their assent to the verdict . . . ." *State v. Fate*, 38 N.C. App. 68, 75, 247 S.E. 2d 310, 314 (1978). This each juror clearly did. We hold that this procedure was substantially in accord with the requirements of G.S. 15A-1238 and note in passing that defendant made no request at

trial that the Clerk be instructed to be more specific in the questions propounded to the jurors. *See id.*

No error.

Judges MARTIN (Robert M.) and HILL concur.

HELEN C. PRESTON v. BENJAMIN THOMPSON

No. 8021SC1189

(Filed 4 August 1981)

1. **Physicians, Surgeons and Allied Professions § 11.2— results of treatment guaranteed—writing required**

A dentist, while generally not an insurer of results, may enlarge his responsibility to the patient and contract to fulfill specific assurances, but such assurances must be in writing to be enforceable. G.S. 90-21.13(d).

2. **Physicians, Surgeons and Allied Professions § 11.2; Uniform Commercial Code § 6— dentist not merchant—dentures not goods**

Defendant's providing of dentures for plaintiff did not constitute a sale of goods within the meaning of G.S. 25-2-105 and defendant dentist was not a merchant within the meaning of G.S. 25-2-104(1), and the transaction between the parties was thus not covered by an implied warranty under G.S. 25-2-315.

APPEAL by plaintiff from *Lupton, Judge.* Judgment entered 9 September 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 28 May 1981.

Plaintiff, Helen Preston, instituted this action alleging breach by defendant, Benjamin Thompson, a dentist, of express and implied warranties and guarantees as to a set of dentures furnished to Mrs. Preston by Dr. Thompson.

On or about 15 August 1978 Mrs. Preston consulted with Dr. Thompson about obtaining a new set of dentures. She had previously determined through a listing in the yellow pages that Dr. Thompson was a specialist who limited his practice to preparing and fitting dentures. Mrs. Preston told Dr. Thompson that she had problems with the dentures she was using and wanted a new set which would be satisfactory to her and would enable her to eat. In her deposition, Mrs. Preston testified that Dr. Thompson

made oral assurances to her that he could make dentures that would fit to her satisfaction, stating, among other things, "I don't see any reason why we couldn't make you a set of teeth that would fit." Dr. Thompson denied making such assurances to Mrs. Preston. Rather, he contended that he fully explained the difficulties and problems that would be involved in her treatment, and that Mrs. Preston understood and consented to his proceeding with professional services.

Mrs. Preston paid Dr. Thompson $750, the price upon which they had agreed. She returned to Dr. Thompson's office on six occasions for impressions and preliminary measurements to be made. She received the set of dentures on 20 October 1978.

Mrs. Preston experienced no problems with the upper set of dentures, but had pain and trouble eating because of the lower set. She continued treatment on a regular basis until May 1979, during which time Dr. Thompson made numerous adjustments to the lower dentures. Mrs. Preston claims one tooth became chipped and was never repaired. In his answer to plaintiff's interrogatories, Dr. Thompson stated he felt great progress had been made in Mrs. Preston's treatment and he was willing to continue working with her indefinitely, but she refused to continue.

After discovery, defendant moved for summary judgment and plaintiff moved for partial summary judgment as to the affirmative defenses of the statute of frauds under N.C.G.S. 90-21.13(d) and 25-2-201. Defendant was granted summary judgment in his favor; plaintiff's motion was denied and she appeals.

Billings, Burns & Wells, by R. Michael Wells, for plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by F. Joseph Treacy, Jr., for defendant appellee.

MARTIN (Harry C.), Judge.

[1] Plaintiff first argues that a dentist, while generally not an insurer of results, may enlarge his responsibility to the patient and contract to fulfill specific assurances. Although we find no cases in North Carolina addressing this issue, we have no quarrel with this proposition. *See* Annot., 43 A.L.R. 3d 1221 (1972 and 1980 Supp.). Our General Assembly, in enacting Article 1B of Chapter

90 of the General Statutes of North Carolina, apparently considered this very issue. N.C.G.S. 90-21.13(d) provides:

> No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider.

A dentist is specifically included under the term "health care provider." N.C. Gen. Stat. 90-21.11.

Plaintiff contends that N.C.G.S. 90-21.13 is not relevant, as a matter of law, to the instant case. She relies on the caption of the section, "Informed consent to health care treatment or procedure," and the title of the article, "Medical Malpractice Actions," emphasizing that the act deals with malpractice or negligence actions, not an action brought on a theory of contract. She further relies upon the fact that all cases citing N.C.G.S. 90-21.12, which sets the standard of health care, have been brought upon malpractice theories. *Tatham v. Hoke*, 469 F. Supp. 914 (W.D. N.C. 1979); *Page v. Hospital*, 49 N.C. App. 533, 272 S.E. 2d 8 (1980); *Tripp v. Pate*, 49 N.C. App. 329, 271 S.E. 2d 407 (1980); *Hart v. Warren*, 46 N.C. App. 672, 266 S.E. 2d 53, *disc. rev. denied*, 301 N.C. 89 (1980); *Vassey v. Burch*, 45 N.C. App. 222, 262 S.E. 2d 865, *rev'd*, 301 N.C. 68 (1980); *Thompson v. Lockert*, 34 N.C. App. 1, 237 S.E. 2d 259, *disc. rev. denied*, 293 N.C. 593 (1977). N.C.G.S. 90-21.13, the statute here in question, has not been cited previously.

It is true, as plaintiff urges, that when the meaning of a statute is in doubt, reference may be made to the title and context of an act to determine the legislative purpose. *Sykes v. Clayton, Comr. of Revenue*, 274 N.C. 398, 163 S.E. 2d 775 (1968). However, the title of a statute does not control over the text, but may be considered only when the meaning of language of the statute is doubtful. *Blowing Rock v. Gregorie*, 243 N.C. 364, 90 S.E. 2d 898 (1956). Where it is clear and unambiguous, the courts must give the language its plain and definite meaning and may not interpolate or superimpose provisions and limitations not contained therein. 12 Strong's N.C. Index 3d Statutes § 5.5 (1978).

The statute here in question plainly mandates that "[n]o action may be maintained against any health care provider upon *any* guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment *unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed . . .*." N.C. Gen. Stat. 90-21.13(d) (emphasis ours). We perceive the statute was intended to apply to circumstances precisely like that which plaintiff alleges. The statute clearly and unequivocally relates to an agreement, a contract, between the health care provider and the patient to achieve a definite result.

Contrary to plaintiff's contention, the recent case of *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E. 2d 482 (1980), does not control the case sub judice. In *Flippin*, the Supreme Court considered a new statute of limitations for malpractice actions, N.C.G.S. 1-15(c), effective 1 January 1977, and held it was unconstitutional to apply it to bar the plaintiff's claim. Plaintiff cites the language of *Flippin*, 301 N.C. at 118, 270 S.E. 2d at 488, that the section "deals exclusively with medical malpractice actions," as conclusive authority that N.C.G.S. 90-21.13 does not apply to an action brought under a theory of contract or warranty. Plaintiff conveniently overlooks the preceding sentence, however, reading: "As implied in its title, *the act is far ranging in scope; its various provisions deal with several aspects of professional malpractice.*" *Id.* (emphasis ours). Because the statute plainly encompasses the type of action in the present case, plaintiff cannot remove her action from its effect nor change the essence of her claim by labeling it an action of a different name.

The reasons for this statutory requirement are clear. Every patient certainly enters health care treatment (including dental treatment) with hopes and expectations of satisfactory results. Because of the uncertainty inherently involved in a course of treatment, due largely to personal physical and emotional idiosyncrasies of the individual patient, it would generally be imprudent for the health care provider to guarantee a definite result. A patient understandably may be disappointed when his expectations are not fulfilled or his condition fails to improve, and seek recourse against the provider, despite the fact that every effort was expended to obtain the desired results. The legislature wisely foresaw the likelihood that these disappointed patients might

believe they had been promised specific results, and chose to require that any suit based upon such claims must be supported by written assurances. Similar statutes of frauds as a safeguard to claims regarding certain transactions have long been part of our law. *See* N.C. Gen. Stat. 25-2-201 (sales of goods); 22-2 (transactions involving real property). Plaintiff's action is based solely upon allegations of *oral* assurances. Defendant posed the following interrogatory:

> Do you contend that the defendant provided you with any written guaranty, warranty or assurance relative to your dentures, their fit or your treatment or any written note, memorandum of such guaranty, warranty or assurance that was signed by the defendant?

Plaintiff answered: "No, but Plaintiff contends that oral statements were made." N.C.G.S. 90-21.13(d) controls, and, by her own admissions, plaintiff's claim does not fall within the mandate of the statute.

Nor is there any merit to plaintiff's contention that application of the statute to her case would violate the equal protection clause of the Fourteenth Amendment of the United States Constitution. She argues that the statute is arbitrary and capricious, with no rational basis, as other professional groups are not afforded such protection. We cannot agree. The reasons previously discussed provide a rational basis for the statute. The legitimate concerns regarding suits involving the dispensing of health care were succinctly articulated in *DiAntonio v. Northampton-Accomack Memorial*, 628 F. 2d 287, 291 (4th Cir. 1980) (upholding the constitutionality of the Virginia Medical Malpractice Act):

> The elimination of frivolous claims and the provision and promotion of mediation and settlement provide a rational basis for the legislation. The different treatment of medical malpractice plaintiffs from other tort plaintiffs is not a denial of equal protection, when the special problems posed by soaring insurance costs are considered.

The language of the Illinois appellate court is also instructive:

> "The application of the ordinary rules dealing with mercantile contracts to a contract entered into between a physician and a patient in our opinion is not justified. The relationship

> is a peculiar relationship inasmuch as the physician cannot, and should not, so terrify the patient by pointing out to him the manifold dangers which are present at any time the slightest surgical operation is performed. To do so might produce a psychic reaction which would seriously retard the success of the physician's treatment." . . . Therefore the courts which have recognized an action based upon the express warranty of a physician to effect a particular cure have distinguished between so-called therapeutic reassurances that the patient will recover and express promises that treatment will produce a specific result and have stated that it is doubtful that an action for breach of warranty can ever result from a physician's expression of opinion.

Rogala v. Silva, 16 Ill. App. 3d 63, 66-67, 305 N.E. 2d 571, 574 (1973) (citations omitted). We hold that application of N.C.G.S. 90-21.13(d) does not violate plaintiff's constitutional rights.

[2] Plaintiff may not avoid the effect of the statute by stating a cause of action under the Uniform Commercial Code, alleging that the transaction constituted a sale of "goods," N.C.G.S. 25-2-105, by a "merchant," N.C.G.S. 25-2-104(1), and is thus covered by an implied warranty under N.C.G.S. 25-2-315. She attempts to distinguish *Batiste v. Home Products Corp.*, 32 N.C. App. 1, 231 S.E. 2d 269, *disc. rev. denied*, 292 N.C. 466 (1977), in which this Court held that a physician's issuance of a prescription for an oral contraceptive drug did not constitute a sale of the drug within the meaning of the U.C.C. While we acknowledge that *Batiste* is factually distinguishable, we find the legal principles there enunciated apply to the present case. There the Court stated:

> While plaintiff's argument may be ingenuous, it is not, in our opinion, either factually or legally sound. The Uniform Commercial Code was designed to apply to transactions between a seller and a purchaser. Inherent in the legislation is the recognition that the essence of the transaction between the retail seller and the consumer relates to the article sold, and that the seller is in the business of supplying the product to the consumer. *It is the product and that alone for which he is paid.* The physician offers his professional services and skill. It is his professional services and his skill for which he is paid, and they are the essence of the relationship between him and his patient. . . .

> The fact remains that one does not normally go to a physician to purchase medicines or drugs or bandages or other items incidental to medical treatment. . . .
>
> We adhere to the general and majority rule that those who, for a fee, furnish their professional medical services for the guidance and assistance of others are not liable in the absence of negligence or intentional misconduct.

Id. at 6-7, 231 S.E. 2d at 272-73 (emphasis ours).

Other courts have similarly held that a physician is neither a merchant nor a seller of goods under the U.C.C. *See Allen v. Ortho Pharmaceutical Corp.*, 387 F. Supp. 364 (S.D. Tex. 1974); *Foster v. Memorial Hosp. Ass'n of Charleston*, 219 S.E. 2d 916 (W. Va. 1975). Analogously, North Carolina, like most other states, has enacted a statute exempting the distribution or use of blood or other human tissues incident to a transfusion or transplantation from the definition of a sale and the applicability of warranties. N.C. Gen. Stat. 90-220.10.

Plaintiff earnestly argues in her brief that she "went to defendant appellee Thompson for the purchase of dentures," the sale of which was the "essence of the transaction." She contends that because she did not want to go to a "regular" dentist, but sought out a specialist and informed him of her reason for consulting him, the transaction became one for the sale of goods. Plaintiff's position is untenable. Another Illinois case, *Carroll v. Grabavoy*, 77 Ill. App. 3d 895, 396 N.E. 2d 836 (1979), addressed an almost identical claim. There the plaintiff brought an action against her dentist based upon the breach of express and implied warranties that the dentures she received from him would be attractive, would fit well, and would be pleasing to her. The court held that the rendering of dental services in connection with a set of dentures was not a sale of goods as defined by the U.C.C.

The fact that defendant holds himself out as specializing in the preparing and fitting of dentures does not remove him from the practice of dentistry and transform him into a merchant. If anything, his specialty practice indicates a higher degree of skill and training in the treatment of patients requiring dental prosthetics. Plaintiff in no way implies that defendant merely dispensed a set of dentures upon her request; instead her deposi-

tion testimony and her affidavit, as well as defendant's evidence, clearly indicate a protracted course of *treatment*, with numerous adjustments and fittings. Without a doubt, plaintiff paid for and received a course of health care treatment and services, not merely a piece of merchandise. Furthermore, we note that the record indicates defendant was cooperating with plaintiff and was continuing her treatment. He felt progress was being made, and plaintiff decided to terminate the relationship.

We hold that the trial court did not err in granting summary judgment in favor of defendant.

Affirmed.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA v. STEVE ALLEN MARTIN

No. 8121SC75

(Filed 4 August 1981)

1. **Criminal Law § 66— identification testimony—instructions on credibility of witnesses**

The trial court in a prosecution for armed robbery did not err in failing to instruct the jury *ex mero motu* that (1) it must find that the identification testimony of two robbery victims was entirely the product of their recollection of the offender at the time of the offense and did not result from photographs shown them by an investigating officer, and (2) in considering the credibility of one victim, the jury should take into account a prior incorrect identification by such victim.

2. **Criminal Law § 66.9— photographic identification—no impermissible suggestiveness—absence of finding**

Testimony regarding photographic identifications of defendant was not improperly admitted because the court failed to make a specific finding or conclusion that the identification procedures were not impermissibly suggestive where the court's findings clearly established the circumstances enabling the victims to identify defendant, and the trial court concluded that the identification testimony by the victims was admissible.

3. **Criminal Law § 66.8— photograph chosen in pretrial procedure—waiver of objection**

Defendant waived his right to object to the admissibility of a photograph of defendant chosen from a photographic array by two robbery victims by per-

mitting the victims and a police officer to give testimony about the photograph without objection, and the photograph was properly admitted into evidence over defendant's objection without a showing by the State that the photograph had been legally obtained.

4. **Criminal Law §§ 43.1, 66.8— mug shot used in photographic identification—admissibility**

Where defendant waived his right to object to the use of a photograph of defendant chosen from a photographic array by two robbery victims, the trial court did not err in admitting the photograph into evidence because it was a mug shot which indicated to the jury that defendant had a prior record.

5. **Criminal Law § 102.5— cross-examination of witness—no gross impropriety**

The prosecutor's remarks to defendant during cross-examination did not constitute so gross an impropriety as to require correction *ex mero motu*.

6. **Criminal Law § 134.2— sentencing—right of allocution**

The trial court did not violate G.S. 15A-1334(b) by sentencing defendant without first asking him if he wished personally to address the court, there having been sufficient compliance with the statute where defendant's counsel was given the opportunity to speak in defendant's behalf.

APPEAL by defendant from *Collier, Judge*. Judgment entered 4 November 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 8 May 1981.

On 18 August 1980, the Forsyth County grand jury returned indictments charging defendant with two armed robberies. Defendant was convicted by the jury on both charges and sentenced to a prison term of fifteen to twenty-five years. Other facts pertinent to this decision are related below.

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

Appellate Defender Project for N.C., by Assistant Appellate Defender Marc D. Towler, for defendant appellant.

WELLS, Judge.

[1] In his first argument, defendant contends that the trial court erred in failing to instruct the jury *ex mero motu* that:

(A) It must find that the identification testimony of prosecuting witnesses Holley and Watson was entirely the product of their recollection of the offender at the time of the offense and

did not result from photos shown them by investigating officer Charles; and

(B) In considering the credibility of Holley, the jury should take into account a prior incorrect identification by Holley.

State's evidence at trial indicated that James Holley and Phyllis Watson rented a motel room in Winston-Salem at approximately 10:00 p.m. on 5 June 1980. As the couple unlocked the door to their room, they were pushed into the room from behind and knocked to the floor by two men. The men pulled a gun, tied up the couple and took cash and personal objects from Holley and Watson.

Holley was called to testify at trial and was asked if he saw either of the men in the courtroom. Defense counsel objected to the identification testimony, and a *voir dire* was conducted.

Holley testified on *voir dire* that inside the room a light above a big mirror provided sufficient light to see. Holley estimated that the two men were in the room for five to ten minutes and stated that during that time he looked at defendant's face five or six times. Holley further stated that defendant was not wearing anything over his face and then gave a description of defendant as he appeared the night of the robbery.

Holley testified that on 23 June 1980 a policeman, Officer Charles, brought a stack of twenty-five to fifty photographs to Holley's parents' home for Holley to view. Holley testified that when he came to defendant's photograph he stopped and told Charles that defendant was one of the robbers. Holley did not look through any more photographs. Holley further stated that Charles did not indicate to him who he should choose.

On cross-examination, Holley stated that he had previously viewed some photographs at the police station about a week after the robbery. At that time, Holley chose a photograph which "sort of described" one of the robbers, but did not make a positive identification. Subsequent investigation of Holley's choice eliminated the chosen man as a suspect.

Watson testified on *voir dire* that there was sufficient light in the room for her to see Martin's face in profile while he was gagging her. Watson further testified that she viewed photo-

graphs on three occasions and picked out Martin's photograph on both the second and third occasions. At no time did Officer Charles suggest which photograph she should choose.

The trial judge instructed the jury in pertinent part as follows:

> I instruct you that the State has the burden of proving the identity of the defendant as the perpetrator of the crime charged in each of the cases beyond a reasonable doubt. This means that you, the jury, must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime charged in each of the two cases before you may return a verdict of guilty in that case, or those cases.
>
> The main aspect of identification is the observation of the offender by the witness at the time of the offense. In examining the testimony of the witness as to the witness's observation of the perpetrator at the time of the crime, you should consider the capacity the witness had to make an observation through his or her senses, the opportunity the witness had to make an observation, and such details as the lighting at the scene of the crime at the time, the mental and physical condition of the witness, the length of time of the observation and any other condition or circumstance which might have aided or hindered the witness in making the observation.
>
> The identification witness is a witness just like any other witness, that is, you should assess the credibility of the identification witness in the same way you would any other witness in determining the adequacy of the witness's observation and the witness's capacity to observe.
>
> As I instructed you earlier, the State must prove beyond a reasonable doubt that the defendant was the perpetrator of the crime charged in each of the cases. If, after weighing all of the testimony, you are not satisfied beyond a reasonable doubt that the defendant was the perepetrator of the crime charged, it would be your duty to return a verdict of not guilty in that case, or those cases.

Defendant contends that the trial judge erred in omitting from his instructions certain portions of the North Carolina Pattern Instructions—Criminal, § 104.90, on identification.[1] As authority for his position, defendant primarily relies on *United States v. Holley*, 502 F. 2d 273 (4th Cir. 1974), and *United States v. Telfaire*, 469 F. 2d 552 (D.C. Cir. 1972). This Court considered the application of the rules established for the federal trial courts in *Holley* and *Telfaire* to a situation similar to the one at issue here in *State v. Lang*, 46 N.C. App. 138, 143-146, 264 S.E. 2d 821, *rev'd on other grounds*, 301 N.C. 508 (1980). As in *Lang, supra*, we find this case "exhibits none of the special difficulties often presented by identification testimony that would require additional information be given to the jury in order for us to repose confidence in their ability to evaluate the reliability of the identification." *Lang, supra*, at 145.

First, we note that the trial court gave instructions which dealt with the question of identification, the State's burden of proving the identity of defendant, the factors to be considered in determining the reliability of the witness's identification testimony, and reasonable doubt. The attention of the jury, therefore, was sufficiently focused on the issue of identity without the omitted instructions. Second, the pattern instruction or its substantial equivalent was not requested by defendant. *See State v. Lang, supra.* Third, although Holley had made a prior

1. The omitted portions were:

> In examining the testimony of the witness as to his observation after the crime you should consider (describe relevant factors). However, your consideration must go further. The identification of the defendant by the witness as the perpetrator of the offense must be purely the product of the witness' recollection of the offender and derived only from the observation made at the time of the offense. In making this determination you should consider the manner in which the witness was confronted with the defendant after the offense, the conduct and comment of the persons in charge of the (describe confrontation; e.g., line-up, show-up, etc.) and any circumstances or pressures which may have influenced the witness in making an identification, and which would cast doubt upon or reinforce the accuracy of the witness' identification of the defendant.
>
> . . . . . .
>
> You may take into account, in your consideration of the credibility of the identification witness, any occasion upon which the witness failed to make an identification of the defendant and/or any occasion upon which the witness made an identification that was not consistent with his in-court identification.

tentative identification of a person other than defendant as one of the perpetrators of the robbery, Holley subsequently made a *positive* identification of defendant from another photographic array. Defendant's photograph was not among the photographs first shown to Holley when he made the tentative identification, and, more importantly, Holley indicated that the person picked in the tentative identification only looked somewhat similar to the robber. Fourth, there was more than just a one-on-one identification here to implicate defendant in the robbery. Watson also positively identified defendant as one of the robbers, thereby corroborating the identification of Holley. As with Holley, Watson had the opportunity to observe defendant under favorable circumstances; she picked defendant from a pretrial photographic lineup; and she made no misidentification. Even though the trial court omitted two portions of N.C.P.I.—Crim. 104.90, we find that the charge, when viewed contextually, was sufficient on the issue of identification under the evidence in this case. The assignments of error brought forth in defendant's first argument are overruled.

[2] In his second argument, defendant contends the trial court erred in failing to exclude testimony regarding the out-of-court identifications of defendant where the court failed to make a finding of fact that the testimony was admissible.

While the finding and conclusions of the trial court did not include a specific finding that the out-of-court identification procedures "were not impermissibly suggestive," *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247, 1253, 88 S.Ct. 967 (1968); *State v. Miller*, 281 N.C. 70, 77, 187 S.E. 2d 729 (1972), the court's findings were in sufficient detail to clearly establish the circumstances out of which the victims were able to identify defendant and the judge concluded that the victim's identification testimony was admissible. The evidence on *voir dire* clearly supports these findings and conclusion and they are therefore binding on us. *State v. McGuire*, 49 N.C. App. 70, 73, 270 S.E. 2d 526, *appeal dismissed*, 301 N.C. 529 (1980). This assignment is overruled.

[3] In his third argument, defendant contends the trial court erred by admitting into evidence, over objection, the photograph of defendant chosen by the prosecuting witnesses from a photographic array. As the initial basis for his argument, defend-

ant points to the trial court's failure to find as fact that evidence of the out-of-court identifications was admissible. For the reasons stated above in Argument II, defendant's initial argument is without merit. Defendant also argues that the trial court erred because there was no showing by the State that the photograph admitted into evidence was legally obtained, *citing State v. Accor and Moore*, 277 N.C. 65, 175 S.E. 2d 583 (1970). The State concedes that the record is silent on this matter. Both of the victims, Mr. Holley and Ms. Watson, testified at length and in detail as to transactions between them and Officer Charles relating to police file photos shown to them by Officer Charles and as to how they each picked defendant's photograph from those shown them. Officer Charles testified at length and in detail as to those transactions, describing how the victims selected defendant's photograph from those shown to them. Defendant did not enter an objection to any of that testimony. Officer Charles identified the photograph of defendant picked by the victims without objection by defendant. It was not until the State offered defendant's photograph that defendant objected. At this point the trial court overruled the objection and instructed the jury that they might consider the photograph only for the purpose of illustrating the testimony of Officer Charles and not for substantive purposes. Had defendant objected to the testimony about the photograph as it was given [*State v. Edwards*, 274 N.C. 431, 434, 163 S.E. 2d 767, 769 (1968)], the limiting instruction would not have removed the prejudice to defendant without a finding by the trial court that the photograph was legally obtained, as required under *State v. Accor and Moore, supra.* We hold, however, that defendant's general objection to in-court identification testimony did not raise the issue before the trial court of the admissibility of the photograph itself and that by allowing the witnesses to give testimony about the photograph without objection, defendant waived his right to object to the admissibility of the photograph itself. It is well established that the admission of testimony or other evidence over objection is harmless when testimony or other evidence of the same import has previously been admitted without objection. *State v. Silhan*, 302 N.C. 223, 247, 275 S.E. 2d 450, 469 (1981). In order for defendant to be entitled to the findings required under *Accor*, it was necessary for him to separately object to or move to suppress testimony *as to the photograph itself*, as was the case in *Accor*.

[4] Defendant next argues that the trial court erred by admitting his photograph into evidence because the photo was a mug shot which indicated to the jury that defendant had a prior record. On somewhat similar facts, our Supreme Court held in *State v. Fulcher*, 294 N.C. 503, 512-13, 243 S.E. 2d 338 (1978), that defendant in that case was not prejudiced by the introduction of mug shots. The Court stated that defendant, by his previous cross-examination of the State's witnesses, had brought into question, before the jury, the propriety of the pre-arrest identification procedures; thus, there was no prejudicial error in permitting the State to show the jury the photographs used in that process. As we noted earlier, defendant waived his right to object to the use of the photograph. The three assignments of error upon which defendant's third argument is based are overruled.

[5] Defendant brings forth several assignments of error in his fourth argument. Defendant contends that the prosecutor's cross-examination of defendant denied him a fair trial by a) implying that defendant's prior record should be considered as substantive evidence of guilt; b) calling upon defendant to comment on the credibility of the State's witnesses; c) implying that because defendant had little income he was guilty of the robbery; and d) improperly calling attention to defendant's failure to call a witness. An examination of the record shows that at none of the relevant points during cross-examination did defendant's counsel object. Defendant's failure to object waived his right to assert these matters on appeal. *State v. Silhan, supra.* None of the statements constituted so gross an impropriety that we need detail them here or correct the alleged abuse *ex mero motu. See State v. Locklear*, 294 N.C. 210, 215, 241 S.E. 2d 65 (1978). The assignments are overruled.

[6] In his fifth argument, defendant contends the trial court erred in sentencing him without first affording him an opportunity to make a statement. Under G.S. 15A-1334(b), a defendant "may make a statement in his own behalf" at his sentencing hearing. In the case *sub judice*, after the jury returned its verdict, the trial judge asked if there was "anything else you want to say." Although it is not clear to whom the question was directed, defendant's counsel replied, "Your Honor, I don't know what I could add that has not come out in the trial. The defendant says to me he was not involved in this." Defendant contends on appeal that it

is mandatory under G.S. 15A-1334(b) that defendant be allowed to speak, that it is not sufficient that his counsel spoke, and that the case must be remanded for re-sentencing.

As authority for his position, defendant cites 18 U.S.C., Rule 32(a)(1) and *United States v. Bebik*, 302 F. 2d 335 (4th Cir. 1962). Under Rule 32(a),

> Before imposing sentence the court *shall* afford counsel an opportunity to speak on behalf of the defendant *and shall address the defendant personally* and ask him if he wishes to make a statement in his own behalf . . . . (Emphasis added.)

In *Bibik*, the defendants were represented by counsel. Before he sentenced the defendants, the trial judge asked "Do you gentlemen have anything to say on the matter of punishment?", in reply to which counsel responded for their respective clients. Sentence was then imposed. The *Bebik* court, at p. 337, found that Rule 32(a) had not been complied with because "the right of allocution was not accorded to the defendant as the statute requires." The federal statute and G.S. 15A-1334(b) are not so similar as to require the same finding in the case *sub judice*. The federal statute clearly *requires* the trial judge to address both defendant's counsel and the defendant before imposing sentence. G.S. 15A-1334(b) imposes no such requirement, and we hold that it was sufficient that defendant's counsel spoke for him. Defendant's final assignment is overruled.

In the trial of defendant, we find

No error.

Judges MARTIN (Robert M.) and CLARK concur.

KIRKPATRICK & ASSOCIATES, INC. v. THE WICKES CORPORATION, T/A WICKES LUMBER AND BUILDING SUPPLIES

No. 8110SC44

(Filed 4 August 1981)

Indemnity § 2.1— roofing subcontractor—death of worker—indemnification required

An indemnity clause in the parties' contract required defendant to indemnify plaintiff for any claims made in connection with the work that defendant as subcontractor agreed to perform, regardless of whether the claims were occasioned by defendant or by third parties, and the agreement clearly covered an accident in which a worker was electrocuted in connection with the roofing work defendant contracted to perform; moreover, plaintiff's admission of negligence did not bar its claim for recovery based upon the indemnity clause, nor was plaintiff barred from recovery by the fact that defendant was released and discharged by the deceased worker's estate from liability resulting from his death.

APPEAL by plaintiff from *Lee, Judge.* Judgment filed 7 November 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 4 June 1981.

Plaintiff brought this action seeking recovery pursuant to an indemnity agreement.

Plaintiff was the general contractor for the construction of housing units for the Housing Authority of the City of Goldsboro, North Carolina. On 4 April 1977, plaintiff and defendant entered into a contract in which defendant agreed to be the subcontractor for certain roofing work in connection with the project. The contract contained the following indemnity clause:

> The Subcontractor hereby agrees to save and indemnify and keep harmless the Contractor, against all liability, claims, judgments or demands for damages arising from accidents to persons or property, whether occasioned by said Subcontractor, his agents or employees, provided said accidents occur in connection with the Subcontractor's work or are occasioned by said Subcontractor, his agent or employees, in connection with other work; and the said Subcontractor will defend any and all suits which may be brought against the Contractor on account of any such accidents, and will make good to and reimburse the Contractor for any expenditures that said Contractor may make by reason of such accident.

Defendant contracted with D & S Roofing Company to perform certain services connected with the roofing work. On 15 July 1977, Clifford Dunn, a partner in D & S Roofing, was working on the roof of one of the houses when he came in contact with an electrical power line and was electrocuted.

Dunn's estate made a claim against plaintiff for damages arising from Dunn's death. Plaintiff notified defendant in writing of the claim and requested that defendant or its insurer assume the claim and provide a defense. Defendant refused to do so.

On 9 November 1978, plaintiff settled the claim with Dunn's estate upon payment of $17,500. Claims against defendant and Carolina Power & Light Company were also settled. Releases were executed in favor of plaintiff, defendant, and Carolina Power & Light Company.

Based upon its settlement and payment, plaintiff demanded indemnification from defendant. Defendant refused, and plaintiff filed its complaint. Defendant asserted plaintiff's contributory negligence and the release of defendant by Dunn's estate as absolute bars to plaintiff's right of recovery. In its answers to defendant's requests for admissions, plaintiff admitted that Dunn was an independent contractor, and "[t]hat at all relevant times and in all relevant regards the plaintiff, Kirkpatrick & Associates, Inc., was negligent and that its negligence was a proximate cause of the injuries to Clifford Daniel Dunn."

Following discovery, both parties moved for summary judgment. From the granting of defendant's motion and the denial of plaintiff's motion, plaintiff appeals.

Boyce, Mitchell, Burns & Smith, by Lacy M. Presnell III, for plaintiff appellant.

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

MARTIN (Harry C.), Judge.

Summary judgment is appropriate only when the evidence before the court demonstrates that there is no genuine issue as to any material fact and that a party is entitled to a judgment as a matter of law. N.C. Gen. Stat. 1A-1, Rule 56(c). Here, the facts are

not controverted. The sole issue on appeal is whether, as a matter of law, plaintiff is entitled to indemnification by defendant under the terms of the contract.

In interpreting a contract of indemnity, the Court's function is to ascertain and give effect to the intention of the parties, and the ordinary rules of contract construction apply. *Dixie Container Corp. v. Dale*, 273 N.C. 624, 160 S.E. 2d 708 (1968). Where the contractual language is clear and unambiguous, the Court must interpret the contract as written. *Corbin v. Langdon*, 23 N.C. App. 21, 208 S.E. 2d 251 (1974). In an indemnity contract, the agreement will be construed to cover all losses, damages, and liabilities which reasonably appear to have been within the contemplation of the parties, but not those which are neither expressed nor reasonably inferrable from the terms. *Dixie Container Corp., supra.* Indemnity contracts are entered into to save one party harmless from some loss or obligation which it has incurred or may incur to a third party. *Id.*

We agree with plaintiff's position that the language in the indemnification clause here in question does require defendant to indemnify plaintiff for any claims made in connection with the work that defendant, as subcontractor, agreed to perform, regardless of whether the claims were occasioned by defendant or by third parties. Defendant agreed

> to save and indemnify and keep harmless [plaintiff] against *all* liability, claims, judgments or demands for damages arising from accidents to persons or property, whether occasioned by [defendant], his agents or employees, *provided* said accidents occur *in connection with* [defendant's] work *or* are *occasioned* by [defendant], his agents or employees, in connection with other work . . . . [Emphasis ours.]

The agreement clearly covers an accident which occurs in connection with the roofing work defendant contracted to perform. It would also cover accidents occasioned, or caused, by defendant associated with other work. In either event, the undisputed facts show that Clifford Dunn, at the time he was killed, was performing roofing work that was defendant's obligation or was connected with the same. The fact that his status was that of an independent contractor is irrelevant and does not destroy or alter defendant's contractual obligation. The agreement plainly

does not require that defendant itself actually cause the injury or loss upon which recovery is sought.

Defendant contends that because plaintiff admitted its own negligence and that such negligence was a proximate cause of Dunn's death, it is barred from recovering under the contract by the doctrine of contributory negligence or assumed risk. The cases cited by defendant, *Etheridge v. Light Co.*, 249 N.C. 367, 106 S.E. 2d 560 (1959), *Clark v. Freight Carriers*, 247 N.C. 705, 102 S.E. 2d 252 (1958), and *Dalrymple v. Sinkoe*, 230 N.C. 453, 53 S.E. 2d 437 (1949), do not involve indemnity contracts. Negligence is not an issue in the case sub judice, as plaintiff's action is based not upon allegations of defendant's negligence but upon the existence of the indemnification contract. *See Dixie Container Corp., supra.*

Defendant cites the language of *Hill v. Freight Carriers Corp.*, 235 N.C. 705, 710, 71 S.E. 2d 133, 137 (1952), as authority for its proposition that public policy opposes contracting against liability from one's own negligence:

> Contracts which seek to exculpate one of the parties from liability for his own negligence are not favored by the law. . . . Hence it is a universal rule that such exculpatory clause is strictly construed against the party asserting it. . . . It will never be so construed as to exempt the indemnitee from liability for his own negligence or the negligence of his employees in the absence of explicit language clearly indicating that such was the intent of the parties.

(Citations omitted.) *Hill* was decided under Georgia law, and concerned a situation in which the plaintiff leased his tractor to defendant, a common carrier, under a contract including a provision that the plaintiff "will bear the expense of all losses thru fire, theft & collision to said motor vehicle and [the defendant] is not responsible for any of the above said losses." *Id.* at 706, 71 S.E. 2d at 134. While the plaintiff was operating the tractor on business for the defendant, he was involved in an accident with another driver who was on a trip for the defendant under a similar contract. The defendant sought to exculpate itself from liability for damages incurred by the plaintiff under the fellow servant doctrine and the terms of the contract. The Court, in applying the law of Georgia, held that the contract did not relieve the defend-

ant of liability for two reasons: (1) the language used did not clearly indicate such an intent, and (2) it would be contrary to public policy to permit a common carrier to contract against liability for damages caused by its employees' negligence while engaged in operating its vehicles used in interstate commerce.

Hill has no application to the present case. It is well established in North Carolina that "[i]t is not contrary to public policy for an indemnitee to contract with another to save him harmless from liability to a third party." *Gibbs v. Light Co.*, 265 N.C. 459, 467, 144 S.E. 2d 393, 400 (1965).

> There is a distinction between contracts whereby one seeks to wholly exempt himself from liability for the consequences of his negligent acts, and contracts of indemnity against liability imposed for the consequences of his negligent acts. The contract in the instant case is of the latter class and is more favored in law.

Id. Accord, Cooper v. Owsley & Son, Inc., 43 N.C. App. 261, 258 S.E. 2d 842 (1979). Defendant's ultimate liability to plaintiff is in contract, not in tort. *See Hargrove v. Plumbing and Heating Service*, 31 N.C. App. 1, 228 S.E. 2d 461, *disc. rev. denied*, 291 N.C. 448 (1976). To construe the language of the indemnity clause to be ineffective under the circumstances of this case would render the provision virtually meaningless.[1] *Cooper, supra.* There are few situations conceivable where a party would be seeking indemnification had it not been guilty of some fault, for otherwise no judgment could be recovered against it. *Id.; Hargrove, supra.* Plaintiff's admission of negligence does not bar its claim for recovery based upon the indemnity clause.

Defendant further relies on the fact that it was released and discharged by Clifford Dunn's estate from liability resulting from Dunn's death. It argues that the estate thereby implicitly released plaintiff from claims for which plaintiff may have been liable as a result of defendant's acts; therefore any payments made by plaintiff to the estate were merely voluntary. Although the release was apparently before the trial court, it has not been made a part of the record on appeal, and we are unable to deter-

1. In its brief, defendant argues that, under the construction it urges, there might still be provided indemnity for such acts as mere negligent supervision by plaintiff. While the logic of this conclusion eludes us, we do not believe that the parties could have intended to draw up a contract of indemnity applicable to so narrow an interpretation.

mine if, by its terms, it released all other tortfeasors or was limited to defendant. If defendant had believed the estate's claim against plaintiff was based upon the same acts as the claim against itself, it should have assumed and defended the claim by the estate against plaintiff, as plaintiff requested it to do under the indemnity agreement. Defendant apparently believed the claim against plaintiff arose from a separate tort and refused to assume and defend it. Because of its refusal to do so, plaintiff was entitled to make a good faith settlement with the estate, as the law encourages settlements. *See Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E. 2d 769 (1970); 12 Strong's N.C. Index 3d Torts § 7.7 (1978). Dunn's estate filed separate claims against plaintiff and defendant, and the release in favor of defendant had no effect as to the claim against plaintiff. Plaintiff's right to indemnity does not rest upon any theory of subrogation to the rights of the injured party. Strong's, *supra*, § 3.1. Indemnity assumes derivative fault, not joint fault. *Id.; Edwards v. Hamill*, 262 N.C. 528, 138 S.E. 2d 151 (1964). Defendant's liability for the claim against plaintiff arose solely from its contractual obligation.

A settlement is presumed to be fair and reasonable, and the burden of showing a lack of good faith is upon the party asserting it. *Wheeler, supra.* In its complaint, plaintiff alleged that its settlement with Dunn's estate was fair and reasonable. Defendant generally denied the allegation, but offered no forecast of evidence to sustain its motion for summary judgment on this issue. Defendant cannot rely on the bald allegation of its pleadings alone, in the face of the presumption of the regularity of settlements. Therefore, there is no genuine issue of fact as to a bona fide settlement, and plaintiff was entitled to judgment as a matter of law on the basis of the indemnification agreement. The trial court erred in granting summary judgment to defendant and denying plaintiff's motion for the same. The actions of the trial court are

Reversed.

Judges HEDRICK and WELLS concur.

LYNN R. JOHNSON v. ROBERT DUNLAP AND RACING, INC. D/B/A RAINBOW SPEEDWAY

No. 8118SC25

(Filed 4 August 1981)

1. **Rules of Civil Procedure § 50— motions for directed verdict, judgment n.o.v.—failure to state grounds therefor—absence of objection at trial**

Where plaintiff did not object at trial to the failure of defendants' motions for directed verdict and judgment n.o.v. to state specific grounds therefor, plaintiff cannot raise such issue on appeal.

2. **Torts § 7.2; Waiver § 2— release from liability—waiver of rights by second release**

Defendants waived their rights under a 25 August 1973 release from liability when they presented to and had plaintiff execute a 25 September 1973 release and paid him the sum of $1500 as provided therein.

3. **Trial § 51; Rules of Civil Procedure § 59— verdict contrary to evidence—new trial**

The trial court did not abuse its discretion in setting aside a jury verdict and ordering a new trial on the ground the verdict was "contrary to the evidence." G.S. 1A-1, Rule 59(a)(9).

APPEAL by plaintiff from *Lane, Judge.* Judgment entered 4 June 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 3 June 1981.

Plaintiff seeks to recover for personal injuries sustained on 25 August 1973 when hit by a racing vehicle while he was in the pit area of Rainbow Speedway in Reidsville. He intended to drive in a subsequent race. His right leg was crushed and subsequently amputated.

Defendants in their answer alleged *inter alia* that plaintiff signed at the entrance to the pit area a "Waiver and Release" form on 25 August 1973, and that on 25 September 1973 signed a "Release" form. In both of these forms plaintiff released defendants from any and all liability arising out of the accident on 25 August 1973.

Defendants' motion to sever the issues as to plaintiff's alleged release was allowed.

At trial defendants' evidence tended to show that the pre-injury release forms of 25 August 1973 were prepared and delivered by defendants' insurer to defendants. The forms consisted of paper, 8½ inches by 11 inches, with the printed release

provisions at the top followed by lines for signature and car number. The forms were placed on clipboards and given to gate attendants, who stood at the gate to the pit area. As the cars participating in the race approached the gate the attendant presented the clipboard to those entering the pit area, primarily the drivers of participating cars and their crews. Each person admitted to the pit area was charged a fee of $4.00 and required to sign the release form affixed to the clipboard. Several cars were often waiting at the pit gate, and the several attendants would simultaneously collect admission fees and signatures from those in cars lined up at the gate.

On the night of 25 August 1973 about 300 people were admitted to the pit area. Bobby Wade Marshall testified that he was a pit attendant; that he signed the release form as pit gate official; that he did not necessarily observe all persons sign the form because he was busy accepting admission fees and making change; and that the signature of "Lynn Johnson" and Car No. 5 appeared on one of the release forms.

At the hospital plaintiff signed an accident report dated 14 September 1973 and received periodic payments under defendants' accident insurance policy. Defendants also had a liability policy. Defendant Dunlap visited plaintiff at the hospital two or three weeks after the 25 August 1973 accident and found him to be alert but in pain. On 25 September 1973 plaintiff signed a release of all claims relating to the 25 August 1973 accident in consideration for the payment of $1500.00. A handwriting expert testified that the signatures on the 25 August and 25 September 1973 releases were those of plaintiff.

The plaintiff testified that his signature appeared on the release, Defendants' Exhibit 2, but he had never seen the release form before, though he had signed his name on several other occasions when entering the pit gate. Plaintiff was accompanied by two men who testified that the clipboard was handed to them, that they saw no release form but only lines for signature, and they signed.

The release included *inter alia* the following provisions: "IN CONSIDERATION of being permitted to enter . . . the RESTRICTED AREA . . . 1. HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the Promoter . . . from all liability . . .

for all loss or damage . . . on account of injury to the person or property . . . whether caused by the negligence of RELEASEES or otherwise while the Undersigned is upon the Restricted Area . . . ."

While in the pit area after parking his car, which he intended to enter in a subsequent race, plaintiff was struck by a participating car. He was taken to the hospital. He suffered an upper thigh amputation of the right leg and a fracture of the left leg which required a pin in the shin. He was in much pain throughout and was given narcotics throughout his stay in the hospital, until released on 16 October 1973. He did not recall signing an accident report or the 25 September 1973 release. His attending physician did not think he had the capacity to understand or enter into a business agreement. Others testified that they visited plaintiff in the hospital and in their opinion he did not have the mental capacity to sign a legal document.

Issues were submitted to and answered by the jury as follows:

"ISSUES

1. Did the plaintiff release, waive, discharge and covenant not to sue the defendants on August 25, 1973?

Answer: No.

2. Did the plaintiff on September 25, 1973 release the defendants from any and all liability arising out of the accident on August 25, 1973?

Answer: No."

Defendants moved for judgment N.O.V. (no grounds stated) and for conditional new trial "on the grounds that the jury verdict appears to have been given under the influence of passion and prejudice, that there is insufficient evidence to justify the jury verdict, that the jury verdict is contrary to the evidence and that justice and equity require a new trial."

Judgment was entered in pertinent part as follows:

"[A]nd it appearing to the Court that the motion for directed verdict by the defendants on each issue could properly have

been granted, and that if the judgment herein is vacated or reversed as to either issue, in the discretion of the Court, a new trial should be granted the defendants as to such issue on the grounds that the jury verdict appears to have been given under the influence of passion and prejudice, that there is insufficient evidence to justify the jury verdict, that the jury verdict is contrary to the evidence, and that justice and equity require a new trial.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff shall have and recover nothing of any of the defendants; that the plaintiff's action as to all defendants shall be and the same is hereby dismissed with prejudice; that the costs of this action shall be paid by the plaintiff, and that a conditional new trial is granted to the defendants on each issue as to which this judgment is hereafter vacated or reversed on appeal."

Younce, Wall & Chastain by Percy L. Wall and Peter Chastain for plaintiff appellant.

Nichols, Caffrey, Hill, Evans & Murrell by William D. Caffrey and Eugene W. Purdom for defendant appellees.

CLARK, Judge.

The trial court erred in granting the judgment N.O.V., and the judgment must be reversed and a new trial ordered.

[1] The defendants' motion for directed verdict and motion for judgment N.O.V. did not state the specific grounds therefor as required by G.S. 1A-1, Rule 50(a). Both the North Carolina Supreme Court and the Court of Appeals have stated that this requirement is mandatory. *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974), and *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E. 2d 769 (1970). But the Supreme Court has stated: "However, the courts need not inflexibly enforce the rule when the grounds for the motion are apparent to the court and the parties." *Anderson v. Butler*, 284 N.C. at 729, 202 S.E. 2d at 588. Further, the plaintiff did not object at trial to the failure of the motion to state specific grounds. Having failed to so object, the plaintiff cannot raise the issue on appeal. *Builders Supplies Co. v. Gainey*, 10 N.C. App. 364, 178 S.E. 2d 794, *cert. denied*, 278 N.C. 300, 180 S.E. 2d 178

(1971); *Pergerson v. Williams*, 9 N.C. App. 512, 176 S.E. 2d 885 (1970).

Under the circumstances we consider on its merits the trial court's granting of the judgment N.O.V. in favor of defendants. A motion for judgment N.O.V. is a motion that judgment be entered in accordance with the movants' earlier motion for a directed verdict and notwithstanding the contrary verdict actually returned by the jury. *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E. 2d 1 (1973). Though no specific grounds were stated for either the motion for directed verdict or motion for judgment N.O.V., motions under Rule 50 are designed to test the sufficiency of the evidence. It is apparent to this Court, and should be to the parties, that the trial court granted the judgment N.O.V. on the ground that defendants by their evidence had established the due execution of either one or both of the releases and that plaintiff had failed to offer sufficient evidence that he did not validly execute the 25 August 1973 and the 25 September 1973 releases.

The defendants having pled the releases in bar of plaintiff's claim, they had the burden of proof. A directed verdict, or a judgment N.O.V., can be granted for the party having the burden of proof only where the credibility of movant's evidence is manifest as a matter of law. *Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979). *See* Note, *Directing a Verdict in Favor of the Party with the Burden of Proof*, 16 Wake Forest L. Rev. 607 (1980).

[2] Though waiver is not allowed as a defense by reply under G.S. 1A-1, Rule 7, and not raised in or considered by the trial court or argued in the briefs on appeal, it is manifest from defendants' own evidence that their rights under the 25 August 1973 release were waived when they presented to and had plaintiff execute the 25 September 1973 release and paid to him the sum of $1500.00 provided therein. *See* 13 Strong's N.C. Index 3d *Waiver* § 2 (1978). Waiver is a matter of law to be determined by the court where the facts are not disputed. *Builders v. Gadd*, 183 N.C. 447, 111 S.E. 771 (1922). The provisions of a contract (release) may be waived by intentionally relinquishing a known right, advantage, or benefit, and such intention to waive may be expressed or implied from acts or conduct naturally leading the other party to believe that the right has been relinquished. *Klein v. Insurance Co.*, 289 N.C. 63, 220 S.E. 2d 595 (1975); *Fetner v. Granite Works*,

251 N.C. 296, 111 S.E. 2d 324 (1959); *Lithographic Co. v. Mills*, 222 N.C. 516, 23 S.E. 2d 913 (1943).

[3] Assuming, arguendo, that there was no waiver of the 25 August 1973 release, the plaintiff offered ample evidence that he did not see and did not knowingly and voluntarily execute the release or that it was vitiated by fraud or mistake. Though plaintiff's signature appears on the release, his testimony that he had never seen it is supported by testimony that his two companions signed what appeared to be a legal pad on a clipboard at the pit gate when plaintiff signed, yet their signatures were not on the release offered in evidence by defendants. Further, all the evidence tends to show that some 300 signatures were obtained by several pit area attendants as the cars were lined up at the pit gate for admission. The jury could find from this evidence that plaintiff had never seen the release or that the circumstances were such that he was not given an opportunity to read it. Releases which exculpate persons from liability for negligence are not favored by the law. *Jordan v. Storage Co.*, 266 N.C. 156, 146 S.E. 2d 43 (1966); *see* Annot., 175 A.L.R. 8 (1948).

It is also manifest that plaintiff's evidence was sufficient to show mental incompetency at the time he executed the release in the hospital on 25 September 1973 or that the consideration was grossly inadequate. *See* 12 Strong's N.C. Index 3d *Torts* § 7.2 (1978).

Defendants joined with their motion for judgment N.O.V. a motion for a new trial in the alternative as allowed by G.S. 1A-1, Rule 50(b)(1). The stated grounds for the new trial motion, as required by Rule 59(a), were all incorporated and adopted in the judgment entered by the trial court, as follows: (1) the jury verdict appears to have been given under the influence of passion and prejudice, (2) there is insufficient evidence to justify the jury verdict, (3) the jury verdict is contrary to the evidence, and (4) justice and equity require a new trial.

G.S. 1A-1, Rule 59(a) lists eight specific grounds for granting a new trial and one "catch-all" ground, Rule 59(a)(9), "any other reason heretofore recognized as grounds for a new trial." The only ground listed in the judgment specifically provided for by Rule 59 is insufficiency of the evidence, and we have found that the evidence was sufficient to support the verdict. The other

three grounds in the judgment came within the "catch-all" Rule 59(a)(9). We do not find it necessary to determine whether the grounds "passion and prejudice" of the jury and "justice and equity" are grounds "heretofore recognized" in this State. The ground "contrary to the evidence" has been so recognized and interpreted as giving to the trial judges broad discretionary authority to set aside a verdict and order a new trial. No issue of law is raised, and the ruling is not reviewable on appeal in the absence of manifest abuse of discretion. *Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977). While we find little in the record on appeal in support of the stated "contrary to the evidence" ground, we do not find a manifest abuse of discretion.

The judgment N.O.V. is reversed and the cause is remanded for a

New trial.

Judges MARTIN (Robert M.) and HILL concur.

IN THE MATTER OF THE WILL OF ALLYNE H. COLEY, DECEASED

No. 809SC884

(Filed 4 August 1981)

1. Wills § 21.4— caveat proceeding—undue influence—insufficiency of evidence

The trial judge in a caveat proceeding did not err by refusing to submit an issue of undue influence to the jury where caveator offered evidence of deceased's weakened mental and physical condition, the result of the will itself which left $1,000 to her and the remainder of the estate to propounder, the propounder's involvement in assisting testatrix, who was her aunt, to get the will prepared, and the propounder's desire that her aunt make a will and that she share in her aunt's estate, but such evidence was not sufficient to support an inference that the will was the result of an overpowering influence exerted by propounder on testatrix which overcame testatrix's free will and substituted for it the wishes of propounder so that testatrix executed a will which she otherwise would not have executed.

2.1 Wills § 22— caveat proceeding—lack of testamentary capacity—insufficiency of evidence

Evidence of lack of testamentary capacity was insufficient to send that issue to the jury in a caveat proceeding since no witness offered any opinion

negating any element of testamentary capacity, and evidence of testatrix's weakened physical condition and confusion alone was insufficient to make a prima facie case of lack of capacity.

APPEAL by caveator from *Farmer, Judge.* Judgment entered 10 April 1980 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 1 April 1981.

The testatrix, Allyne H. Coley, died on 23 February 1979. A will purportedly executed by testatrix on 18 April 1978 was presented to the Clerk of Superior Court of Granville County for probate by LaVerne C. Marks, who is testatrix's niece, beneficiary, and the executrix of her will. Mamie G. Hoffmann, another niece of testatrix, and also a beneficiary under her will, filed a caveat to the will, alleging that it was not the last will and testament of the testatrix because it was procured by the undue influence of the propounder and because testatrix lacked testamentary capacity at the time the purported will was made. The will provided that caveator was to receive $1,000 from testatrix's estate and propounder was to receive the remainder of the estate.

Propounder's motion for directed verdicts on the issues of undue influence and lack of testamentary capacity, made at the close of all the evidence, was granted by Judge Farmer. Judge Farmer also granted propounder's motion for peremptory instructions to the jury on the issues of whether the document offered into probate was executed by testatrix according to the legal requirements for a valid will and whether the document was the last will and testament of the testatrix. The jury answered these two issues affirmatively. From a judgment admitting the document to probate in solemn form, caveator appeals.

Other facts relevant to the decision of this case are recited and discussed in the opinion.

Arthur Vann, for the propounder-appellee.

Harriss, Mulligan, Embree, Herbert & Derr by Michael J. Mulligan, for the caveator-appellant.

MARTIN (Robert M.), Judge.

By her first assignment of error, caveator contends the court should have allowed her pre-trial motion for continuance. The mo-

tion was addressed to the sound discretion of the trial judge and his ruling thereon will not be disturbed in the absence of a manifest abuse of discretion. No abuse of discretion has been shown.

By her second assignment of error, caveator presents the questions of whether she presented a *prima facie* case that testatrix's will was the product of undue influence or that testatrix lacked sufficient mental capacity to make the will.

In a caveat proceeding, the burden of proof is upon the propounder to prove that the instrument in question was executed with the proper formalities required by law. Once this has been established, the burden shifts to the caveator to show by the greater weight of the evidence that at the time of the execution thereof testatrix did not have sufficient mental capacity to make a will or that it was procured by undue influence. It is our function, in a case such as this, to consider all of the evidence in the light most favorable to the caveator, deem her evidence to be true, resolve all conflicts in her favor and give her the benefit of every reasonable inference to be drawn in her favor. *In re Andrews*, 299 N.C. 52, 261 S.E. 2d 198 (1980). For this reason, although much of caveator's own evidence, including her testimony, was contradictory and often tended to negate her claims of undue influence and lack of testamentary capacity, we will recite only the evidence which tended to support her claims. Viewing the evidence in such manner, if caveator presented sufficient evidence of undue influence or lack of testamentary capacity so that the jury could find for the caveator, if it believed her evidence, then the motion for directed verdict on that issue should have been denied.

[1] First, we will consider the question of whether caveator presented sufficient evidence of undue influence to send that issue to the jury.

> To constitute undue influence within the meaning of the law, there must be more than *mere* influence or persuasion because a person can be influenced to perform an act that is nevertheless his voluntary action. *In re Will of Frank*, 231 N.C. 252, 56 S.E. 2d 668 (1949), *rehearing denied*, 231 N.C. 736, 57 S.E. 2d 315 (1950). For the influence to be undue,

" 'there must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made.' " *In re Will of Kemp*, 234 N.C. 495, 498, 67 S.E. 2d 672, 674 (1951), *quoting In re Will of Turnage*, 208 N.C. 130, 131, 179 S.E. 332, 333 (1935); *see generally*, Wiggins, *Wills and Administration of Estates in North Carolina* § 55 (1964).

. . .

It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty. *In re Will of Beale, supra.*

Several of the factors that are relevant on the issue of undue influence include:

"1. Old age and physical and mental weakness.

2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.

3. That others have little or no opportunity to see him.

4. That the will is different from and revokes a prior will.

5. That it is made in favor of one with whom there are no ties of blood.

6. That it disinherits the natural objects of his bounty.

7. That the beneficiary has procured its execution." *In re Will of Mueller*, 170 N.C. 28, 30, 86 S.E. 719, 720 (1915).

In re Andrews, supra at 53-55; 261 S.E. 2d at 199-200.

Caveator presented evidence on three of the seven factors listed above as relevant to the issue of undue influence.

(1) Testatrix was 75 years old and was physically and mentally weak at the time she made the will in question. She had a stroke in 1963, after which her memory was impaired. Testatrix was able to overcome most of the physical effects of the stroke. One of testatrix's friends testified "[a]fter the stroke she was never right again. If somebody wanted her to do something they'd tell her today and she'd fall right in with it. Well, maybe tomorrow, she'd do the same thing with somebody else. That condition continued in my opinion right up to the date of her death." Several witnesses testified that beginning in 1973, testatrix's health gradually deteriorated. She developed hearing problems and was not as active physically as she had been before that time. She had arthritis and was partially paralyzed. It was difficult for her to move around and she had to be carried to the car. She was "confused" at times. At other times she acted "normally."

(2) Propounder and her family moved into testatrix's home approximately four months *after* the will was made and lived there with testatrix until she died in 1979. From 1949 to 1962 she saw testatrix four or five times a year. She did not see testatrix again until 1971 when she saw her once. From 1972 to 1975 she visited testatrix four or five times per year. She started visiting testatrix more frequently in 1975. In January of 1978, propounder started writing some of testatrix's checks for her. Other evidence was presented concerning propounder's close association with testatrix some months *after* the will was made.

(3) There was no evidence presented which tended to show that others had little or no opportunity to see testatrix.

(4) There was no evidence that the will was different from a prior will. Caveator testified that she had been told testatrix made a prior will but that she had never seen it.

(5) The will was not made in favor of one with whom testatrix had no blood ties.

(6) The only evidence tending to show that the will disinherited the natural objects of testatrix's bounty was

caveator's testimony that the will "cut off" propounder's sister and daughter and caveator's children.

(7) The attorney who drafted the will testified that propounder made the two appointments he had with testatrix concerning the will. Testatrix told him how she wanted to dispose of her property in the will. Propounder testified that she drove testatrix to the attorney's office twice; once to discuss the provisions of the will and once to sign it. She was present in the room with the attorney and testatrix on both occasions. She called the attorney about drafting the will at testatrix's request. Testatrix gave her a key to the lock box in which the will was kept. Both propounder and caveator testified that they had discussed getting testatrix to make a will in 1976. They went to an attorney's office together "to see what claim an outsider could have on Allyne Coley's property." Caveator testified that on the way to the attorney's office, propounder stated, "she wanted to get her share of that land and she said that if she had to prove Allyne mentally incompetent and have to have her institutionalized, that she would." Caveator also testified that propounder told her "that she wanted my aunt to make a will and she said that if she could get her to make a will that she was going to get it with her and take and put in the lock box so that Allyne wouldn't tear this one up. She also said that she was going to try to get it done one way or the other."

We recognize that usually the trier of fact must decide the presence of undue influence from circumstantial evidence.

> Caveator must rely on inferences from the surrounding facts and circumstances that arise on the evidence in his effort to prove that undue influence existed at the time testator executed his last will and testament thereby causing him to execute a will that he otherwise would not have executed. The more adroit and cunning the person exercising the influence, the more difficult it is to detect the badges of undue influence and to prove that it existed. *In re Will of Beale*, 202 N.C. 618, 163 S.E. 684 (1932).

In re Andrews, supra at 54, 261 S.E. 2d at 199-200.

> The test for determining the sufficiency of the evidence of undue influence is usually stated as follows: "[i]t is 'generally

> proved by a number of facts, each one of which standing alone may have little weight, but taken collectively may satisfy a rational mind of its existence.' " *Id.* at 29, 86 S.E. at 719, *quoting In re Will of Everett*, 153 N.C. 83, 87, 68 S.E. 924, 925 (1910).

In re Andrews, supra at 55, 261 S.E. 2d at 200.

We do not believe caveator presented sufficient evidence of undue influence to survive propounder's motion for directed verdict on that issue. Caveator's case on this issue consisted of evidence of the deceased's weakened mental and physical condition, the results of the will itself, the propounder's involvement in assisting her aunt to get the will prepared, and the propounder's desire that her aunt make a will and to share in her aunt's estate. This evidence was not sufficient to support an inference that the will was the result of an overpowering influence exerted by propounder on testatrix which overcame testatrix's free will and substituted for it the wishes of propounder, so that testatrix executed a will that she otherwise would not have executed. The trial judge did not err by refusing to submit the issue of undue influence to the jury.

[2] Next we turn to the question of whether caveator presented sufficient evidence of lack of testamentary capacity to send that issue to the jury. Mental capacity of a testatrix to make a will is the capacity to understand the kind, nature and extent of her property; to know the natural objects of her bounty; to understand the effect of her act; and to make a disposition of her property. *In re Will of Shute*, 251 N.C. 697, 111 S.E. 2d 851 (1960). The law presumes that a testatrix possessed testamentary capacity, and those who allege otherwise have the burden of proving by the preponderance or greater weight of the evidence that she lacked such capacity. *In re Will of York*, 231 N.C. 70, 55 S.E. 2d 791 (1949); *In re Burns' Will*, 121 N.C. 336, 28 S.E. 519 (1897). Where the issue is the mental capacity of the testatrix at the time of making the will, evidence of incapacity within a reasonable time before and after is relevant and admissible insofar as it tends to show mental condition at the time of execution of the will. *In re Will of Stocks*, 175 N.C. 224, 95 S.E. 360 (1918).

A nonexpert witness, who knew the testatrix, had conversations or business transactions with her, saw her, heard her talk

and observed her conduct, may express an opinion or opinions that the testatrix did or did not have sufficient mental capacity to know (1) the nature and extent of her property; (2) who were the natural objects of her bounty; and (3) what she was doing, and to whom she wished to give her property and how, that is, the force and effect of her act in making a will, thereby disposing of her property. *In re Will of Tatum*, 233 N.C. 723, 65 S.E. 2d 351 (1951); *In re Will of York, supra.* Such a witness may relate incidents of conversation, conduct and demeanor of testatrix which tend to show testamentary capacity, or want thereof, and it is not necessary that the witness have or express an opinion as to mental competency of testatrix or that the incident or incidents related be known to another witness who did express such opinion. *In re Will of Hall*, 252 N.C. 70, 113 S.E. 2d 1 (1960). Capacity to make a will is not a question of fact. It is a conclusion which the law draws from certain facts and premises. *In re Will of Tatum, supra; In re Will of York, supra; In re Will of Lomax*, 224 N.C. 459, 31 S.E. 2d 369, 155 A.L.R. 278 (1944). Hence, the witness must state the facts gained from personal observations as a predicate for the expression of his opinion. *In re Will of Lomax, supra.*

In the instant case, caveator's evidence concerning lack of testamentary capacity was insufficient. No witness offered any opinion negating any element of testamentary capacity. The evidence of her weakened physical condition and "confusion" alone was insufficient to make a *prima facie* case of lack of testamentary capacity.

The trial court did not err by allowing propounder's motion for directed verdicts on the issues of undue influence and lack of testamentary capacity.

Affirmed.

Judges WHICHARD and BECTON concur.

IN THE MATTER OF THE APPLICATION OF ALAMANCE SAVINGS AND LOAN ASSOCIATION, INC., (PROPOSED), BURLINGTON, NORTH CAROLINA, A STOCK-OWNED SAVINGS AND LOAN ASSOCIATION

No. 8010SC1177

(Filed 4 August 1981)

1. **Injunctions § 12.1— hearing on motion to show cause—judgment on merits—harmless error**

Error, if any, in the trial court's entry of a final judgment on the merits in a hearing on a motion to show cause was harmless where judgment on the merits was entered on an issue solely of law, and the court had before it all that was required for a decision of this purely legal question.

2. **Administrative Law § 4; Banks and Banking § 1.1— Savings and Loan Commission—unfavorable action on charter application—no final agency decision—right to reconsider application**

A vote by the Savings and Loan Commission on 14 February 1980 which failed to adopt the recommendation of the Commission's Administrator that an application for a charter be approved was not a "final agency decision" since no written decision was ever entered in accordance with the 14 February vote; therefore, the Commission could properly reconsider and approve the application for a charter on 16 July 1980.

APPEAL by respondent (Alamance Savings and Loan Association, Inc. (Proposed)) from *Bailey, Judge*. Order entered 16 October 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 27 May 1981.

The proposed Alamance Savings and Loan Association applied to the Savings and Loan Commission for a charter on 31 October 1979. At a hearing before the Commission on 14 February 1980, one of the Commissioners moved that the Commission follow the recommendation of the Commission's Administrator that the application be approved. The Chairman put the motion to the Commission as follows: "Moved . . . that we approve this application." The motion was defeated by a vote of three to two. One Commissioner was absent from the meeting.

On 21 February, the Attorney General responded to inquiries from the Chairman of the Commission with a letter stating that agencies in North Carolina have no authority to reconsider their decisions.

At a meeting of the Commission on 13 March 1980, the same Deputy Attorney General who had drafted the 21 February letter stated that a new vote on the application would not constitute a reconsideration because the Commission had merely voted against a motion to follow the recommendation of the Administrator, and not a motion to approve the application of Alamance Savings and Loan. He quoted from Robert's Rules of Order, which govern Commission procedure, to the effect that "voting down a motion or resolution that would express a particular opinion is not the same as adopting a motion expressing the opposite opinion, since —if the motion is voted down—no opinion has been expressed." H. Robert, Robert's Rules of Order Newly Revised 86 (1970). He concluded that the Commission had never voted on the issue of whether to approve Alamance's application and that any vote on that issue would be valid and not a reconsideration of the first vote. He also opined that the Commissioner who had not been present at the 14 February meeting could vote if he had reviewed the transcript of that meeting. Decision on the matter was delayed until the next meeting.

On 15 May 1980 the Commission met and voted on a motion to approve the application of the proposed Alamance Savings and Loan. The Commissioner who had been absent from the first meeting was present and voted for the motion, resulting in a vote of three for, three against. The Chairman voted to break the tie. He voted in favor of the motion. The final decision of the Commission was served on 21 July 1980.

The opposing savings and loans petitioned for judicial review under the Administrative Procedure Act, G.S. 150A-43 *et seq.*, and requested a stay of the Commission's decision pending such review. A show cause order issued on 19 August 1980, and the hearing on the show cause order was continued until the week of 15 September 1980. The opposing savings and loans filed affidavits stating that a new savings and loan in their area would jeopardize their ability to make home mortgage loans.

The opposing savings and loans filed briefs supporting their request for a preliminary injunction and opposing the Commission's decision. Alamance filed memoranda opposing the injunction and supporting their request for bond should the injunction issue.

At the show cause hearing the court considered the briefs and oral arguments of counsel and reviewed the transcripts of the Commission's meetings, concluding that the Commission's first vote (on 14 February 1980) constituted a final agency action. Since that conclusion controlled all other issues, the court entered a final order in favor of the opposing savings and loans. On appeal Alamance argues not only that the court erred in concluding that the Commission's 14 February vote was final, but also that the court lacked jurisdiction to enter a final judgment on the merits at a show cause hearing.

Attorney General Edmisten by Lucien Capone, III, Attorney for the North Carolina Savings and Loan Commission, amicus curiae.

Powe, Porter & Alphin by James L. Stuart and Eugene F. Dauchert, Jr., for appellant Alamance Savings and Loan, Inc. (Proposed).

Hatch, Little, Bunn, Jones, Few & Berry by John W. McClain, Jr.; Silver, Freeman, Housley, Taff & Goldberg by Daniel J. Goldberg and Matthew G. Ash for appellees.

CLARK, Judge.

[1] While we agree with appellant that the entry of a final judgment on the merits is a somewhat questionable procedure, we note that the record reveals that the court had before it the briefs of the parties and the pertinent portions of the transcripts of the meetings of the Savings and Loan Commission and that the court had the benefit of the oral arguments of the attorneys for both parties on the merits. In light of the facts that judgment on the merits was entered on an issue solely of law and that the court below had before it all that was required for decision of this purely legal question, we fail to see how appellant was prejudiced by entry of judgment on the merits. Appellant has neither presented nor alluded to any new materials on this appeal that would have in any way affected the decision on the merits of the issue determined by the court below. A reversal by us would result only in delaying our inevitable decision on the substantive issue on this appeal. We hold, therefore, that any error was harmless and elect to move on to consideration of the merits of the appeal.

[2] The only remaining issue before us then is whether the trial court erred in concluding as a matter of law that the vote of the Savings and Loan Commission on 14 February 1980, which failed to adopt the recommendation of the Administrator that the application be approved, was final and conclusive, rendering the subsequent actions of the Commission to approve the application null and void and without legal effect. We hold that the trial court erred. The 14 February 1980 vote of the Commission did not amount to a "final agency decision" within the meaning of G.S. 150A-36.

The Commission is vested with the "full power and authority to review, approve, disapprove, or modify" any action of the Administrator. G.S. 54-24.1(c). In a contested case such as the case *sub judice* the role of the Commission is essentially that of a first level of administrative review. *See* 4 N.C.A.C. 9A.0205, 4 N.C.A.C. 9B.0201. The decision of the Commission is appealable to the Superior Court. G.S. 150A-45. Only a "final agency decision" is subject to judicial review. G.S. 150A-43.

A final agency decision is defined in G.S. 150A-36, which provides that such decision "shall be made, after review of the official record as defined in G.S. 150A-37(a), in writing and shall include findings of fact and conclusions of law." The 14 February 1980 vote of the Commission was obviously not a final agency decision. No facts were found upon which any conclusions of law could be based. Furthermore, G.S. 150A-36 clearly envisions a *writing* as the final agency decision. Our reading of the statute suggests that the writing is not merely a memorialization of the decision, but is the decision itself, without which agency action does not become final. Since no written decision was ever entered in accordance with the 14 February vote, no final decision within the meaning of the Administrative Procedure Act was rendered by that vote standing alone. The trial court erred in holding that this initial vote was final and conclusive. Only the written decision is final. Until that decision was rendered, the Commission was as free to reconsider its views as is this Court to reconsider its decisions until its written decisions are filed and certified to the court below. *See State v. Council*, 129 N.C. 511, 39 S.E. 814 (1901); N.C. Rules App. Proc., Rule 32.

The Administrative Procedure Act provides very clearly what constitutes a final agency decision. By its very nature a decision that is not final is subject to change. This is as it should be. Administrative agencies should be encouraged to continue cases under active deliberation until rendition of a final decision to assure that that decision is the product of adequate, sound deliberation. *See* Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. Rev. 833, 892 (1975). That an agency retains jurisdiction to continue its deliberations after an initial vote and until such time as a final agency decision is rendered has been previously recognized by this Court in other contexts. *Davis v. Dept. of Transportation*, 39 N.C. App. 190, 250 S.E. 2d 64 (1978), *disc. rev. denied*, 296 N.C. 735, 254 S.E. 2d 177 (1979). The federal jurisdiction similarly recognizes such authority: "Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court open to review upon the final hearing." *New Orleans v. Paine*, 147 U.S. 261, 266, 37 L.Ed. 162, 163, 13 S.Ct. 303, 306 (1893). We note that parties are protected from unreasonable delay on the part of agencies in reaching final decisions by G.S. 150A-44, which allows a party adversely affected by such delay to seek a court order compelling action by the agency. *See Stevenson v. Dept. of Insurance*, 31 N.C. App. 299, 229 S.E. 2d 209, *disc. rev. denied*, 291 N.C. 450, 230 S.E. 2d 767 (1976); *Davis v. Dept. of Transportation, supra.*

The decision of 16 July 1980 being the final agency action in this case, the Order of the trial court that the 14 February 1980 vote was final must be reversed and the case remanded to the Superior Court division for review of the 16 July 1980 decision on the merits.

Reversed and remanded.

Judges MARTIN (Robert M.) and HILL concur.

LOUISE HENSGEN, AND KATHRYN DOUGHERTY HENSGEN, MARK McQUOWN HENSGEN AND NICHOLAS FREDRICK HENSGEN, MINORS, BY LOUISE HENSGEN, GUARDIAN v. LOWELL HENSGEN AND LOIS THOMPSON

No. 809DC1072

(Filed 4 August 1981)

1. **Rules of Civil Procedure § 59— motion for new trial denied—findings supported by evidence**

The trial judge's findings of fact contained in its order denying defendants' motions for a new trial were supported by competent evidence where the evidence tended to show that defendants established a course of dealing by which their local counsel dealt with them and defendants dealt with their local counsel almost exclusively through an attorney in their home state; defendants were informed through counsel in their home state of both local counsel's intention to withdraw as attorney of record and the date for which trial was scheduled; one defendant had frequent conferences with counsel in her home state in April and May before the case was tried on 29 May, but she made no attempt to contact anyone other than counsel in her home state to ascertain the status of her case; and defendants did not appear when their case was called for trial.

2. **Attorneys at Law § 6— withdrawal of attorney of record—reasonable notice**

No more than adequate or reasonable notice is required for an attorney to withdraw as attorney of record; therefore, in light of the course of dealings established by defendants between counsel in their home state and local counsel, notice by local counsel to counsel in defendants' home state constituted reasonable notice to defendants.

3. **Rules of Civil Procedure § 59— motion for new trial denied—no showing of surprise**

The trial judge did not abuse his discretion in denying defendants' motions for a new trial where the evidence showed that defendants were given notice of the trial of their case and of the need to have counsel other than their attorney of record to protect their interest; defendants therefore failed to show surprise; and it was within the discretion of the trial court to determine whether defendants' neglect in not procuring other counsel or in not appearing for trial was excusable neglect. G.S. 1A-1, Rules 59 and 60.

APPEAL by defendants from *Allen, Judge*. Order entered 6 March 1980 in District Court, GRANVILLE County. Heard in the Court of Appeals 5 May 1981.

Plaintiffs instituted this action for divorce, alimony, child support and a declaration that a certain recorded deed is null and void. In the verified complaint, plaintiffs allege *inter alia* that defendants Lowell Hensgen and Lois Thompson are residents of

Nebraska, that plaintiff Louise Hensgen and defendant Lowell Hensgen were married in 1958, that defendant Lowell Hensgen and plaintiff Louise Hensgen own certain real property in Granville County as tenants by the entirety, that defendant Lowell Hensgen abandoned plaintiff Louise Hensgen in 1971, and that in 1974 defendant Lowell Hensgen executed a deed purporting to convey said real property to defendant Thompson. Defendants filed a joint answer denying the material allegations of the complaint, alleging the invalidity of the marriage between defendant Hensgen and plaintiff Louise Hensgen, and counterclaiming for a partition sale of the real property.

The case was called for trial on 29 May 1979. Plaintiffs appeared with their attorneys but defendants did not appear. Defendants' attorney of record, R. Gene Edmundson, was present and at that time the trial judge granted Edmundson's motion to withdraw as attorney of record for defendants. The trial judge then denied Edmundson's motion for a continuance and plaintiffs were allowed to proceed with their case. On 14 June 1979, the trial judge entered a judgment against defendants, granting a divorce, child support, alimony, and a lien on the real property.

On 25 June and 29 June 1979, defendants moved for a new trial or for amendment of the order pursuant to G.S. 1A-1, Rule 59 and Rule 60. At the consolidated hearing on both motions, defendants presented the testimony of defendant Thompson and Russell S. Daub, a Nebraska attorney. Thompson, a Nebraska court reporter, testified that she retained Edmundson as her attorney soon after she received the complaint in this action, and that after experiencing difficulty in contacting Edmundson, she retained Daub to be her counsel, to assist her in the matter, and to take care of matters with Edmundson. Thompson explained that the last direct contact she had with Edmundson was a letter received from him in September 1977, that she relied on the advice of Daub and kept in close contact with Daub, that prior to 29 May she was unaware that her case had been set for trial or that Edmundson intended to withdraw as attorney of record, and that she never personally received a copy of Edmundson's motion to withdraw. On cross-examination, Thompson admitted that she learned from Daub that Edmundson was contemplating withdrawing and that the trial was to be heard sometime during the term

of court beginning on 28 May, and that in preparing for trial she consulted only with Daub and never contacted Edmundson.

Daub testified that he had received a letter from Edmundson on 6 March 1977 that included a copy of Edmundson's motion to withdraw, that he had received on 20 March 1977 a document indicating that the trial would be scheduled in the term of court beginning 28 May, and that Daub had discussed each of these letters with Thompson. Daub also testified that after receiving notice of the 28 May trial date, he began settlement negotiations directly with plaintiffs' attorney and that this action was with defendant Thompson's permission. Daub testified that he received no correspondence from Edmundson, the North Carolina court system, or plaintiffs' attorneys informing Daub of a specific trial date. Although Daub's records revealed that Edmundson attempted to contact Daub by telephoning Daub's office on 25 May, Daub testified that he received no message until 30 May when he received a letter from Edmundson.

Plaintiffs presented the testimony of Gene Edmundson and various exhibits, which included the three letters from Edmundson to Daub. The letter dated 6 March 1979 stated as follows:

> Dear Russell:
>
> I am enclosing a copy of a motion allowing my withdrawal in the Hensgen and Thompson case. I am also enclosing a copy of an order which I intend to present to the Judge for his signature. If I have not heard anything from anyone in Omaha in regard to this motion, I intend to send the Judge an order for signature within ten days from the date of this letter. It is my understanding that some attorney in Raleigh, North Carolina has been contacted by Lois Thompson, but he has not contacted me. I understand that he did contact Mary Tolton, who appears for the plaintiffs in this case.
>
> Yours very truly,
> s/R. Gene Edmundson

The letter of 10 May 1979 reads:

Dear Russell:

The above captioned case [*Hensgen, et al. v. Hensgen and Thompson*] has been set for trial on Tuesday, May 29, in the Granville County District Court. This is the third case on the docket for that day and I am sure it will be tried.

I have called you several times but have been unable to get in touch with you.

Yours very truly,
s/R. Gene Edmundson

The letter of 30 May 1979 reads:

Dear Russell:

After several attempts to get in touch with you by telephone and attempting to get you to answer my correspondence the enclosed order was signed by C. W. Allen, Jr., presiding judge on May 29, 1979.

Yours very truly,
s/R. Gene Edmundson

Enclosed was Edmundson's order of withdrawal as attorney of record.

In its order denying defendants' motions for a new trial or for amendment of the order, the trial court made numerous findings of fact and concluded that both defendants and their Nebraska attorney had sufficient and adequate notice of both Edmundson's intent to withdraw and the date of trial of the case, so that defendants' failures to retain new local counsel, to contact the Clerk of Superior Court of Granville County concerning the status of the case prior to trial, and to appear when their case was called for trial, do not show such surprise or excusable neglect as would justify setting aside an order pursuant to either Rule 59 or 60 of the North Carolina Rules of Civil Procedure. Defendants have appealed from this order.

Levine & Stewart, by Mary C. Tolton for plaintiffs-appellees.

Kirby & Wallace, by David F. Kirby for defendants-appellants.

WELLS, Judge.

[1] Defendants first argue that the trial judge's findings of fact contained in the order are not supported by any competent evidence in the record. The findings of fact to which defendants object include findings that defendants established a course of dealing by which their local counsel, Edmundson, dealt with them, and defendants dealt with Edmundson almost exclusively through Daub, that defendants were informed through Daub of both Edmundson's intention to withdraw as attorney of record and the date for which trial was scheduled, and that Thompson had frequent conferences with Daub in April and May of 1979 but that she made no attempt to contact anyone other than Daub to ascertain the status of her case. There was plenary evidence presented at the hearing to support these findings of fact and thus such findings are binding or conclusive on this Court, even if the evidence might sustain findings to the contrary. *Moore v. Deal*, 239 N.C. 224, 228, 79 S.E. 2d 507, 510 (1954); *Fountain v. Patrick*, 44 N.C. App. 584, 585, 261 S.E. 2d 514, 515 (1980).

[2] Defendants next contend that to withdraw as attorney of record, an attorney must serve (in accordance with G.S. 1A-1, Rule 5) his client with a copy of the written motion to withdraw, and that because such notice to defendants was lacking in this case, defendants' Rule 59 and Rule 60 motions should have been granted as a matter of law. Defendants base this contention on dicta in *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E. 2d 303, 306 (1965), to the effect that "written notice served on the client would be the most satisfactory evidence" that a client received "reasonable notice" of her attorney of record's intent to withdraw. To begin with, we note that the rules governing withdrawal of counsel are set forth in Rule 16 of the General Rules of Practice for the Superior and District Courts (adopted pursuant to the provisions of G.S. 7A-34), published in Appendix I in Volume 4A of the General Statutes, and in Canon 43 of the Canons of Ethics of The North Carolina State Bar, published in Appendix VII of Volume 4A, and that the provisions of Rule 5 of the Rules of Civil Procedure are not applicable to motions of counsel to withdraw. In previous cases involving this question, our appellate courts have held that no more than "adequate" or "reasonable" notice is required. *Smith v. Bryant, supra*, at 211, 141 S.E. 2d at 306; *Perkins v. Sykes*, 233 N.C. 147, 152-53, 63 S.E.

2d 133, 137-38 (1951); *Gosnell v. Hilliard*, 205 N.C. 297, 300-301, 171 S.E. 52, 54 (1933); *Trust Co. v. Morgan-Schultheiss* and *Poston v. Morgan-Schultheiss*, 33 N.C. App. 406, 414, 235 S.E. 2d 693, 697-98, *disc. rev. denied*, 293 N.C. 258, 237 S.E. 2d 535 (1977), *cert. denied*, 439 U.S. 958, 99 S.Ct. 360, 58 L.Ed. 2d 350 (1978). *See also United States v. Maines*, 462 F. Supp. 15, 16 (E.D. Tenn. 1978). The facts found by the trial court show that attorney Edmundson provided prompt and timely notice to Daub of his intentions to withdraw, and in light of the course of dealings established by defendants between Daub and Edmundson, we hold that notice to Daub constituted reasonable notice to defendants.

[3] Defendants' final argument is that in denying defendants' Rule 59 and Rule 60 motions, Judge Allen either abused his discretion or otherwise erred. Whether considered as a Rule 59(a), Rule 60(b)(1) or 60(b)(6) motion, defendants' motion was addressed to the sound discretion of the trial judge, whose ruling, in the absence of abuse of that discretion, should not be disturbed on appeal. *See Hamlin v. Austin*, 49 N.C. App. 196, 270 S.E. 2d 558 (1980); *Endsley v. Supply Corp.*, 44 N.C. App. 308, 310, 261 S.E. 2d 36, 38 (1979); *compare Chris v. Hill*, 45 N.C. App. 287, 262 S.E. 2d 716, *app. dismissed*, 300 N.C. 371, 267 S.E. 2d 674 (1980).

The essence of defendants' argument is surprise. The evidence before the trial court showed that defendants were given both notice of the pending trial and of the need to have counsel other than Edmundson to protect their interest. It was within the discretion of the trial court to determine whether defendants' neglect in either not procuring such other counsel or in not appearing for the trial was excusable neglect. We hold there was no abuse of the trial court's discretion in denying defendants' motions.

The order denying defendants' motions must be and is

Affirmed.

Judges HEDRICK and MARTIN (H.) concur.

MARION E. CRANFORD v. JOHNNIE CLIFFORD HELMS AND RONALD DEAN HELMS

No. 8115SC3

(Filed 4 August 1981)

Limitation of Actions § 12.1; Rules of Civil Procedure § 15— voluntary dismissal— *second complaint—no relation back—statute of limitations*

Plaintiff's original complaint filed within the statute of limitations alleging that defendant was driving an automobile involved in an accident and that defendant's negligence caused plaintiff's injuries, and an amendment thereto alternatively naming another person as either the owner or the driver of the automobile and alleging that whoever was driving, if not the owner, was doing so with "the knowledge, permission and consent of the owner," did not give defendant notice of the transactions or occurrences potentially giving rise to defendant's liability under plaintiff's second complaint alleging that defendant was the owner of the automobile driven by another person who was acting as defendant's agent; therefore, the second complaint did not relate back to the first complaint and was barred by the three-year statute of limitations where plaintiff took a voluntary dismissal of the first complaint and the second complaint was filed more than seven years after the accident. G.S. 1A-1, Rule 15(c).

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 13 August 1980, in Superior Court, ORANGE County. Heard in the Court of Appeals 2 June 1981.

In August 1975, plaintiff filed a suit against defendant Johnnie Clifford Helms alleging that, in August 1972, due to his negligence, defendant Helms' car collided with plaintiff's car causing her bodily injury. In April 1976, the defendant in that action moved for summary judgment alleging that he was not operating the vehicle at the time of the accident, that he was not present at the scene, and that he was not responsible for the operation of the vehicle. Plaintiff then moved to amend her complaint to add defendant Ronald Dean Helms as a party-defendant alleging that one or the other of the two defendants was operating the vehicle at the time of the accident. The motion to amend the complaint to add Ronald Dean Helms was denied; the denial was "based in part upon the finding that the Statute of Limitations would bar a new cause of action against Ronald Dean Helms and that nothing appears of record to indicate to the Court that the Statute of Limitations as to Ronald Dean Helms was tolled. . . . " The court did, however, allow plaintiff to amend her complaint in order to allege that either the defendant Johnnie Clifford Helms or Ronald

Dean Helms was operating the vehicle and that the operator of the vehicle was negligent. Further, the court allowed the addition of the following paragraph 6:

> 6. The motor vehicle which collided with the automobile which the Plaintiff was operating was owned by Johnnie Clifford Helms or Ronald Dean Helms and was registered with the North Carolina Department of Motor Vehicles in the name of Johnnie Clifford Helms or Ronald Dean Helms, and the driver of the automobile, if not the owner, was operating said automobile with the knowledge, permission and consent of the owner.

On 3 October 1978, the plaintiff filed a Notice of Voluntary Dismissal. Within a year, she filed a second complaint against both defendants, based on the same 1972 automobile accident. The second complaint alleged that defendant Johnnie Clifford Helms was the owner of the vehicle driven by defendant Ronald Dean Helms who was acting as Johnnie Helms' agent. Alternatively, the complaint alleged that the vehicle was maintained by Johnnie Helms as a family purpose vehicle and that the negligence of driver Helms should be imputed to owner Helms.

The defendants answered denying the material allegations of the complaint and affirmatively pleading the statute of limitations. Both defendants successfully moved for summary judgment in their favor. Plaintiff appealed.

Newsom, Graham, Hedrick, Murray, Bryson and Kennon, by Lewis A. Cheek, for plaintiff appellant.

Lee A. Patterson, II, for defendant appellees.

ARNOLD, Judge.

Having abandoned her appeal with regard to defendant Ronald Dean Helms, plaintiff assigns as error the entry of summary judgment in favor of defendant Johnnie Clifford Helms, hereinafter referred to as the defendant. This assignment of error presents for this Court the question of whether the three-year statute of limitations had expired at the commencement of plaintiff's action based on agency.

Plaintiff's second complaint, filed in September 1979, clearly alleged that she was proceeding against the defendant on the

theory that his agent's negligence was imputed to him. That complaint, however, was filed some seven years after the accident in question and, unless it is determined that it "relates back" to plaintiff's first amended complaint, it is barred by the three-year statute. G.S. 1A-1, Rule 15(c) provides:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

Was the amendment to plaintiff's complaint in which plaintiff alleged that Ronald Dean Helms, "if not the owner, was operating said automobile with the knowledge, permission and consent of the owner," the defendant herein, sufficient to give the defendant notice of the occurrences giving rise to the agency issue alleged in the second complaint? If so, the second complaint "relates back" to the first complaint, and the defense of the statute of limitations is defeated. If not, the second complaint merely alleges an action which is barred by the three-year statute.

Under North Carolina law prior to the enactment of the Rules of Civil Procedure, complaints which failed to allege that the driver of the automobile was acting as agent of the owner of the automobile were held fatally deficient as to the owner. *Beasley v. Williams*, 260 N.C. 561, 133 S.E. 2d 227 (1963); *Parker v. Underwood*, 239 N.C. 308, 79 S.E. 2d 765 (1954). This rule persisted notwithstanding G.S. 20-71.1 which allowed proof of ownership to be *prima facie* evidence that a motor vehicle was being used at the time of an accident with the authority and knowledge of the owner. *Parker v. Underwood, supra.*

In the case of *Nolan v. Boulware*, 21 N.C. App. 347, 204 S.E. 2d 701, *cert. denied*, 285 N.C. 590, 206 S.E. 2d 863 (1974), this Court noted the effect of the Rules of Civil Procedure on this strict rule requiring allegation of agency. Since a complaint need contain only a "short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved," G.S. 1A-1, Rule 8(a)(1), the court held that the complaints alleging that the negligent acts of one defendant

were "imputed to the defendant Boulware" were sufficient to give Boulware notice that plaintiffs intended to prove facts to establish Boulware's legal responsibility for the negligent acts of her co-defendant.

After reviewing recent case law as well as plaintiff's first complaint, as amended, against defendant, we conclude that the complaint fails to give defendant sufficient notice of the transactions or occurrences giving rise to the alleged liability. In the first complaint, plaintiff alleged that the defendant was driving the automobile and that it was defendant's negligence that caused the accident resulting in her injuries. As amended, that complaint alternatively named Ronald Dean Helms as either the owner or operator of the vehicle, and it alleged that, whoever was driving the car was doing so with "the knowledge, permission and consent of the owner," whichever one that was. There was no allegation that Ronald Dean Helms was acting as defendant's agent; nor any allegation that the negligent acts of Ronald Helms were imputed to his father, as was the case in *Boulware.* Moreover, there was no allegation that the automobile he was using was a family purpose vehicle. Proof that one owns a vehicle operated in a negligent manner and gives another permission to drive it, causing injury to a third party, is not sufficient to impose liability on the owner. *Beasley v. Williams, supra.* It follows that the mere allegation that one owns an automobile which was operated in a negligent manner is insufficient to give defendant notice of the transaction or occurrence for which he is supposedly liable.

The first complaint as amended falls far short even of the notice-pleading standard set forth in *Boulware, supra.* It did not put defendant on notice of the transactions or occurrences potentially giving rise to his liability. The second complaint, filed seven years after the accident in question, cannot, therefore, relate back to the first complaint. Since the second complaint was barred by the statute of limitations, summary judgment for the defendant was properly granted.

Affirmed.

Judges VAUGHN and BECTON concur.

JAMES W. MILLS, EMPLOYEE, PLAINTIFF v. J. P. STEVENS & COMPANY, INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8010IC1149

(Filed 4 August 1981)

1. Master and Servant § 68— workers' compensation—no occupational disease

The Industrial Commission did not err in concluding that plaintiff had not contracted an occupational disease while employed in defendant's textile mill where the evidence tended to show that plaintiff suffered from chronic bronchitis and had evidence of mild obstructive lung disease, aggravated by exposure to cotton dust, but such infirmities would not interfere with any work except the most strenuous kind, and plaintiff therefore did not suffer any disablement which would entitle him to compensation.

2. Master and Servant § 69.1— loss of earning capacity—sufficiency of finding

There was no merit to plaintiff's contention that the Industrial Commission's findings of fact were insufficient to support its conclusions on the issue of loss of earning capacity because they did not compare plaintiff's actual wages he was earning before he left defendant's employ and the wages he was earning at the time of the hearing, since to adopt plaintiff's argument would be equivalent to holding that plaintiff was entitled to continue in a particular type of work and that his inability to perform a particular type of work due to his susceptibility to infirmity from that work constituted disability under the Workers' Compensation Act.

APPEAL by plaintiff from an order of the Full Industrial Commission entered 10 July 1980. Heard in the Court of Appeals 26 May 1981.

Plaintiff filed his claim for workers' compensation benefits and medical expenses for an occupational disease. Hearings were held before Deputy Commissioners Delbridge and Roney, followed by an order denying plaintiff's claim. That order contained findings of fact, summarized as follows.

Plaintiff is a thirty-three year old male who was employed in defendant's textile mill in Roanoke Rapids from 1964 to January of 1978. During his employment, he was exposed to large amounts of cotton dust, and after several years on the job, he developed symptoms of having a stopped up chest and having a cold much of the time. His symptoms improved when he was not working on weekends. Between January 1978 and June 1978, plaintiff was unemployed. In June 1978, plaintiff became employed by the City of Roanoke Rapids on a full-time basis as a truck driver, making

$3.47 an hour at the time of the hearings on 10 April 1979 and 8 August 1979. Plaintiff's present work requires physical exertion. During the period January 1978 to June 1978, plaintiff applied for and received unemployment compensation. Plaintiff has smoked a pack of cigarettes a day since he was sixteen years old and continues to do so. Plaintiff exhibits mild obstructive lung disease characteristics, and has a history of chronic or recurring bronchitis. Cotton dust is an aggravating factor in these symptoms. Plaintiff's pulmonary functions are mildly obstructed, but plaintiff is not disabled for work. Although he should not return to work in a cotton dust environment, plaintiff has suffered no permanent damage to his lungs or respiratory system. Once the aggravating exposure to cotton dust was eliminated, plaintiff's ability to work was not impaired.

Upon these findings of fact, Deputy Commissioner Delbridge entered the following conclusion of law:

> While the plaintiff was exposed to the inhalation of cotton dust in his employment with the defendant employer such exposure has caused him no disability nor permanent lung damage.

Upon the foregoing findings and conclusions, an award was entered denying plaintiff's claim. Plaintiff appealed to the Full Commission. Commissioner Brown, writing for a majority of the Full Commission, entered an order concluding that plaintiff had failed to sustain his burden of proof that he suffers from an occupational disease caused by exposure to cotton dust while in the employ of defendant and adopting and affirming the opinion and award entered by Deputy Commissioner Delbridge. Plaintiff has appealed from the award of the Full Commission.

Hassell & Hudson, by Robin E. Hudson, for plaintiff-appellant.

Maupin, Taylor & Ellis, P.A., by Richard M. Lewis and David V. Brooks, for defendants-appellees.

WELLS, Judge.

[1] Plaintiff first contends that the Commission erred in concluding that plaintiff had not contracted an occupational disease. We do not agree, but hasten to point out that plaintiff's argument

does not address the dispositive question in this appeal, which is whether plaintiff's capacity to earn wages has been diminished. The plaintiff's entitlement to compensation under the Workers' Compensation Act is rooted in and must be measured by his capacity or incapacity to earn wages. *See Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 155 S.E. 2d 755 (1967). *See also Morrison v. Burlington Industries*, 47 N.C. App. 50, 55, 266 S.E. 2d 741, 744 *remanded for additional proceedings*, 301 N.C. 226, 271 S.E. 2d 364 (1980). "Under the . . . Compensation Act *disability* refers not to physical infirmity but to a diminished capacity to earn money." *Mabe v. Granite Corp.*, 15 N.C. App. 253, 255, 189 S.E. 2d 804, 806 (1972), *quoting Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857 (1965). "Under our . . . Compensation Act injury resulting from occupational disease is compensable only when it leads to disablement." *Woods v. Stevens & Co.*, 297 N.C. 636, 644, 256 S.E. 2d 692, 697 (1979). The wording of G.S. 97-52 makes it abundantly clear that "disablement" resulting from an occupational disease is the basis for compensation.

The Industrial Commission found that plaintiff is not disabled from work. This finding is supported by the evidence. The only medical witness to address this issue was Dr. Herbert O. Sieker, a professor of medicine at Duke University Medical Center and a member of the Industrial Commission's Textile Occupational Disease Panel. Dr. Sieker's testimony was to the effect that plaintiff suffered from chronic bronchitis and had evidence (symptoms) of mild obstructive lung disease, aggravated by exposure to cotton dust, but that such infirmities would not "interfere with any work except the most strenuous of things". Dr. Sieker testified that if plaintiff continued to work in an environment which caused exposure to cotton dust, it was quite possible plaintiff's mild lung obstruction would worsen. He further testified that he would advise plaintiff "not to be in the cotton dust environment." His testimony is best summed up by the following quotation.

> The patient has a history of chronic bronchitis and has evidence of mild obstruction consistent with that diagnosis. Symptons have been worse in the cotton dust exposure in the recent past so I think one would have to say there is a contribution to the bronchitis from the cotton dust exposure but that the impairment is minimal.

In his filed medical report, we find the following statement:

> The patient has a history of chronic or recurring bronchitis. It would appear that cotton dust is an aggravating factor in producing his symptoms. Pulmonary function studies, however, showed only mild restriction and obstruction and both from the history and the objective data I do not believe the patient is disabled for work. He should not return to work in the cotton dust environment, however.

The Commission's finding of no disablement, supported as it is by Dr. Sieker's evaluation, is binding on us on appeal. *Graham v. City of Hendersonville*, 42 N.C. App. 456, 460, 255 S.E. 2d 795, 797, *cert. denied*, 298 N.C. 568, 261 S.E. 2d 121 (1979).

[2] Plaintiff also argues that the Commission's findings of fact were not sufficient to support the Commission's conclusions on the issue of loss of earning capacity because they did not compare plaintiff's actual wages he was earning before he left defendant's employ and the wages he is now earning. The Commission made a finding that plaintiff was, at the time of hearing, employed on a full-time basis with a regular work schedule of at least forty hours per week at an hourly rate of $3.47. There was no finding as to plaintiff's hourly rate or number of regular hours worked while he was employed by defendant, but the evidence shows that at the time plaintiff left defendant's employ, he was working "mostly" forty-eight hours a week, and that he was earning at a rate of slightly more than $4.20 per hour. Plaintiff's argument misses the mark. To adopt plaintiff's argument would be equivalent to holding that plaintiff was entitled to continue in a particular type of work and that his inability to perform a particular type of work due to his susceptibility to infirmity from that work constitutes disability under the Workers' Compensation Act. This argument was considered and rejected by this Court in *Sebastian v. Hair Styling*, 40 N.C. App. 30, 251 S.E. 2d 872, *disc. rev. denied*, 297 N.C. 301, 254 S.E. 2d 921 (1979). In the case before us, plaintiff's sensitivity to cotton dust does not translate into disability due to occupational disease.

We hold that the Commission's findings of fact are supported by evidence, that these findings of fact reach and resolve the issues raised by the evidence, that the Commission's conclusions

are justified by its findings of fact, and that the order and award of the Commission should be and are

Affirmed.

Judges HEDRICK and MARTIN (H.) concur.

GEORGIA SLOAN NABORS v. MICHAEL J. FARRELL

No. 8118DC22

MICHAEL J. FARRELL v. GEORGIA A. FARRELL (NABORS)

No. 8118DC23

(Filed 4 August 1981)

1. **Divorce and Alimony § 26.4— modification of foreign child custody decree—action pending in another state—jurisdiction**

The trial court should have dismissed the wife's action to modify the child visitation provisions of a Massachusetts child custody decree for lack of jurisdiction, although the wife and children are now residents of North Carolina, where the husband's modification action was pending in Massachusetts at the time the wife filed her action in this State; the Massachusetts court exercised jurisdiction substantially in conformity with G.S. Ch. 50A in that the husband still lived in Massachusetts and had significant connections with that state, the children had significant connections with Massachusetts with regard to the issue of visitation, and Massachusetts clearly had substantial evidence concerning the children's welfare during the time they were in that state; and the Massachusetts court's modification order was binding on the wife because she submitted to the jurisdiction of the Massachusetts court when her attorney made a general appearance at the hearing on the husband's complaint. G.S. 50A-6(a).

2. **Divorce and Alimony § 25.12— child visitation order—contempt motion—no jurisdiction**

The trial court could not rule on the husband's motion to hold the wife in contempt for failure to abide by a Massachusetts child visitation order which had been filed in North Carolina pursuant to G.S. 50A-15 where the trial court had no jurisdiction of the action in which the motion was made.

IN No. 8118DC22, appeal by plaintiff from *Williams, Judge.* Order entered 4 August 1980 in District Court, GUILFORD County.

Appeal by defendant from *Campbell, Judge.* Order entered 19 August 1980 in District Court, GUILFORD County. In No. 8118DC23, appeal by plaintiff from *Williams, Judge.* Order entered 2 October 1980 in District Court, GUILFORD County. Heard in the Court of Appeals 3 June 1981.

The parties were granted a divorce by decree entered in the Probate Court of Berkshire County, Massachusetts, on 5 November 1975. The decree granted Wife custody of the three minor children born of the marriage. Husband was granted visitation rights, including one month during the summer when the children were to reside with his relatives in Dalton, Massachusetts. The decree further granted Wife the right to move with the children to North Carolina. Wife and the three children moved to this State in July 1975 and have lived here continuously since that time. Husband continues to live in Massachusetts.

On 13 June 1979, Husband filed a complaint for modification of the divorce decree in the same court in which the original decree had been granted. Husband requested that a definite visitation period be established and that the place of visitation be with him in his new home. Wife filed answer through an attorney in Massachusetts who represented her at the hearing on the complaint on 13 April 1980. The Massachusetts court entered an order on 30 April 1980 establishing the period between 15 July and 15 August as the visitation period and providing that visitation would be in a place selected by Husband. Pursuant to G.S. 50A-15, copies of the original decree and the modification order were filed with the clerk of court of Guilford County on 1 August 1980.

With full knowledge of the pending suit for modification in Massachusetts, Wife brought suit in Guilford County on 21 February 1980, seeking modification of the original judgment rendered in Massachusetts. Husband filed answer, asking *inter alia,* that the action be dismissed for lack of jurisdiction, citing Chapter 50A of the General Statutes, the Uniform Child Custody Jurisdiction Act. Prior to Husband's answer, Wife moved on 2 June 1980 for a temporary order altering the provisions of the Massachusetts decree. On 11 June 1980 Judge Williams conducted a hearing on Wife's motion for a temporary order. In an order filed 4 August, Judge Williams concluded as a matter of law

that Wife had consented to the jurisdiction of the Massachusetts court to decide the issues presented in Husband's complaint for modification. The judge ordered that Wife's motion be denied and the Massachusetts modification order be recognized and enforced in North Carolina as a decree of the courts of this State. Wife gave notice of appeal.

Thereafter, on 1 August 1980, Husband filed a motion seeking to have Wife held in contempt for failing to abide by the order entered in the Massachusetts court on 30 April 1980 and filed in this State on 1 August 1980. Judge Frank Campbell denied Husband's motion on 19 August 1980 concluding that the trial court was without jurisdiction to punish for contempt of its orders pending Wife's appeal. Husband appealed. Meanwhile, on 13 August, Husband had filed motion in Guilford County, No. 80CVD5586, asking that the court hold Wife in contempt for failure to abide by the orders of the Massachusetts court which had been filed in this State pursuant to G.S. 50A-15. Judge Williams denied Husband's motion on 2 October 1980 for the reason that Husband could obtain the relief sought by his motion for contempt in No. 80CVD2395. Husband appealed.

Eugene S. Tanner, Jr., for plaintiff appellant-appellee.

Graham, Cooke, Miles & Daisy, by Donald T. Bogan, for defendant appellee-appellant.

HILL, Judge.

[1] The Guilford County court should have dismissed Wife's action for lack of jurisdiction. G.S. 50A-6(a) provides that:

> If at the *time of filing* the petition a proceeding concerning the custody of the child was *pending* in a court of another state exercising jurisdiction *substantially in conformity with this Chapter*, a court of this State shall not exercise its jurisdiction under this Chapter, unless the proceeding is stayed by the court of the other state . . .. (Emphasis added.)

Clearly, at the time Wife filed her action in Guilford County seeking modification of the original custody decree, Husband's modification action was pending in Massachusetts. The question we must answer is whether Massachusetts was exercising jurisdiction substantially in conformity with Chapter 50A.

Massachusetts has not enacted the Uniform Child Custody Jurisdiction Act. Nevertheless, the Act is not reciprocal and in order to determine whether Massachusetts properly exercised jurisdiction, we look to see whether the modification decree was made under factual circumstances meeting the jurisdictional standards of G.S. 50A.

G.S. 50A-3(a) provides in part that:

> A court . . . authorized to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> . . . .
>
> (2) It is in the best interest of the child that [the] court . . . assume jurisdiction because (i) . . . the child and at least one contestant, have a significant connection with [the] State, and (ii) there is available in [the] State substantial evidence relevant to the child's present or future care, protection, training, and personal relationships.

Husband, still living in Massachusetts, clearly had significant connections with Massachusetts. The children clearly had significant connections with Massachusetts with regard to the issue of visitation. Massachusetts clearly had substantial evidence concerning the children's welfare during the time they were in that state, and it was in the best interest of the children that Massachusetts exercise jurisdiction over matters relating to their stay in that state. Because Wife submitted to the jurisdiction of the Massachusetts court when her attorney made a general appearance at the hearing on Husband's complaint, that court's modification order is binding on her. *See* G.S. 50A-13 and 50A-12.

Judge Williams concluded and decreed that the Massachusetts order should be recognized and enforced as a decree of this State's courts. The judge went on to deny Wife's motion for temporary custody and modification of the original divorce decree. We hold that the more correct action would have been for Judge Williams simply to dismiss Wife's action for lack of jurisdiction. For the reasons stated above, Wife's assignments of error are overruled.

[2] Husband has brought forth one assignment of error in No. 8118DC22. Husband contends that Judge Campbell erred in denying his motion of 1 August 1980 asking that Wife be held in contempt for failing to abide by the order entered in Massachusetts on 30 April 1980 and filed with the clerk of court on 1 August. We disagree.

Judge Campbell concluded that pending Wife's appeal of Judge Williams' order, the trial court was without jurisdiction to punish for contempt of its orders. We hold that it would have been more correct for the judge to conclude that he could not rule on Husband's motion for contempt when the court had no jurisdiction of the action in which the motion had been made. Husband's assignment of error is overruled.

Husband has brought forth another assignment of error in No. 8118DC23. Husband contends that Judge Williams erred by decreeing in his order of 2 October 1980 that the pendency of No. 8118DC22 abated Husband's motion for contempt in No. 8118DC23. We agree.

Contrary to Judge Williams' conclusion, Husband cannot obtain the relief sought in No. 8118DC23 by his motion for contempt in No. 8118DC22. Husband's motion for contempt in the latter action must be heard.

No. 8118DC22—Modified and Affirmed.

No. 8118DC23—Reversed.

Judges MARTIN (Robert M.) and CLARK concur.

SOPHIE S. ANDERSON AND EDWARD S. ANDERSON v. DONOVAN B. MOORE AND WIFE, PATRICIA MOORE; AND RAY FRANCONI AND WIFE, LENA FRANCONI

No. 8128SC47

(Filed 4 August 1981)

Fraud § 12— agreement to purchase company—insufficiency of evidence of fraud

Where plaintiffs instituted an action seeking rescission of an agreement for the purchase of a company and they alleged that defendants fraudulently procured the agreement by misrepresenting the amount plaintiffs would be paid for their stock, evidence was insufficient to be submitted to the jury where it tended to show that the female plaintiff, who signed the agreement, either knew the nature of the transaction or relied upon her father's representations that she should sign the agreement; there was no evidence that defendants intentionally or recklessly made fraudulent misrepresentations upon which plaintiffs relied; and there was no evidence that plaintiffs' stock was worth more than the sum defendants paid for it.

APPEAL by plaintiffs from *Allen, Judge.* Judgment entered 22 September 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 4 June 1981.

On 6 April 1979 plaintiffs instituted this action seeking rescission of an agreement entered into on 6 August 1962, or in the alternative, damages. The plaintiffs alleged that the defendants fraudulently procured this agreement by misrepresenting the amount the plaintiffs would be paid for their stock and that they were unaware of this fraud until 1977.

Plaintiffs are the daughter and grandson of E. S. Street, who died 17 July 1965. Street, his wife and the plaintiff Sophie Anderson were formerly the majority shareholders of the common stock of Concrete Products Company of Asheville, Inc. The defendants, Moore and Franconi, were the remaining common shareholders. Mr. Moore was elected president of the corporation in 1957. In approximately 1960, Mr. Street and Mr. Moore began to discuss plans for the continuity of the company and the possible purchase of the company by Mr. Moore. No agreement was reached at that time, but attorneys were hired to prepare the plans and documents necessary for this transfer. A plan for the reorganization of the corporation with the objectives of vesting equity in the common stock in Mr. Moore, providing a guaranteed income to the Street family, and facilitating the estate planning of Mr.

Street, was subsequently devised. This plan recommended that the charter and by-laws of the corporation be amended to authorize the conversion of common stock into preferred stock and the exercise of this right of conversion by Street, his wife and his daughter.

In accordance with these recommendations the certificate of incorporation was amended to effect a recapitalization of the company's capital stock. A new issue of 4% cumulative preferred stock of $100 par was authorized, and it was provided that each share of commom capital stock would be convertible, at the option of the holder. The common stock could be converted into the new preferred stock at the rate of one share of $100 par value common stock for the number of shares of $100 par value 4% cumulative preferred stock as, based on the book value of such $100 par value common stock surrendered for conversion, was equal to the par value of the 4% cumulative preferred stock issued in exchange. All stockholders executed an assent to this change in the charter.

On 6 August 1962 an agreement was entered into between the five stockholders and the company. It placed transfer restrictions on common and preferred stock and provided for the mandatory sale and purchase of all preferred stock held by the Streets and Sophie Anderson at the death of E. S. Street. The Streets and Mrs. Anderson exercised their conversion privileges on 8 August 1962 at a special meeting. The number of preferred shares to be issued in exchange was determined after the annual audit and was based on the book value of the stock as of 31 July 1962.

Mr. Street died in July 1965 and pursuant to the 6 August 1962 agreement, the defendant Moore exercised his option to purchase the Street and Anderson preferred shares and delivered the required notes and collateral security agreements. From 1965 until July of 1980 Moore made all payments called for by the notes and the plaintiffs accepted the payments without question.

The defendants filed a motion for summary judgment and in support of their motion offered the depositions of Sophie Anderson, Edward Anderson, Donovan Moore and James Toland, numerous documents and the pleadings. From the judgment entered granting the defendants' motion, the plaintiffs appeal.

Lawrence T. Jones and Snyder, Leonard, Biggers and Dodd, by Gary A. Dodd, for plaintiff appellants.

Adams, Hendon, Carson and Crow, by George Ward Hendon, for defendant appellees.

ARNOLD, Judge.

Plaintiffs' sole assignment of error is that the trial court erred in granting summary judgment in favor of the defendants. The party moving for summary judgment has the burden of establishing the lack of a triable issue of material fact by the record properly before the court. Rendition of summary judgment is conditioned upon a showing by the movant that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972).

Plaintiffs allege that defendant Moore fraudulently misrepresented material facts concerning the transfer of shares from the plaintiffs to the defendants with the intention of deceiving them and depriving them of their ownership and control of Concrete Products Company without adequate consideration. More specifically, they allege that prior to entering into the 6 August 1962 agreement, defendant Moore represented to them that they would be financially more secure if they would exchange their shares of common stock for preferred stock, and purposely concealed that the exchange would cause them to forfeit all voting rights and would establish the monetary sum they would receive for their stock when they sold it pursuant to the agreement at the death of E. S. Street.

The parties agree that the 6 August 1962 agreement controls the determination of this action. Plaintiffs contend that they understood the agreement to provide that the conversion of their common stock into preferred was to be at the fair market value of the common stock. The defendants contend that the parties understood that the contract called for conversion from common into preferred stock for book value in 1962, and a sale of the preferred stock at the death of E. S. Street. For the reasons that follow, we find that the defendants, as movants for summary judgment, have shown that there are no genuine issues of

material fact as to the alleged fraud and that they are entitled to judgment as a matter of law.

To make out an actionable case of fraud plaintiffs must show: (a) that the defendant made a representation relating to some material past or present fact; (b) that the representation was false; (c) that when he made it defendant knew it was false or he made positive assertions recklessly without any knowledge of their truth; (d) that the defendant made the false representation with the intention that it should be acted on by the plaintiff; (e) that the plaintiff reasonably relied upon the representation and acted upon it; and (f) that the plaintiff suffered injury. *Odom v. Little Rock & I-85 Corporation*, 299 N.C. 86, 261 S.E. 2d 99 (1980). A thorough review of the deposition of Sophie Anderson reveals that defendant Moore made no representations that constitute actionable fraud.

Mrs. Anderson testified that Mr. Moore made several statements to the effect that their future was secure, and that they "would have so much money they wouldn't know what to do." She further testified that she understood the main terms of the agreement, except she thought the value of the preferred stock would be established at the time her father died rather than at the time it was issued, and that no one told her it would be valued at the later time, but she and her mother "just assumed it." She specifically stated that Don Moore never told them anything and that she and her mother signed what her father told them to sign.

It is apparent that the plaintiff either knew the nature of the transaction or relied upon her father's representations. There is no evidence that the defendants intentionally or recklessly made fraudulent misrepresentations upon which plaintiff relied. Moreover, there is no evidence in the record that the stock was worth more than the sum defendant Moore paid for it. Since there are no genuine issues of material fact as to the essential elements of actionable fraud, and plaintiffs have failed to make out a *prima facie* case, the defendants are entitled to judgment as a matter of law. The judgment of the trial court granting summary judgment in favor of the defendants therefore is affirmed.

Affirmed.

Judges VAUGHN and BECTON concur.

BLUE RIDGE SPORTCYCLE COMPANY, INC., AND JOHN K. JONAS, JR. v. LEONARD SCHROADER AND WIFE, KATHY SCHROADER, INDIVIDUALLY; SCHROADER MOTORCYCLE, INC. D/B/A SCHROADER HONDA-KAWASAKI; KATHERINE J. WALDROP; LINDA JANETTE HOLCOMBE; LARRY D. HOLCOMBE; AND DENNIS J. WINNER

No. 8028SC1122

(Filed 4 August 1981)

Appeal and Error § 6.2— summary judgment as to one party—premature appeal

Plaintiffs had no right to an immediate appeal from summary judgment granted to defendant attorney where plaintiffs sought to recover against defendant attorney only if they were unable to recover against the other defendants on their primary claims. G.S. 1A-1, Rule 54(b); G.S. 1-277; G.S. 7A-27(d).

APPEAL by plaintiffs from *Thornburg, Judge.* Judgment entered 20 June 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 8 May 1981.

This is an appeal from summary judgment for defendant Winner, an attorney, on plaintiffs' third claim for relief, no disposition having been made on plaintiff's first and second claims against the other defendants.

THE COMPLAINT

The plaintiffs are Blue Ridge Sportcycle Company, Inc., (hereinafter referred to as "Blue Ridge") and Jonas, owner of all the Blue Ridge stock. On 17 February 1970 the defendants Waldrop and Holcombe were lessees of a building on Patton Avenue in Asheville and on that date subleased the property to Blue Ridge for a period ending in March 1986.

After subletting, Blue Ridge made additions to the building and other improvements having a market value of $60,000.

On 28 August 1975, Blue Ridge assigned its sublease to R. C. Muse, who agreed to pay and did pay (1) to defendants Holcombe

and Waldrop the sum of $500 per month and (2) to Blue Ridge the sum of $500 per month for its leasehold improvements.

In June 1976 plaintiffs and Muse with their attorneys (defendant Winner representing plaintiffs), entered into negotiations for a new sublease to change the manner and form in which Muse made lease payments to defendants Holcombe and Waldrop, but to continue making the $500 monthly payments to plaintiffs for leasehold improvements. One of the documents prepared by the attorney was a "Release," which acknowledged that Blue Ridge had defaulted in lease payments to defendants Waldrop and Holcombe, that a new tenant had been procured, and provided that each released the other from "any and all claims and demands."

During the Fall of 1976 Muse sold his motorcycle business to defendants Schroader, who agreed to make the lease payments to Holcombe and Waldrop and also to pay plaintiffs $500 per month for the leasehold improvements.

Defendants Schroader thereafter paid plaintiffs $500 per month as agreed up to and including July of 1977, when they ceased making the payments.

In their first and second claims plaintiffs sought to recover payment for their leasehold improvement for the period from 1 July 1977 to 1 March 1986. In their third claim the plaintiffs seek in the alternative to recover from defendant Winner if they do not recover on their first and second claims on the ground that Attorney Winner in representing plaintiffs was negligent in preparing and having Blue Ridge execute the aforesaid "Release" without otherwise protecting plaintiffs' leasehold interests, resulting in the discontinuance of the $500 monthly payments for leasehold improvements.

THE SUMMARY JUDGMENT

Defendant Winner, after filing answer denying negligence, moved for summary judgment supported by the pleadings, various depositions, and exhibits.

The trial court, after hearing, found no genuine issue of material fact and allowed the motion.

Russell L. McLean, III for plaintiff appellant.

Morris, Golding, Blue and Phillips by William C. Morris, Jr., for defendant appellee, Winner.

CLARK, Judge.

The threshold question before this Court, though not argued by either party, is whether an appeal lies from the summary judgment for the defendant Winner. It is established that if an appealing party has no right of appeal, an appellate court on its own motion, should dismiss the appeal even though the question of appealability has not been raised by the parties themselves. *Bailey v. Gooding*, 301 N.C. 205, 270 S.E. 2d 431 (1980); *Dickey v. Herbin*, 250 N.C. 321, 108 S.E. 2d 632 (1959); *Rogers v. Brantley*, 244 N.C. 744, 94 S.E. 2d 896 (1956).

In a multiple claim or multiple party action, an appeal from a summary judgment granted for one party or on one claim is premature if the trial court does not make a determination under G.S. 1A-1, Rule 54(b) that there was no just reason for delay, unless a substantial right is involved as provided by G.S. 1-277 and G.S. 7A-27(d). *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976); *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976).

Since the trial court made no finding under Rule 54(b) that there was no just reason for delay, we must determine if plaintiffs had the statutory right of appeal under G.S. 1-277 and G.S. 7A-27(d) because a substantial right is involved. We conclude that there is no substantial right involved and that the appeal is premature.

In their first two claims for relief, plaintiffs allege that defendants Schroader, lessees, agreed to pay plaintiffs for their leasehold improvements, and that the release was executed and delivered to defendants Holcombe and Waldrop, lessors, without the knowledge and consent of plaintiffs, and that said defendants relying on said release fraudulently entered into a direct sublease with defendants Schroader with intent to defraud the plaintiffs. The third claim for relief against defendant Winner for malpractice was in the alternative, "if and in the event the Court should find that the plaintiffs should not recover and shall not recover

under its claims for relief set forth under One and Two above . . . ."

Since plaintiffs seek to recover against defendant Winner only if they are unable to recover against the other defendants on their primary claims, the primary claims must first be determined. Only if the court determines that plaintiffs cannot recover on their primary claims can plaintiffs' right to recover from defendant Winner be affected by the summary judgment for Winner. If the plaintiffs should recover against the other defendants on either one or both of the primary claims, plaintiffs under the pleadings could not and do not seek to recover against defendant Winner for malpractice.

The summary judgment is not appealable on the theory that it affects a substantial right of the plaintiffs and will work injury to plaintiffs if not corrected before a trial and appeal from final judgment on the primary claims. If the summary judgment for defendant Winner is in error, plaintiffs can preserve their right to complain of the error by a duly entered exception, and may appeal after adverse judgment on the primary claims. If plaintiffs should recover against the other defendants on their primary claims, there would be no basis for an appeal from the summary judgment against defendant Winner; if plaintiffs do not recover on their primary claims, they may then appeal from the summary judgment. *See Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979).

The courts do not favor a piecemeal appeal in a Rule 54(b) situation. *See* W. Shuford, N.C. Civil Practice and Procedure § 54-5 (1975). But the appeal from the summary judgment in this case is also objectionable in that, though on its face a final judgment, it is actually a conditional one that would adversely affect the plaintiffs only if and when it is determined that they cannot recover on their primary claims. At this stage of the proceeding the appeal is premature, and this Court, if it now entertained the appeal, would be giving an advisory opinion on a matter that will not be in controversy if subsequently plaintiffs do recover on their primary claims. The summary judgment is not final but interlocutory because further judicial action is necessary in order fully and finally to settle the rights of the parties. An order is interlocutory "if it does not determine the issues but directs some

further proceeding preliminary to final decree." *Greene v. Laboratories, Inc.*, 254 N.C. 680, 693, 120 S.E. 2d 82, 91 (1961).

The appeal from the summary judgment is in violation of G.S. 1-277 and G.S. 7A-27 which prohibits appeal from an interlocutory order and also in violation of G.S. 1A-1, Rule 54(b) which prohibits appeal from a judgment which adjudicates fewer than all of multiple claims, it appearing that plaintiffs are not now deprived of a substantial right. The reason for these statutes and rules is "to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division." *Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E. 2d 338, 343 (1978).

The appeal is

Dismissed.

Judges MARTIN (Robert M.) and WELLS concur.

STATE OF NORTH CAROLINA v. LARRY CHAMBERS

No. 8120SC113

(Filed 4 August 1981)

1. Criminal Law § 91.7— absence of witnesses—continuance properly denied

The trial court's denial of defendant's motion to continue because of the unavailability of three of defendant's witnesses was not an abuse of discretion or a denial of defendant's constitutional rights, since the indictment had been pending against defendant since February of 1980 but defendant had not subpoenaed the three witnesses to be present at the 16 September trial, and defendant's motion to continue was not supported by affidavits showing sufficient grounds.

2. Criminal Law § 105.1— motion to dismiss—failure to renew

By introducing evidence defendant waived his motion to dismiss made at the close of the State's evidence, and having failed to renew his motion at the close of all evidence, defendant established no basis upon which to appeal denial of his motion. G.S. 15-173.

3. Robbery § 5.4— failure to instruct on lesser offense—no error

The trial court in an armed robbery case did not err in failing to instruct the jury on the lesser included offense of common law robbery where the

State's evidence tended to show that defendant and his accomplice, who was holding a gun, were acting in concert to accomplish the taking of personal property by the use of a dangerous weapon, accompanied by danger or threat to the victim's life, while defendant's evidence tended to show only that defendant committed neither armed robbery nor common law robbery.

APPEAL by defendant from *Cornelius, Judge.* Judgment entered 17 September 1980 in Superior Court, UNION County. Heard in the Court of Appeals 28 May 1981.

Defendant was indicted for the armed robbery of Mary Kiser. Defendant's first trial in June 1980 ended in a mistrial. On 15 September 1980, defendant was arrested for failure to appear at the last term of court. Prior to trial on 16 September 1980, defendant's counsel moved for a continuance on the grounds that defendant's counsel did not know that defendant would appear that day and thus was not completely prepared for trial in that three of defendant's alibi witnesses were not present. The trial judge denied the motion for a continuance.

The State's evidence tended to show that on the afternoon of 4 January 1980, Mary Kiser, the owner and manager of the Neighborhood Grocery, was in the store along with two of her employees, Pat Wilson and Cindy Carpenter. Kiser was checking invoices in her office with the door open when she noticed a black male, about six feet tall, wearing an Army jacket, standing outside the office door. Kiser identified this person as defendant. When Kiser asked if she could help him, defendant stepped in the office and grabbed Kiser's money box which had been sitting on a table in the office. When Kiser attempted to retrieve the money box, defendant stated, "Hell, woman, this is a damn holdup. I'll kill you." At this point, another male, wearing a ski mask and holding a handgun, brought Wilson and Carpenter back to the office where the two males forced all three women into the walk-in beer cooler and locked the door.

The defendant's evidence consisted of the alibi testimony of defendant and Pamela Terry, an acquaintance of defendant. Their testimony indicated that defendant had been in Durham at all times on 4 January 1980.

Defendant was convicted of robbery with a firearm, a violation of G.S. 14-87. From this judgment, defendant has appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney General Evelyn M. Coman, for the State.

Joe P. McCollum, Jr., for defendant-appellant.

WELLS, Judge.

[1] Defendant first assigns as error the trial court's denial of defendant's motion to continue because of the unavailability of three of defendant's witnesses. Defendant urges both an abuse of discretion and the denial of his constitutional rights as error. At the hearing on this motion, defendant's attorney stated that the three absent witnesses were alibi witnesses and that although they had been present during earlier terms of court, they had not been subpoenaed for the 16 September term. Defendant stated that he was unsure of the address of one of the witnesses. The assistant district attorney stated that the State's witnesses had been present every time the case had been calendared and that it would be a hardship on State's witnesses to grant a continuance.

Ordinarily, a motion for a continuance is addressed to the sound discretion of the trial judge whose subsequent ruling is reviewable only for abuse of discretion. If the motion is based on a right guaranteed by the federal and State constitutions, the question presented on appeal is one of law and not of discretion. *State v. Thomas*, 294 N.C. 105, 111, 240 S.E. 2d 426, 431 (1978); *State v. Brower*, 289 N.C. 644, 660, 224 S.E. 2d 551, 562 (1976). "Whether a defendant bases his appeal upon an abuse of judicial discretion or a denial of his constitutional rights, he must show both that there was error in the denial of the motion and that he was prejudiced thereby before he will be granted a new trial." *State v. Thomas, supra.*

We first conclude that the trial judge did not abuse his discretion in denying defendant's motion. The motion was made after the case was called for trial. *State v. Oden*, 44 N.C. App. 61, 62, 259 S.E. 2d 795, 796 (1979), *disc. rev. denied*, 299 N.C. 333, 265 S.E. 2d 401 (1980). Although the indictment had been pending since February 1980, defendant had not subpoenaed the three witnesses to be present at the 16 September trial and neither was defendant's motion supported by affidavits showing sufficient grounds. *See, State v. Davis*, 38 N.C. App. 672, 676, 248 S.E. 2d 883, 886 (1978); *see also State v. Oden, supra.* Based on these

facts, we hold that the defendant has not shown any abuse of discretion by the trial judge in denying the motion for a continuance. *See State v. Lee*, 293 N.C. 570, 574, 238 S.E. 2d 299, 302 (1977); *State v. Tolley*, 290 N.C. 349, 356-57, 226 S.E. 2d 353, 361 (1976); *State v. Horton*, 44 N.C. App. 343, 345, 260 S.E. 2d 780, 781 (1979).

Turning to defendant's contention that the denial of his motion also constituted a denial of defendant's constitutional rights, we quote our Supreme Court as follows: "Due process requires that every defendant be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony." *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E. 2d 526, 531 (1970), *quoted with approval in State v. Thomas, supra*, at 113, 240 S.E. 2d at 433. Defendant's rights of confrontation and of due process under the federal and State constitutions, in this context, require that defendant be permitted the opportunity fairly to prepare and present his defense. *State v. Thomas, supra; compare State v. Smathers*, 287 N.C. 226, 230-32, 214 S.E. 2d 112, 115-16 (1975). We conclude that defendant was not deprived of a fair opportunity to prepare and present his defense and that defendant's rights under the federal and State constitutions were not denied him. The record suggests only "a natural reluctance to proceed to trial, engendered by the seriousness of the charge and lack of a substantial defense, rather than scarcity of time or absence of bona fide witnesses." *State v. Tolley, supra*, at 358, 226 S.E. 2d at 362; *see also State v. Thomas, supra; State v. Sutton*, 34 N.C. App. 371, 374-75, 238 S.E. 2d 305, 307 (1977), *disc. rev. denied*, 294 N.C. 186, 241 S.E. 2d 521 (1978). This assignment is overruled.

[2] Defendant next assigns error to the trial judge's denial of defendant's motion to dismiss at the close of the State's evidence. Defendant presented evidence following the denial of his motion, and defendant did not renew his motion at the close of all evidence. By introducing evidence, defendant waived his earlier motion to dismiss, and having failed to renew his motion, defendant has established no basis upon which to appeal the denial of his motion. G.S. 15-173; *State v. Alston*, 44 N.C. App. 72, 73, 259 S.E. 2d 767, 768 (1979); *State v. Rhyne*, 39 N.C. App. 319, 322, 250 S.E. 2d 102, 104 (1979); *see also State v. McKinney*, 288 N.C. 113,

116, 215 S.E. 2d 578, 581 (1975). This assignment of error is overruled.

[3] Defendant's final assignment of error is to the failure of the trial judge to instruct the jury on the lesser included offense of common law robbery. When there is some evidence supporting a lesser included offense, defendant is entitled to a jury instruction thereon even in the absence of a specific request for such instructions. *State v. Banks*, 295 N.C. 399, 416, 245 S.E. 2d 743, 754 (1978); *State v. Bell*, 284 N.C. 416, 419, 200 S.E. 2d 601, 603 (1973). When all the evidence tends to show that defendant committed the crime with which he is charged and there is no evidence of guilt of the lesser included offense, the court correctly refuses to charge on the unsupported lesser offense. *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976).

The elements of the offense of armed robbery are (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of firearms or other dangerous weapons, implements or means; and (3) danger or threat to the life of the victim. G.S. 14-87; *State v. Moore*, 37 N.C. App. 248, 253, 245 S.E. 2d 898, 901, *cert. denied*, 295 N.C. 651, 248 S.E. 2d 255 (1978). The essential difference between armed robbery and common law robbery is that the former requires evidence showing that the victim was endangered or threatened by the use or threatened use of a firearm or other weapon, implement or means. *State v. Joyner*, 295 N.C. 55, 63, 243 S.E. 2d 367, 373 (1978).

Neither the State's nor the defendant's evidence shows that defendant committed the offense of common law robbery. The State's evidence tends to show that defendant and the other man holding the gun were acting in concert to accomplish the taking of personal property by the use of a dangerous weapon, accompanied by danger or threat to the victim's life. *See, State v. Moore, supra.* Although defendant threatened to kill Kiser and grabbed the money box before Kiser observed the handgun, the robbery was still in progress when Kiser saw the other man with the handgun forcing Wilson and Carpenter to the back of the store. *Compare, State v. Fountain*, 14 N.C. App. 82, 187 S.E. 2d 493 (1972). The State's evidence shows one continuous transaction wherein defendant and his companion took the money box from

Kiser by threatening the use of the handgun. Defendant's evidence tends to show only that defendant committed neither crime. Therefore there was no evidence from which a jury could have found that the defendant committed the offense of common law robbery, and thus it was not error for the trial judge to fail to instruct the jury on common law robbery.

Defendant received a trial free from prejudicial error.

No error.

Judges HEDRICK and MARTIN (H.) concur.

JOHN HEIDLER v. BONNIE HEIDLER

No. 8021DC1148

(Filed 4 August 1981)

Appeal and Error § 68— mandate of Court of Appeals—binding effect on trial court

Where the Court of Appeals held that plaintiff was entitled to a new trial on defendant's counterclaim for alimony because the trial court failed to submit the issues of fact to the jury even though plaintiff did not appear for trial, the mandate of the Court of Appeals was binding on the trial court, and the trial court had no authority to reinstate the judgment of the original trial without giving plaintiff a new trial although the decision in this case was subsequently overruled by another decision of the Court of Appeals.

APPEAL by plaintiff from *Harrill, Judge.* Judgment entered 19 September 1980 in District Court, FORSYTH County. Heard in the Court of Appeals 26 May 1981.

Plaintiff husband filed an action for absolute divorce on 14 March 1977. Defendant wife counterclaimed for alimony without divorce and to recover certain sums allegedly advanced to plaintiff by defendant during the marriage. Plaintiff's original attorney of record was allowed to withdraw as counsel for plaintiff by order entered 6 March 1978. Plaintiff did not appear when the case was called for trial on 2 June 1978. Plaintiff had no counsel of record at that time. Defendant's counsel announced in open court that defendant waived trial by jury as demanded in her

answer and counterclaim. The trial court proceeded to hear the defendant's evidence without a jury.

On 11 August 1978 judgment was entered awarding the defendant permanent alimony in the sum of $300.00 per month, attorney's fees of $500.00 and a money judgment in the sum of $16,504.02. Plaintiff appealed to this Court assigning as error, *inter alia*, the trial court's failure to submit the issues of fact to a jury. This Court held, in *Heidler v. Heidler*, 42 N.C. App. 481, 256 S.E. 2d 833 (1979), that the trial court did so err. The opinion of this Court was filed in the Office of the Clerk of Superior Court of Forsyth County on 31 July 1979, and the judgment of this Court, certifying that opinion and expressly awarding to the plaintiff a new trial, was filed 21 August 1979.

On 3 June 1980 this Court filed its opinion in *Frissell v. Frissell*, 47 N.C. App. 149, 266 S.E. 2d 866 (1980), overruling the decision in *Heidler v. Heidler, supra*. On 3 July 1980 the defendant moved the trial court for an order reinstating the trial court's judgment of 11 August 1978. Prior to the trial court's ruling on the defendant's motion, the defendant filed a document with the clerk of this Court designated "Petition for Reconsideration or for a Rehearing in *Heidler v. Heidler*, No. 7821DC1038." On 24 July 1980 the trial court purported to enter an order granting the defendant's motion and reinstating the judgment originally entered 11 August 1978, and the plaintiff gave notice of appeal. On 6 August 1980 this Court denied the defendant's Petition for Reconsideration or for a Rehearing. When plaintiff's counsel became advised of the defendant's Petition for Reconsideration or for a Rehearing, a motion was filed pursuant to G.S. 1A-1, Rule 60(b) for relief from the trial court's order of 24 July 1980 on the ground that the defendant's filing of the petition removed the cause from the jurisdiction of the Forsyth County District Court and rendered it *functus officio*.

Following a hearing on 12 September 1980, the trial court ruled that it was in fact without jurisdiction to enter its order of 24 July 1980, but allowed defendant's renewed motion for reentry of the trial court's judgment in the cause of 11 August 1978. From the order entered 19 September 1980, plaintiff appeals.

House, Blanco & Randolph, P.A., by Clyde C. Randolph, Jr., and Reginald F. Combs, for plaintiff-appellant.

David A. Wallace for defendant-appellee.

WELLS, Judge.

Plaintiff contends that the trial court erred in three respects in failing to comply with the order of remand entered in the previous appeal: (1) the trial court acted without authority in entering an order reinstating its prior judgment, which had been reversed by this Court with instructions for a new trial, without granting the plaintiff a new trial; (2) the previous decision of this Court reversing the judgment of the trial court was based upon a consideration of only one of plaintiff's five allegations of error, and the trial court effectively deprived plaintiff of judicial review of his four remaining allegations of error by reinstating the original judgment; and (3) this Court's decision in *Frissell v. Frissell, supra,* upon which the trial court's order of 19 September 1980 was based, was incorrectly decided. We will consider plaintiff's first and third contentions. It is not necessary to consider plaintiff's second contention.

We hold that the trial court erred in reinstating its order of 11 August 1978 and in failing to grant plaintiff a new trial. When the judgment of this Court in *Heidler v. Heidler, supra,* was properly certified to the Clerk of Superior Court of Forsyth County, it became the mandate of this Court. *See* Rule 32 of the N.C. Rules of Appellate Procedure. *See also* 1 McIntosh, N.C. Practice 2d §§ 62-66, at 35-45 (1956); 1 Strong's N.C. Index 3d, Appeal and Error, §§ 66-68.1, at 369-75. The mandate of this Court flowing from its judgment in *Heidler v. Heidler, supra,* is binding upon the trial court, requires the trial court to follow it strictly and without variation or departure, and leaves the trial court without authority to enter any judgment in the cause other than that ordered by this Court. *See D & W, Inc. v. Charlotte,* 268 N.C. 720, 152 S.E. 2d 199 (1966); *Gardner v. Gardner,* 48 N.C. App. 38, 44, 269 S.E. 2d 630, 633 (1980). Harsh as the result may seem in this particular case, our system of jurisprudence requires consistency of compliance by the trial courts with the mandates of our appellate courts, without exception. The mandate of this Court in *Heidler v. Heidler, supra,* entitles plaintiff to a new trial on all the issues

presented in the pleadings. The trial court's order of 19 September 1980 must be vacated and upon remand, a new trial must be granted.

The decision of this court in *Frissell v. Frissell, supra*, shall control upon remand: *i.e.*, should either party to this case not appear when the case is again called for trial, such non-appearance would constitute a waiver of that party's right to a trial by jury. *See also Morris v. Asby*, 48 N.C. App. 694, 696, 269 S.E. 2d 729, 731 (1980).

The result is:

The order of the trial court entered 19 September 1980 is

Vacated. The cause is remanded to the District Court of Forsyth County for a

New trial.

Judges HEDRICK and MARTIN (H.) concur.

JESSE A. BROOME, ET UX LEWELLYN T. BROOME v. CHRISTOPHER S. PISTOLIS, ET UX HELEN A. PISTOLIS

No. 807SC1180

(Filed 4 August 1981)

Easements § 5.3— driveway—easement by implication—insufficiency of evidence

Evidence was insufficient to support creation of an easement by implication in a driveway between the parties' houses where the evidence established that plaintiffs had access to their property from a public street which was paved and provided parking; the front door of plaintiffs' dwelling was not more than 40 feet from the curb; there was sufficient width between the plaintiffs' house and their property line with defendant to provide plaintiffs with access by automobile to the rear of their house; and the evidence thus established that plaintiffs' use of the driveway in question was only a convenience to them and not a necessity.

APPEAL by plaintiffs from *Tillery, Judge*. Judgment entered 13 October 1980 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 27 May 1981.

Plaintiffs instituted this action to recover monetary damages and to obtain an injunction compelling the defendants to remove an obstruction from a driveway over which plaintiffs claim an easement by implication. Plaintiffs and defendants are next-door neighbors, and the driveway is between their houses. Defendants moved to dismiss the action for failure to state a claim, and the plaintiffs thereafter filed an amended complaint alleging their claim in more detail. A hearing was held on defendants' motion, and an order was entered finding facts and dismissing the action. Plaintiffs appeal.

Hopkins & Allen, by Grover Prevatte Hopkins and Janice Watson Davidson, for plaintiff-appellants.

Weeks, Muse & Surles, by Oliver S. Surles, for defendant-appellees.

HILL, Judge.

The parties stipulated to certain facts not alleged in the complaint for the purpose of the hearing on defendants' motion. It is clear from the order entered that the trial court considered the stipulated facts. The defendants' motion to dismiss for failure to state a claim was thereby converted into a motion for summary judgment. *See* G.S. 1A-1, Rule 12(b); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The plaintiffs did not object to consideration of the stipulated facts and did not request a continuance in order to produce other evidence. They participated in the hearing through counsel. Plaintiffs thus waived any objection to the consideration of defendants' motion as one for summary judgment. *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 248 S.E. 2d 904 (1978). We interpret the order below as dismissing plaintiffs' action by way of summary judgment in favor of defendants. We interpret the "findings of fact" in the trial court's order as a mere statement of undisputed material facts since true findings of fact from disputed evidence are inappropriate in ruling upon either a motion to dismiss for failure to state a claim, *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979), or a motion for summary judgment, *Capps v. City of Raleigh*, 35 N.C. App. 290, 241 S.E. 2d 527 (1978). So interpreted, the order is affirmed.

There are three essential elements to the creation of an easement by implication upon severance of title. They are:

(1) A separation of the title; (2) before the separation took place, the use which gives rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and (3) the easement shall be necessary to the beneficial enjoyment of the land granted or retained.

Barwick v. Rouse, 245 N.C. 391, 394, 95 S.E. 2d 869, 871 (1957). As to the element of necessity, although the greater weight of the authorities seems to hold that no easement will be created by implication unless the easement is one of strict necessity, our Supreme Court has interpreted the requirement to mean "only that the easement should be reasonably necessary to the just enjoyment of the property affected thereby . . .." *Packard v. Smart*, 224 N.C. 480, 484, 31 S.E. 2d 517, 519 (1944). Still, creation of an easement by implication cannot rest upon mere convenience. *Bradley v. Bradley*, 245 N.C. 483, 96 S.E. 2d 417 (1957).

The first two elements of plaintiffs' claim are not challenged on appeal. As to the element of necessity, the complaint and amended complaint each allege that the defendants' obstruction of the driveway prevents the plaintiffs from having access to the rear entrance of their residence, that the plaintiff Jesse A. Broome has difficulty with walking and now has to walk a greater distance to reach his house from the street, and that use of the driveway "is reasonably necessary for the plaintiffs to have the fair, full, convenient, and comfortable enjoyment of their property." The parties stipulated facts as follows:

1. There is more than an automobile's width between the Broome dwelling and the property line between the parties.

2. Both the Broome and Pistolis dwellings are situated on lots of about 53 feet in width, each lot fronting about 53 feet on Baker St. The dwellings' front doors are not more than 40 feet from the Baker St. curb.

3. The curb has been cut for a drive.

4. A manhole has been constructed near the drive exit.

5. Baker Street is curbed, guttered, paved and has parking on both sides.

6. The plaintiff, Jesse A. Broome, died subsequent to the filing of the complaint.

The material before the trial court established that the plaintiffs have access to their property from a public street which is paved and provides parking and that there is sufficient width between the plaintiffs' house and their property line with the defendants to provide plaintiffs with access by automobile to the rear of their house. The material thus established that the plaintiffs' use of the driveway in question is only a convenience to them, and such evidence will not support creation of an easement by implication. Summary judgment for defendants was proper.

Affirmed.

Judges MARTIN (Robert M.) and CLARK concur.

STATE OF NORTH CAROLINA v. SAMUEL (PETE) MALLOY

No. 8116SC8

(Filed 4 August 1981)

Criminal Law § 26.5— acquittal on assault charge—trial for common law robbery—no double jeopardy

The jury's acquittal of defendant on a charge of misdemeanor assault inflicting serious injury did not bar the subsequent prosecution of defendant on a charge of common law robbery, since each offense required proof of a fact not required for conviction of the other.

APPEAL by defendant from *Battle, Judge.* Judgment entered 6 August 1980 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 4 May 1981.

Defendant was indicted for common law robbery and assault with a deadly weapon with intent to kill inflicting serious injury. At trial the assault charge was reduced to misdemeanor assault inflicting serious injury.

The jury returned a not guilty verdict on the assault charge but was unable to agree on the robbery charge. A mistrial was declared, and defendant was thereafter re-tried and convicted of the robbery.

From a judgment of imprisonment, defendant appeals.

Attorney General Edmisten, by Associate Attorney General Lisa Shepherd, for the State.

Cabell J. Regan for defendant-appellant.

WHICHARD, Judge.

The sole issue presented is whether the not guilty verdict on the assault charge barred subsequent prosecution of the robbery charge on grounds of double jeopardy. It did not.

> If each of two criminal offenses, as a matter of law, requires proof of some fact, proof of which fact is not required for conviction of the other offense, the two offenses are not the same and a former jeopardy with reference to the one does not bar a subsequent prosecution for the other.

State v. Overman, 269 N.C. 453, 465, 153 S.E. 2d 44, 54 (1967). Conviction of misdemeanor assault requires proof of infliction of or attempt to inflict serious injury, G.S. 14-33(b)(1), while conviction of common law robbery does not. Conviction of common law robbery requires proof that property was taken from another against his will by violence or putting him in fear, *State v. Black*, 286 N.C. 191, 209 S.E. 2d 458 (1974), while conviction of misdemeanor assault does not. Thus, each offense for which defendant was tried required proof of a fact not required for conviction of the other; and acquittal on the assault charge did not bar prosecution for the robbery.

No error.

Chief Judge MORRIS and Judge WEBB concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 JULY 1981

IN RE SIMMONS No. 8018DC1049	Guilford (80SP945)	Affirmed
MANN v. MANN No. 8010DC1088	Wake (79CVD4198)	Affirmed
MEDFORD v. MOODY No. 8029SC1083	McDowell (76CVS0269)	Affirmed
STATE v. GURGANUS No. 816SC16	Halifax (79CRS12786) (79CRS12788)	No Error
STATE v. MOORE No. 8115SC151	Orange (80CRS3854) (80CRS3855) (80CRS9730) (80CRS9731) (80CRS9732) (80CRS9733)	No Error
STATE v. THOMPSON No. 8121SC78	Forsyth (80CRS16398)	No Error
STATE v. WARD No. 811SC114	Pasquotank (80CRS1749) (80CRS1750)	No Error
WASHINGTON HOUSING AUTHORITY v. MABRY No. 802SC933	Beaufort (78SP124)	Affirmed

FILED 4 AUGUST 1981

IN RE CALHOUN No. 8012SC740	Cumberland (80CVS19)	No Error
IN RE KRESGE No. 8028DC1214	Buncombe (80SP493)	Affirmed
STATE v. DELLINGER No. 8125SC150	Burke (80CRS6283)	No Error
STATE v. FORBEY No. 815SC85	New Hanover (80CRS8956)	No Error
STATE v. GAINEY No. 8112SC136	Cumberland (80CRS7606)	No Error
STATE v. ROBINETTE No. 8125SC132	Caldwell (78CRS1691) (78CRS1692)	Affirmed

STATE v. SHEPPARD No. 8119SC76	Randolph	No Error in the trial. Remanded with instructions for modification of judgment.
SYKES v. MELTON No. 816SC40	Halifax (80CVS22)	Affirmed
WHITE v. RASCOE No. 806SC913	Bertie (79CVS257)	No Error

In re Peirce

IN THE MATTER OF: AMY BETH PEIRCE, MINOR (DOB: 12/17/78)

No. 8025DC919

(Filed 18 August 1981)

1. **Parent and Child § 1; Rules of Civil Procedure § 1— procedure to terminate parental rights—rules of civil procedure inapplicable**

G.S. Ch. 7A, Art. 24B exclusively controls the procedure to be followed in the termination of parental rights, and the Rules of Civil Procedure are inapplicable to such a proceeding.

2. **Parent and Child § 1— procedure to terminate parental rights**

The statutorily established procedure for the termination of parental rights does not include the right to file a counterclaim. G.S. 7A-289.29.

3. **Parent and Child § 1; Trial § 6— proceeding to terminate parental rights—recording of hearing—stipulation**

In a proceeding to terminate parental rights, respondents were estopped from complaining on appeal as to the quality of recording equipment used to record the proceeding, since all parties stipulated to the use of recording machines in lieu of a court reporter for the taking of evidence; furthermore, respondents failed to show that they were prejudiced by the loss of specific portions of testimony resulting from a gap in the tape recording of the proceeding where respondents did not allege or show in the record what the lost testimony was.

4. **Parent and Child § 1— proceeding to terminate parental rights—preliminary hearing**

There was no merit to respondents' argument that the trial court failed to conduct a satisfactory preliminary hearing as required by G.S. 7A-289.29(b), since the trial judge, in the judgment terminating respondents' parental rights, specifically stated that a preliminary hearing with due notice was conducted by him and the judge specifically set out the issues which were arrived at in the special hearing to be determined at the subsequent trial.

5. **Parent and Child § 1; Evidence § 48.1— proceeding to terminate parental rights—parenting skills—expert testimony**

In a proceeding to terminate parental rights the trial court did not err in permitting a social worker to state her opinion concerning respondents' parenting skills, since the experience the witness received as a social worker for approximately four years gave her qualifications and skills superior to those of the jury to determine whether respondents' actions in leaving their child in the hospital in North Carolina when they moved to Florida were indicative of good parenting skills; moreover, it was proper for the court on appeal to consider the validity of the trial court's admission of the witness's testimony, despite the fact that she was not formally tendered as an expert.

6. Parent and Child § 1; Evidence § 33— proceeding to terminate parental rights —hearsay testimony

In a proceeding to terminate parental rights where the evidence tended to show that respondent mother moved to Florida, leaving the child in question in a hospital in N.C., the trial court properly sustained petitioner's objection to the question, "Did the Florida Department of Health and Rehabilitative Services contact you in any way regarding the three children in your home to rehabilitate you or to remove your children for being abused, neglected or dependent?" since such question called for hearsay testimony.

7. Parent and Child § 1; Evidence § 33— proceeding to terminate parental rights —admissibility of letters

In a proceeding to terminate parental rights the trial court erred in excluding letters from respondents' counsel to respondents informing them of the progress in petitioner's effort to transfer respondents' child from N.C. to a foster home in Florida where respondents were residing, since the letters were admissible to establish the state of mind of respondents, but exclusion of the letters was harmless error.

8. Parent and Child § 1; Evidence § 25— proceeding to terminate parental rights —photographs

In a proceeding to terminate parental rights the trial court erred in admitting photographs of the child in question, since there was no testimony for the photographs to illustrate; however, respondents failed to show that they were prejudiced or that the trial court's judgment was influenced by the erroneous admission of the photographs.

9. Parent and Child § 1; Rules of Civil Procedure § 60— proceeding to terminate parental rights—amendment of judgment

The trial court acted within its authority in amending its judgment to state that the best interest of the child in question would be served by the termination of parental rights, since the omission of that phrase was an inadvertent clerical oversight, and the trial judge's amendment of the judgment to conform it to his original intention was correct under the authority of G.S. 1A-1, Rule 60(a).

APPEAL by respondents from *Crotty, Judge.* Judgment entered 4 June 1980 in District Court, BURKE County. Heard in the Court of Appeals 6 April 1981.

On 15 March 1979, Judge Samuel McDowell Tate entered an immediate custody order granting temporary custody of Amy Beth Peirce (hereinafter Amy) to the Burke County Department of Social Services (hereinafter petitioner). That order was granted pursuant to a juvenile petition filed on 15 March 1979 by the petitioner alleging that Amy was a neglected child as defined by G.S. 7A-278(4) and asking the court award it custody of Amy. Peti-

tioner further alleged that Amy had been admitted to Grace Hospital on 12 March 1979 with an admitting diagnosis of possible pneumonia and that the failure of Amy's parents, Gayle F. and Kenneth W. Peirce, to cooperate had hampered petitioner's efforts to remedy conditions. On the same day that Judge Tate entered his immediate custody order, Judge Livingston Vernon entered an order appointing C. Thomas Edwards Guardian Ad Litem to represent Amy.

Subsequently, and on 19 March 1979, Judge Vernon entered an order in which he found that Amy was a neglected child as defined in G.S. 7A-278(4), because she was living in an environment injurious to her welfare. Judge Vernon ordered that petitioner retain temporary custody of Amy until further orders of the court were issued.

Then followed a series of orders in which the district court continued temporary custody of Amy with petitioner.

On 28 November 1979, petitioner filed a petition to terminate the parental rights of Gayle F. Peirce and Kenneth W. Peirce (hereinafter respondents) in Amy. Specifically, petitioner requested that respondents' right to consent or object to the adoption of Amy be terminated. Petitioner's suit to terminate respondents' parental rights arose from the earlier action in which Amy was declared a neglected child. As grounds for the requested order, petitioner alleged that Amy had been in foster home care from 5 April 1979 until the date of the filing of the petition and that neither respondent had paid any support for the care of Amy since the initial order placing her in petitioner's custody.

Respondents filed their answer to the petition to terminate parental rights on 22 February 1980. In this pleading they admitted and denied various allegations of the petition. As a further answer and defense and counterclaim respondents alleged: first, that petitioner had failed to institute proceedings to transfer Amy to Florida where they were residents, and requested the court to order petitioner to institute such proceedings so that Amy could be placed in a foster care home near them; second, that petitioner had failed to attempt to rehabilitate, counsel, or reconcile Amy with respondents and had not attempted to work with respondents with regard to their parental abilities as re-

quired by G.S. 7A-542, and no evaluation or home placement or treatment plan had been presented by petitioner as required by G.S. 7A-545; third, that Amy's best interests would be served by transferring her to the proper authorities in the State of Florida so that she could be placed in a foster home there and eventually be reconciled with respondents; and, fourth, in the alternative that they, respondents, be awarded custody of Amy.

On 20 March 1980, Amy's guardian ad litem made a motion to strike respondents' further answer and defense and counterclaim. This motion was made pursuant to G.S. 1A-1, Rule 12(b)(f) on the grounds that respondents' further answer and defense and counterclaim were irrelevant, immaterial and improvidently brought under G.S. 7A-289.22 *et seq.* Subsequently, at trial, the court, over respondents' objection, struck portions of respondents' further answer and defense and counterclaim.

The trial court conducted a hearing on the petition to terminate parental rights. Gail Whisnant who was an employee of petitioner with the status of "Social Worker II" was petitioner's only witness. Her testimony tended to show the following: The termination of parental rights suit grew out of the suit declaring Amy to be a neglected child. Amy was placed in petitioner's custody when she was three months old, and at the time of this hearing she was one year and three months old. At the time the petition was filed, Miss Whisnant felt that the best interests of the child would be served by the termination of respondents' parental rights.

Amy was in the hospital when the initial order of 15 March 1979, in which Judge Tate found Amy to be a neglected child and awarded temporary custody to petitioner, was filed. On approximately 16 or 17 March 1979, while the child was still hospitalized, respondents moved from North Carolina to Florida. Respondents still resided in Florida at the time of the hearing, and Amy was in a foster home in North Carolina.

On 9 April 1979, Judge Vernon entered an order directing respondent, Kenneth W. Peirce, to pay the court $20 per week for Amy's support. Neither petitioner nor Amy ever received payment of any support from either of her parents-respondents.

Following the temporary placement of Amy's custody with petitioner on 15 March 1979, respondents' attorney, on behalf of

respondents, made one request that they be allowed to visit their child. Sometime in July 1979, respondents visited their daughter in petitioner's office. Respondents were 45 minutes late for their initial appointment to visit their child, and she had been returned to the foster parents when they arrived. However, they did later visit their child for approximately one hour. Miss Whisnant stated that to her knowledge respondents had done nothing to reconcile themselves with the child. It was not her responsibility to enact programs to improve the parenting skills of respondents, because they did not live in North Carolina. Miss Whisnant instituted proceedings in June 1979 through the North Carolina Interstate Compact to send Amy to Florida. She requested placement of the child by the Florida authorities with the respondents. Placement of the child with respondents was disapproved by both North Carolina and Florida. Miss Whisnant testified that Florida would not accept placement of the child in Florida.

Miss Whisnant did not request placement of Amy in a foster home in Florida. She stated that she thought that it was legally possible to place a child in Florida for foster care. However, she could not institute proceedings to transfer Amy to a foster home in Florida, because Burke County did not have the funds to pay for such an arrangement.

Petitioner inquired of the proper Florida authorities by letter, respondents' exhibit #1, as to whether Florida would consider taking custody of Amy so that she could be placed in a foster home closer to her parents. Florida did not respond to this request that they take custody of the child.

Respondents' evidence consisted of the testimony of respondent, Gayle F. (Peirce) Ulery, Amy's mother. Mrs. Ulery's testimony tended to show that she left North Carolina in 1979, despite the fact that Amy was hospitalized here, because she had planned to go to Florida before Amy was hospitalized, and before petitioner took temporary custody of the child. She also moved because there were more and better paying jobs and more housing in Florida. Respondent testified that she did not give petitioner her Florida address when she moved, because petitioner did not ask for it. She did not see any reason to contact petitioner in the intervening year.

Respondent, Ulery, testified that in March of 1979 she and her former husband, respondent, Kenneth Peirce, and their three children moved into a three bedroom house in Florida. Both respondents worked for Master Plastics. In August, Gayle and Kenneth Peirce separated, and Kenneth left the home. Gayle Peirce did not divorce Kenneth Peirce, because she discovered at the time of their separation that he was a bigamist and was still married to another woman. After Kenneth left the home in August, Gayle Peirce got a job with Master Tools to support her family. She met Rick Ulery in August at Master Tools. In November they were married. Respondent, Gayle (Peirce) Ulery, stopped work in January of the following year. The family now resides in a one bedroom apartment in Opa Locka, Florida. The three children share the bedroom, and respondent and Mr. Ulery sleep on the sofa bed in the living room.

As to her visit with Amy in July of 1979, respondent testified that she did not see Amy on the first occasion, since she had been delayed getting there, because she took a taxi from her motel to petitioner's office. Respondent stated that she had not visited Amy after July due to the fact that she believed petitioner was going to send Amy down to Florida.

With regard to support for Amy, Gayle (Pierce) Ulery stated that she had not sent any support money to petitioner in the six-month period preceding the hearing. She testified that she was not aware of any court order ordering her to support Amy. She stated that it was her former husband's obligation to support the child. Then respondent testified that she realized that it was her duty and responsibility to support Amy, but that she had not done so. She did not support Amy, because petitioner had custody of her. Respondent testified that she did not have the ability to support the child until after she married Mr. Ulery.

On 4 June 1980, after considering all of the evidence, Judge Crotty entered judgment finding facts and making conclusions of law and decreeing that the parental rights of respondents in Amy be terminated. Respondents' right to object or consent to the adoption of Amy was specifically terminated. Respondents immediately gave notice of their intent to appeal this judgment.

Byrd and Edwards, Guardian Ad Litem, by C. Thomas Edwards, and Powell and Settlemyer, by Douglas F. Powell and Sueanna P. Peeler, for petitioner appellee.

Catawba Valley Legal Services, Inc., by Ellis L. Aycock and Warren C. Hodges, for respondent appellants.

MORRIS, Chief Judge.

Respondents made 27 assignments of error in the record on appeal. They cite all but one of these assignments of error in support of 13 arguments which they bring forth in their appellate brief.

Defendant initially argues that the trial court erred by striking paragraphs three and four of respondent's Further Answer and Defense and Counterclaim to the petition to terminate parental rights. Defendant maintains that G.S., Chap. 7A, Art. 24B, "Termination of Parental Rights" allows the respondent in a termination of parental rights case to file counterclaims as part of its answer. Although, G.S. 7A-289.29(a) does not specifically allow a respondent in such a case to file anything other than an answer to the petition to terminate parental rights, respondents reason by analogy to the N.C. Rules of Civil Procedure, specifically G.S. 1A-1, Rule 7(a) and Rule 13, that the additional filing of counterclaims attached to the answer is permissible. We disagree.

[1] The intent of the legislature controls the interpretation of a statute. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978); *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975). Moreover, "[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning. . . ." *In re Banks*, 295 N.C. 236, 239, 244 S.E. 2d 386, 388 (1978); *Peele v. Finch*, 284 N.C. 375, 200 S.E. 2d 635 (1973).

G.S. 7A-289.22 defines the legislative intent and construction to be given Art. 24B. G.S. 7A-289.22(1) provides in part:

> The general purpose of this Article is to provide *judicial procedures* for terminating the legal relationship between a child and his or her biological or legal parents . . . (Emphasis added.)

The sections of Art. 24B comprehensively delineate in detail the judicial procedure to be followed in the termination of parental rights. This article provides for the basic procedural elements which are to be utilized in these cases. For example, G.S. 7A-289.24 sets out who may petition; G.S. 7A-289.25 establishes the requirements of the petition; G.S. 7A-289.26 describes the procedure to be followed for a preliminary hearing where the identity of one of the parents is unknown; and G.S. 7A-289.29 establishes the necessary contents of the answer. Due to the legislature's prefatory statement in G.S. 7A-289.22 with regard to its intent to establish judicial procedures for the termination of parental rights, and due to the specificity of the procedural rules set out in the article, we think the legislative intent was that G.S., Chap. 7A, Art. 24B, exclusively control the procedure to be followed in the termination of parental rights. It was not the intent that the requirements of the basic rules of civil procedure of G.S. 1A-1 be superimposed upon the requirements of G.S., Chap. 7A, Art. 24B. Therefore, in this case we need only ascertain whether the trial court correctly followed the procedural rules delineated in the latter.

[2] G.S. 7A-289.29 provides, with regard to the respondent's answer in cases where the court is petitioned to terminate parental rights, that:

> (a) Any respondent may file a written answer to the petition. The answer shall admit or deny the allegations of the petition and shall set forth the name and address of the answering respondent or his or her attorney.

This statute does not specifically grant the respondent in these cases the right to file a counterclaim, nor does any other section of G.S., Chap. 7A, Art. 24B, grant to respondent such a right. The statutorily established procedure for the termination of parental rights does not include the right to file a counterclaim, and we will not add that right by imputation. Therefore, it was not error for the trial court in the case *sub judice* to strike paragraphs three and four from respondents' Further Answer and Defense and Counterclaim.

Respondents allege in the alternative that paragraphs three and four were not counterclaims, but "actually did no more than suggest alternative resolutions of the action for consideration by

the court." Therefore, they should not have been stricken by the trial court.

A counterclaim is defined by Black's Law Dictionary, 4th Ed. as "[a] claim presented by a defendant in opposition to or deduction from the claim of the plaintiff." A counterclaim is a separate cause of action, seeking affirmative relief, while a defense merely defeats the plaintiff's cause of action by a denial or confession and avoidance. Both paragraphs of respondents' answer which are in question ask for affirmative relief in a manner which would benefit respondents.

In paragraph three of respondents' Further Answer and Defense and Counterclaim, respondents ask the trial court to place Amy in a foster home close to their own in Florida so that a reconciliation between them and the child might be effected.

Paragraph four asks the trial court to order that custody of Amy be transferred from petitioner to respondents. Both paragraphs ask for affirmative relief for respondents. They are not denials of the petition for termination of parental rights. Thus, the trial court properly considered them as being counterclaims and struck them from respondents' answer.

[3] In their second argument respondents submit that the trial court erred in failing to require adequate equipment and personnel to transcribe the hearing so that it could be preserved in the record on appeal. Respondents allege that the equipment utilized failed to record adequately the entire hearing, and portions actually taped were inaudible. They excepted to three portions of the record where they allege that portions of the testimony of Gayle Ulery and the arguments of counsel and discussion of the court were not recorded.

By motion filed 21 March 1980, respondents asked the trial court to furnish a court reporter or electronic or other mechanical device sufficient to record the trial. G.S. 7A-289.30(a) provides that the adjudicatory hearing on termination is to be reported as provided by G.S. 7A-198 for the reporting of civil trials. The latter statute specifies:

> (a) Court-reporting personnel shall be utilized, if available, for the reporting of civil trials in the district court. If court reporters are not available in any county, electronic or other

> mechanical devices shall be provided by the Administrative Office of the Courts upon request of the chief district judge.

The record of respondents' hearing does not indicate what type of equipment was used to record it. However, the record does state that, "Petitioner, Respondents, and the Guardian Ad Litem stipulated to the use of recording machines in lieu of a court reporter for the taking of evidence." Thus, respondents are estopped from complaining on appeal as to the quality of the recording equipment used. G.S. 7A-198 specifically authorizes the use of electronic recording equipment when court reporters are not available. There is nothing in the record to indicate that court reporters were available, and by their stipulation respondents waive any objection they might have had if they were. We find no error in the manner in which the district court had this hearing recorded.

Ancillary to this argument respondents have made general allegations that they were prejudiced by the loss of specific portions of testimony resulting from gaps in the tape recording. Respondents have failed to show that they were prejudiced in any manner by the loss of this testimony. Respondents have not alleged or shown in the record what the contents of the lost testimony was. Therefore, it is impossible for this Court to determine if they were prejudiced thereby.

[4] Respondents argue that the trial court failed to conduct a satisfactory preliminary hearing in this matter. G.S. 7A-289.29(b) provides:

> If an answer denies any material allegation of the petition, . . . The court shall conduct a special hearing after notice of not less than 10 days nor more than 30 days to the petitioner, the answering respondent(s), and the guardian ad litem for the child, to determine the issues raises by the petition and answer(s). . . .

This statute does not prescribe the exact form the special hearing is to take except that it is to be used to determine the issues raised by the pleadings. Respondents argue in their brief that the trial court held a "brief conference" prior to trial in which a variety of issues were raised and discussed, but none was actually framed or reported for trial. Respondents assert that no written

notice was given by the court or any party ten days in advance of the hearing. Respondents contend that this procedure did not comply with the requirements of G.S. 7A-289.29(b).

The only evidence appearing in the record pertaining to any special preliminary hearing in this matter consists of Judge Crotty's statement in the judgment terminating respondents' parental rights. There he stated:

> It further appearing to the Court that a preliminary hearing was had in accordance with G.S. 7A-586 after due notice to the parties and that the issues for determination at the hearing to terminate parental rights were whether Amy Beth Peirce was a neglected child within the meaning of N.C. G.S. 7A-278(4), and whether the answering parents had failed to provide a reasonable sum for support for their minor child, Amy Beth Peirce, for six months after her placement in the custody of the Burke County Department of Social Services . . .

The trial court's citation of G.S. 7A-586 as the statute requiring preliminary hearing in the matters was obviously erroneous. G.S. 7A-586 deals with the appointments of the guardian ad litem and its duties. This is certainly not harmful error. The only evidence properly before this Court indicates that a preliminary hearing with due notice was conducted in this matter by the trial court. In his judgment Judge Crotty specifically set out the issues which were arrived at in the special hearing to be determined at the subsequent trial. This comports with the rather general statutory requirements of G.S. 7A-289.29(b) for such a special hearing. There is no evidence in the record to indicate that inadequate notice of the special hearing was given. The fact that the hearing was brief and held just prior to the trial does not conflict with the statutory requirements. Therefore, we hold that there was no error in the trial court's conduct of the special hearing.

[5] Respondents made four assignments of error to evidentiary rulings of the trial court. In their second assignment of error respondents claim the trial court erred in failing to sustain their objection to a question asked of witness Gail Whisnant calling for her expert opinion. On redirect examination the guardian ad litem asked Whisnant the following: "In your expert opinion is it indicative of good parenting skills to abandon a child in North

Carolina in March and move to Florida when that child is hospitalized?" Respondents' objection to the question was overruled and the court did not respond to respondents' motion to strike the witness's answer. Respondents contend that Whisnant was not an expert in this area sufficiently qualified to give her opinion, and that she was never properly tendered to the trial court as an expert. Therefore, the admission of her opinion testimony was error. We disagree.

The question of whether a witness is sufficiently qualified to be an expert is one of fact ordinarily to be determined at the discretion of the trial judge. *State v. King*, 287 N.C. 645, 215 S.E. 2d 540 (1975), *death sentence vacated*, 428 U.S. 903, 96 S.Ct. 3208, 49 L.Ed. 2d 1209 (1976); *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972).

> To be an expert the witness need not be a specialist or have a license from an examining board or have had experience with the exact type of subject matter under investigation, nor need he be engaged in any particular profession or other calling. It is enough that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject.

1 Stansbury, N.C. Evidence 2d, § 133 (Brandis rev. 1973), see cases cited therein. Judge Crotty impliedly found Miss Whisnant to be an expert in the area of parenting skills when he overruled respondents' objection to the guardian ad litem's question. The absence of a record finding in favor of the expert's qualifications is no ground for challenging the ruling implicitly made by the judge in allowing the witness to testify. *State v. Shaw*, 293 N.C. 616, 239 S.E. 2d 439 (1977); *Lawrence v. Insurance Co.*, 32 N.C. App. 414, 232 S.E. 2d 462 (1977). There was ample evidence to support Judge Crotty's implied finding that Miss Whisnant was better qualified than the jury to answer questions concerning parenting skills. Miss Whisnant testified that for almost four years she had been employed by petitioner, and that at the time of the trial she had the job status of "Social Worker II". We think that the experience Gail Whisnant received as a social worker for approximately four years gave her qualifications and skills superior to those of the jury to determine whether respondents' actions were indicative of good parenting skills.

Respondents complain that Miss Whisnant was not properly tendered to the court as an expert in the field of parenting skills. The better practice is for the party offering an expert witness formally to tender him or her as an expert witness and to request the court so to find. However, our Supreme Court has held that where the witness's qualifications as an expert are shown, the intent to offer the witness as an expert is clear, and the ruling of the court on the admission of the witness's testimony is expressly stated, the appellate court will consider the validity of the trial court's ruling on the admissibility of expert testimony. *Dickens v. Everhart*, 284 N.C. 95, 199 S.E. 2d 440 (1973). Without reiterating the relevant facts and circumstances surrounding Miss Whisnant's testimony, we think it was proper in this case for us to consider the validity of the trial court's admission of her testimony despite the fact that she was not formally tendered as an expert. This assignment of error is overruled.

[6] Respondent Gayle (Peirce) Ulery was asked on direct examination: "Did the Florida Department of Health and Rehabilitative Services contact you in any way regarding the three children in your home to rehabilitate you or to remove your children for being abused, neglected or dependent?" Petitioner's objection to this question was sustained. Respondents allege as their third assignment of error that the trial court's action in sustaining petitioner's objection to this question was in error. Respondents argue that the witness was competent to answer the question, that the question was not leading, and that the question did not call for a hearsay response by the witness.

No grounds were given by petitioner for its objection to this question. When such a general objection is sustained by the trial court, it may have deemed the evidence to have been inadmissible for any reason. *See* 1 Stansbury, N.C. Evidence, § 27 (Brandis rev. 1973). We think that the trial court properly sustained petitioner's objection to this question and respondents' answer, because it was hearsay. Evidence of nonassertive conduct can be hearsay. 1 Stansbury, N.C. Evidence, § 142 (Brandis rev. 1973). Conduct which was not intended by the actor to assert the existence of a fact nevertheless may tend to show that the actor believed that the fact existed. In this instance, respondent, Gayle (Peirce) Ulery, testified that the Florida Department of Health and Rehabilitative Services did not contact her in any way re-

garding the children remaining in her home, to rehabilitate her, or to remove those children from her home because they were abused, neglected or dependent. By so testifying, the witness implied that the Florida authorities, through the act of their silence or failure to contact her, believed that she was a fit mother for the children remaining in her home. For Mrs. Ulery to testify as to the implied belief of the Florida authorities was patently hearsay. The probative force of this evidence depends in whole upon the competency and credibility of the Florida Department of Health and Rehabilitative Services and not upon that of the witness, Mrs. Ulery. Respondents' assignment of error is overruled.

[7] In their fourth assignment of error respondents assert that the trial court erred by sustaining petitioner's objection to the introduction into evidence of respondents' exhibits numbered 5 and 6. These exhibits consisted of two letters from respondents' counsel to respondents informing them of the progress, or lack thereof, in petitioner's effort to transfer Amy from North Carolina to a foster home in Florida. The purpose of the attempted introduction of these letters was to show that respondents thought their child was going to be sent to Florida during the time period when they allegedly failed to support their child.

Petitioner's objection to the introduction of the letters was based upon the grounds that they constituted hearsay, that they were self-serving statements, that they violated the best evidence rule, and for any other reason.

Respondents assert that this evidence was not hearsay because it was not offered to prove the truth of the contents of the letters, but rather they were offered to establish only the state of mind of the respondents during this time period. We think this reasoning is valid. Whenever the assertion of any person, other than that of the witness, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977). However, if a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay. *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977) *quoting*, 1 Stansbury, N.C. Evidence, § 141 (Brandis rev. 1973). The declaration of one person may be admitted to evidence a state of mind of

another person who heard or read them. *See, Cameron v. Cameron*, 232 N.C. 686, 61 S.E. 2d 913 (1950), 1 Stansbury, N.C. Evidence, § 141 (Brandis rev. 1973). That is precisely what occurred in the case *sub judice*. By introducing these letters, respondents' counsel attempted to show that respondents thought their child was going to be transferred from North Carolina to Florida. Respondents desired to show that they thought that Amy was going to be transferred to Florida as an explanation for why they failed to provide support or visit their child during the period prior to the filing of the termination petition.

For similar reason the best evidence rule was inapplicable in this instance to bar the introduction of these letters which were copies. The best evidence rule like the rule prohibiting the introduction of hearsay applies only when the contents or terms of a document are in question. *State v. Garner*, 34 N.C. App. 498, 238 S.E. 2d 653 (1977), *review denied*, 294 N.C. 184, 241 S.E. 2d 519 (1978) quoting 2 Stansbury, N.C. Evidence, § 191 (Brandis rev. 1973). Since the contents of these letters were not in question and the letters were only collaterally involved in the case, they should have been admitted into evidence even though they were not originals.

Nevertheless, we conclude that even though the letters should have been admitted into evidence, their exclusion was harmless error. Respondent Gayle (Peirce) Ulery testified, without objection, before and after the exclusion of these letters that it was her impression that there was a possibility that the child might be transferred to Florida. "The admission of incompetent testimony will not be held prejudicial when its import is abundantly established by other competent testimony, or the testimony is merely cumulative or corroborative." (Citations omitted.) *Board of Education, v. Lamm*, 276 N.C. 487, 493, 173 S.E. 2d 281, 285 (1970). Therefore, we hold that the exclusion of these letters from evidence in this instance was not such error as to require a new trial.

[8] Respondents' final argument as to alleged error concerning an evidentiary question pertains to the trial court's failure to sustain respondents' objection to the admission of petitioner's exhibits 1, 2, 3 and 4. These exhibits were photographs of Amy taken by petitioner's witness Gail Whisnant on 13 March 1979

while the baby was in the hospital. Respondents contend that the photographs should not have been admitted because they were presented as direct evidence of the child's condition at the time she was taken from respondents, rather than illustrating testimony of her condition.

The current rule in North Carolina is that photographs are not substantive evidence, and they may be used only to illustrate or explain the testimony of a witness. *Barnes v. Highway Commission*, 250 N.C. 378, 109 S.E. 2d 219 (1959); *van Dooren v. van Dooren*, 37 N.C. App. 333, 246 S.E. 2d 20, *review denied*, 295 N.C. 653, 248 S.E. 2d 258 (1978). The photographs in the case *sub judice* were admitted into evidence to show Amy's physical appearance on 13 March 1979. The record reveals that no witness gave testimony as to the condition or physical appearance of the child on that day. Gail Whisnant merely stated that the photographs "fit the physical appearance of Amy on that day." The photographs should not have been admitted over respondents' objection as there was no testimony for them to illustrate.

Even so, respondents have failed to show that they were prejudiced or that the trial court's verdict was influenced by the erroneous admission of the photographs. *See, Board of Education v. Lamm*, supra. In a trial by the court without a jury, the erroneous admission of evidence will not ordinarily be held prejudicial, because it is presumed that the court did not consider the incompetent evidence. *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971); *Anderson v. Insurance Co.*, 266 N.C. 309, 145 S.E. 2d 845 (1966). Hence any error which occurred through the admission of these photographs was harmless.

[9] The judgment terminating parental rights was entered 4 June 1980. On 15 September 1980, an order was filed amending the judgment to state that the best interests of the child would be served by the termination of parental rights. Respondents allege that the trial court was without authority under G.S. 1A-1, Rule 52(b), to so amend its judgment, because no motion to amend was made by a party as required by the rule.

However, G.S. 1A-1, Rule 60 provides:

(a) *Clerical mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from

> oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

In his order amending the intitial judgment Judge Crotty stated:

> That in reciting the Judgment of the Court of 24 ~~March~~ June 1980 the Court directed that the best interests of the minor child would be served by the termination of parental rights after having recited its findings of fact and conclusions of law;
>
> That when the Judgment was prepared and tendered to the undersigned, said language had been inadvertently omitted from said Judgment.

The judgment of the trial court is presumed to be regular and valid. *London v. London*, 271 N.C. 568, 157 S.E. 2d 90 (1967). Judge Crotty's statement suffices to show that the omission of the phrase, "the best interest of the minor child would be served by the termination of parental rights," from the original judgment was an inadvertent clerical oversight. Thus, we think that Judge Crotty's amendment of the judgment to conform it to his original intentions was correct under the authority of G.S. 1A-1, Rule 60(a). The order amending the judgment was entered on 15 September 1980. Subsequently, the appeal was filed and docketed with this Court on 29 September 1980. This comports with the time limitations of the statute.

As a second part of this argument, respondents contend that the trial court failed to consider the best interests of the child in its judgment. Having held that the judgment was properly amended to state that it was the opinion of the trial court that the best interests of the child would be best served by the termination of respondents' parental rights, respondents' argument is rendered specious. Clearly, it is within the discretion of the trial judge to determine whether parental rights should be terminated according to what he believes to be in the child's best interests. Respondents have shown no adequate reason for us to override the decision of the trial judge in this instance.

We have carefully studied respondents' remaining assignments of error, and have determined that they do not involve error sufficiently prejudicial to overturn the judgment of the district court. Accordingly, that judgment is

Affirmed.

Judges MARTIN (Harry C.) and HILL concur.

O. H. COCHRAN AND WIFE, EMMA REID COCHRAN; RAY WILSON FURR AND WIFE, PEGGY MCALISTER FURR; AND MRS. S. L. SAVAGE (WIDOW) v. CITY OF CHARLOTTE

No. 8026SC244

(Filed 18 August 1981)

1. **Aviation § 2— taking by inverse condemnation—frequency of overflights—competency of the evidence**

In an inverse condemnation action, the frequency of overflights subsequent to the alleged date of taking was pertinent to plaintiffs' damages, the difference in value of their property immediately before and after the taking, and it was not error to permit introduction of this evidence.

2. **Aviation § 2— inverse condemnation—witnesses' opinion—material interference with use of property**

In light of (1) evidence that there were no overflights that materially interfered with plaintiffs' use and enjoyment of their properties prior to extension of the runway, (2) absence of evidence to the contrary, and (3) want of a compensable taking absent such direct and immediate interference, admission of plaintiffs' witnesses' opinions as to the value of plaintiffs' properties on the date of alleged taking (1) without overflights and (2) with overflights was not error in an inverse condemnation action.

3. **Aviation § 2; Evidence § 45— inverse condemnation—witnesses' opinion—impact of airport upon surrounding properties**

In an inverse condemnation action, it was not error for the court to permit expert witnesses to offer their opinions regarding the adverse effect on plaintiffs' properties of extension of an airport runway.

4. **Aviation § 2— inverse condemnation—overflights from new runway**

In an inverse condemnation action where an October 1965 taking date was alleged, plaintiffs failed to seek amendment to allege a further taking in June 1979, and plaintiffs failed to object to submission of issues setting a taking date of 11 October 1965, plaintiffs limited the scope of their action to the Oc-

tober 1965 taking, and the trial court properly excluded evidence of overflights from the opening of a new runway in 1979.

5. Aviation § 2— instruction to jury—whether inverse condemnation occurred

An instruction that the jury must be satisfied the flights to and from the airport "were so low and so frequent or regular as to be a direct and immediate invasion of and interference with the use and enjoyment of the plaintiffs' land" that the reasonable market value of plaintiffs' properties was substantially reduced on a certain date, was proper on the issue of whether a taking occurred on that date.

6. Aviation § 2— instruction to jury—damages due to inverse condemnation

In an inverse condemnation case, an instruction that plaintiffs' damages would be the differences in the fair market values of their properties as of a certain date with or without jets and other aircraft flying over the properties regularly and repeatedly was a proper instruction as compensation is the difference in value of their properties immediately before and immediately after the taking of the flight easement.

7. Aviation § 2; Appeal and Error § 49— exclusion of relevant evidence—evidence merely cumulative

Evidence regarding plane crashes in the vicinity of plaintiffs' property was relevant to the issue of damages in an inverse condemnation case; however, exclusion of this evidence was not prejudicial as similar evidence had been admitted and its effect would have been merely cumulative.

8. Aviation § 2; Evidence § 41— witness's opinion on effect of noise—invasion of province of jury

The court did not err in failing to permit "an expert Mechanical and Aerospace Engineer, specializing in the field of Acoustics in Noise and Vibration Control" to express his opinion as to the effect of a taped noise of airplanes on humans as nothing in the record indicated he was better qualified than the jury to draw conclusions from the evidence.

9. Aviation § 2; Evidence § 15.1— admission of party—too remote to have relevance

In an inverse condemnation action, the court properly excluded testimony that an assistant airport manager in 1979 said no one could buy one of the houses near the airport unless he moved it at least one mile from the airport as such testimony was too remote to have relevance to takings which occurred in 1965.

10. Aviation § 2— inverse condemnation—question of taking properly for jury

In an inverse condemnation case where defendant presented evidence tending to show that no substantial diminution in the value of plaintiffs' properties resulted from overflights, the court properly denied plaintiffs' motion for directed verdict on the issue of a taking.

11. Aviation § 2— instruction to jury—interest from date of taking

An instruction to the jury in an inverse condemnation case that, should they find a taking, they were "to add to that amount an award of interest at

the rate of 6% per annum from" the date of the taking to the date of the award was proper.

12. Aviation § 2— inverse condemnation—judgment description of easements acquired—conforming to the verdict

The judgment in an inverse condemnation case properly described the easements acquired in terms of (1) frequency of flights, (2) permissible altitude, (3) type of aircraft, and (4) duration; however, by permitting overflights by "heavy aircraft, both jet powered and propeller driven, commercial and military, *of all types*," it precluded a finding of subsequent taking from introduction of new types of aircraft and must be modified to limit the reference to types of aircraft to those shown by the evidence produced at trial.

APPEAL by plaintiffs and defendant from *Griffin, Judge.* Judgment entered 10 October 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 October 1980.

Plaintiffs seek compensation for alleged inverse condemnation by defendant, as owner and operator of Douglas Municipal Airport (hereinafter Airport), of flight easements in the airspace over plaintiffs' properties. They alleged that defendant, by adoption of an ordinance on 11 October 1965, established at the southerly end of the Airport's North-South runway, an approach zone for landings and take-offs which passed in close proximity to their properties and permitted flights at elevations as low as 105.24 feet (Cochrans), 121.29 feet (Furrs) and 111.25 feet (Savage) above the ground level of these properties. They further alleged that prior to extension of the runway there was no air traffic in the immediate vicinity of their properties, but that thereafter regular and almost continuous flights in close proximity to their properties disrupted their lives and substantially destroyed the market value of their properties. Defendant answered, essentially denying that compensable takings had occurred.

Plaintiffs offered evidence tending to show enactment of the ordinance, extension of the runway, frequency of flights over their properties for various periods between opening of the extension and trial, and effects of these overflights on their persons and properties. Defendants offered evidence tending to show that the noise level from overflights was substantially lower than plaintiffs' evidence indicated, and that the decrease in market value of the properties was substantially less than plaintiffs' evidence indicated.

The jury found that defendant had taken easements over plaintiffs' properties and awarded compensation as follows: Cochrans, $8,100.00; Furrs, $8,600.00; and Savage, $2,200.00. The court entered judgment in accordance with the verdict as to compensation. It further adjudged that defendant was deemed vested, as of 11 October 1965, with perpetual easements over the properties of plaintiffs,[1] and that said easements restrict and encumber said properties

> [b]y permitting the low, regular and frequent flight of heavy aircraft, both jet powered and propeller driven, commercial and military, of all types, (including the resulting noise, jar, vibration, bright lights, smoke and fumes) over said properties in landing on and taking off from [the] North-South Runway . . . at [specified] altitudes.

From the judgment entered, plaintiffs and defendant appeal.

Justice and Parnell, by James F. Justice, for plaintiffs.

Caudle, Underwood and Kinsey, P.A., by William E. Underwood, Jr., for defendant.

WHICHARD, Judge.

SUMMARY OF LAW ON INVERSE CONDEMNATION OF AVIGATION OR FLIGHT EASEMENTS

For over half a century North Carolina statutes have authorized cities and towns to establish airports[2] and to acquire property for that purpose by exercise of the power of eminent domain.[3] Defendant did not seek, by direct exercise of this power, to condemn flight easements over plaintiffs' properties. Plaintiffs allege, however, that defendant has in fact condemned such easements. Plaintiffs by this allegation claim an

> "inverse condemnation," a term often used to designate "a cause of action against a governmental defendant to recover

1. The judgment as set forth in the record on appeal states "over the properties of the *defendants*." (Emphasis supplied.) The obvious intent and the only correct interpretation, however, is to read it as stating "over the properties of the *plaintiffs*."

2. G.S. § 63-2 (1929 Sess. Laws, ch. 87, § 2).

3. G.S. § 63-5 (1929 Sess. Laws, ch. 87, § 5).

> the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency."

Charlotte v. Spratt, 263 N.C. 656, 662-663, 140 S.E. 2d 341, 346 (1965), *quoting from Jacksonville v. Schumann*, 167 So. 2d 95, 98 (Fla. Dist. Ct. App. 1964). " 'Inverse condemnation is a device which forces a governmental body to exercise its power of condemnation, even though it may have no desire to do so.' " *Hoyle v. City of Charlotte*, 276 N.C. 292, 302, 172 S.E. 2d 1, 8 (1970), *quoting from* Bohannon, *Airport Easements*, 54 Va. L. Rev. 355, 373 (1968).

> The advent of the jet age has brought a somewhat novel problem into the area of eminent domain law, that relating to noise from low flights particularly on take-off and landing. The noise problem has been termed "one of the most serious, aggravating problems that we face with regard to the expansion of . . . aviation."

Kettelson, *Inverse Condemnation of Air Easements*, 3 Real Prop., Probate and Trust J. 97 (1968). Affected landowners have sought relief under three legal theories: (1) trespass, (2) nuisance, and (3) compensation for a taking under the power of eminent domain. Of these, eminent domain has emerged as the primary basis of recovery. *Id.*

In *United States v. Causby*, described as "a case of first impression," the United States Supreme Court faced the issue of "whether . . . property was taken within the meaning of the Fifth Amendment by frequent and regular flights of army and navy aircraft over respondents' land at low altitudes." 328 U.S. 256, 258, 90 L.Ed. 1206, 1208, 66 S.Ct. 1062, 1064 (1946). The Court found a compensable taking, stating:

> The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.

Causby, 328 U.S. at 265, 90 L.Ed. at 1212, 66 S.Ct. at 1068. The Court circumscribed the landowner's claim by indicating that

"[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *Causby*, 328 U.S. at 266, 90 L.Ed. at 1213, 66 S.Ct. at 1068. It indicated that, given the requisite interference, compensation is measured in terms of loss to the landowner rather than gain to the sovereign. "Market value fairly determined is the normal measure of the recovery." *Causby*, 328 U.S. at 261, 90 L.Ed. at 1210, 66 S.Ct. at 1066. It further indicated that the taking may be total or partial, permanent or temporary; and that the findings must describe with precision the easement acquired, because that interest vests in the condemning sovereign. *Causby*, 328 U.S. at 267, 90 L.Ed. at 1213, 66 S.Ct. at 1069.

In *Griggs v. County of Allegheny*, the Court held that the responsibility of the federal government under the fifth amendment to pay just compensation for a taking resultant upon repeated low flights over property was equally applicable to a county government under the fourteenth amendment. 369 U.S. 84, 7 L.Ed. 2d 585, 82 S.Ct. 531 (1962). It stated:

> We see no difference between [the county's] responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built. . . . A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned? . . .
>
> The glide path for the . . . runway is as necessary for the operation of the airport as is a surface right of way for operation of a bridge, or as is the land for the operation of a dam. . . . Without the "approach areas," an airport is indeed not operable. [The county] in designating it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough.

Griggs, 369 U.S. at 89-90, 7 L.Ed. 2d at 589, 82 S.Ct. at 534.

In this jurisdiction "[t]he legal doctrine indicated by the term, 'inverse condemnation,' is well established." *Charlotte v. Spratt*, 263 N.C. 656, 663, 140 S.E. 2d 341, 346 (1965).

> Where private property is taken for a public purpose by a municipality or other agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain an action to obtain just compensation therefor.

Charlotte, 263 N.C. at 663, 140 S.E. 2d at 346 (emphasis in original omitted). The North Carolina Supreme Court, in *Hoyle v. City of Charlotte*, applied the doctrine to the taking of avigation or flight easements. 276 N.C. 292, 172 S.E. 2d 1 (1970) (Bobbitt, C.J.).[4] The Court stated that noises and other disturbances from frequent overflights which substantially and adversely affected the reasonable market value of plaintiff's property constituted a taking by defendant of an easement of flight over plaintiff's property. *Hoyle*, 276 N.C. at 303, 172 S.E. 2d at 8. This entitled plaintiff to compensation for the difference in the value of his property immediately before and immediately after the taking. *Hoyle*, 276 N.C. at 307, 172 S.E. 2d at 11. The *date of taking* was thus the appropriate date for determining compensation, and instructions to determine fair market value *at the time of trial* in assessing plaintiff's loss were erroneous. *Hoyle*, 276 N.C. at 307, 172 S.E. 2d at 11.

Finally, when compensation for initial takings of flight easements has been established, further compensable takings occur upon increases in operations or introduction of new aircraft within the easements acquired with consequent decreases in land values significantly beyond the diminutions resulting from the initial takings. *See Avery v. United States*, 330 F. 2d 640 (Ct. Cl. 1964).

DEFENDANT'S APPEAL

[1] The first issue is whether the trial court erred in permitting introduction of evidence as to frequency of flights over and in close proximity to plaintiffs' properties at various times between adoption of the ordinance establishing the approach zone on 11 October 1965 and commencement of trial in August 1979. We hold it did not. The frequency of overflights subsequent to the alleged

4. The Court noted that it had "obliquely" reached the same holding in *Charlotte v. Spratt*, 263 N.C. 656, 140 S.E. 2d 341 (1965).

date of taking was pertinent to plaintiffs' damages, the difference in value of their properties immediately before and immediately after the taking. *Hoyle*, 276 N.C. at 307, 172 S.E. 2d at 11. The fact that actual frequency of overflights could not have been known on the date of the alleged taking is insufficient reason to withhold such information when known at time of trial. This information was the best evidence to indicate the extent of interference with plaintiffs' use and enjoyment of their properties. It was thus highly relevant to a determination of the diminution in value of said properties. By direct condemnation[5] of the easements upon adoption of the ordinance establishing the approach zone, defendant could have litigated the issue of plaintiffs' damages when this evidence was unavailable. Its failure to condemn directly left plaintiffs, if they wished compensation for the diminution in value of their properties, the sole alternative of an action for inverse condemnation. Under these circumstances we find no valid or compelling reasons to foreclose to plaintiffs the opportunity to offer that evidence available at time of trial which most accurately defines the nature and extent of the easements taken and which most graphically depicts the consequent diminution in value of their properties.

[2] The second issue is whether the trial court erred in permitting plaintiffs' appraiser witnesses to render opinions as to the value of plaintiffs' properties on the date of the alleged taking (1) without overflights, and (2) with overflights. Defendant complains that the record indicates the runway had been in service since 1937 and had been used by jet airplanes and other large aircraft prior to its extension in 1965; and contends that by allowing expression of an opinion on the value of plaintiffs' properties in 1965 without overflights, the court gave the jury the inaccurate impression that it was not to consider that overflights of plaintiffs' properties predated the alleged taking in 1965.

A compensable taking of a flight or avigation easement does not occur until overflights constitute a *material* interference with the use and enjoyment of property, such that there is substantial diminution in fair market value. As stated in *Causby*, "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the en-

5. G.S. 63-5.

joyment and use of the land." 328 U.S. at 266, 90 L.Ed. at 1213, 66 S.Ct. at 1068. There was no evidence here indicating that pre-1965 overflights interfered in any material way with plaintiffs' use and enjoyment of their properties. To the contrary, one of the plaintiffs, Mr. Furr, testified,

> As to what, if any, interference we had from the overflight of planes landing and taking off on the north-south runway up to July 2, 1965, during the time the runway was 5000 feet long, before it was reopened following the extension in 1965, *we did not have any overflights.* Now, we could see a plane off at a distance from the airport. We knew the airport was there, but *it never did bother us, not a bit at all.*

(Emphasis supplied.) Another plaintiff, Mr. Cochran, responded to a question as to whether he had noise interference on his property prior to opening of the extended runway in 1965 by stating, "No, sir. Not to bother me."

In light of (1) evidence that there were no overflights that materially interfered with plaintiffs' use and enjoyment of their properties prior to extension of the runway, (2) absence of evidence to the contrary, and (3) want of a compensable taking absent such direct and immediate interference, admission of this evidence was not error. Under the evidence adduced and the applicable law, any effect of pre-1965 overflights on the use, enjoyment, and value of plaintiffs' properties was incidental and not sufficiently material to merit exclusion of the proffered testimony.

[3] The third and final issue is whether the trial court erred in permitting plaintiffs' appraiser witnesses to offer their opinions regarding the adverse effect of extension of the runway on plaintiffs' properties. Defendant contends plaintiffs did not establish a foundation for the witnesses' qualifications to offer opinion evidence in that they did not demonstrate the witnesses' familiarity with the history of the impact of this or any other airport upon surrounding properties during a relevant time frame. We disagree.

Witnesses who are experts in a field may offer opinion testimony regarding matters within the area of their expertise. If a witness is better qualified than the jury to form an opinion from

certain facts, his opinion is admissible. 1 Stansbury, North Carolina Evidence § 132 at 425 (Brandis rev. 1973) (hereinafter cited as Stansbury), and cases cited.

> To be an expert the witness need not be a specialist or have a license from an examining board or have had experience with the exact type of subject matter under investigation, nor need he be engaged in any particular profession or other calling. It is enough that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on a particular subject.
>
> A finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it or the judge abuses his discretion.

1 Stansbury, § 133 at 429-430 (footnotes omitted) and cases cited.

Evidence here supported findings that the witnesses were experts in real estate appraisal. Further, each appraiser related study and experience which gave him special knowledge and expertise regarding the value of property in the airport area. The first appraiser testified,

> I worked up some land comparables in the area to come up with the value of the land. . . .
>
> . . . .
>
> I have made a study of the uses and other characteristics of real estate in the south approach to the north-south runway in connection with the appraisal I have testified about today.

The second appraiser testified, "I have previously appraised damages to properties in the vicinity of Douglas Municipal Airport." The trial court could properly find from this evidence that these witnesses were better qualified than the jurors to render opinions on valuation of the *loci in quo*. *See, generally Redevelopment Comm. v. Panel Co.*, 273 N.C. 368, 159 S.E. 2d 861 (1968). Any lack of familiarity with surrounding properties and the impact thereon of the airport affected the credibility of these witnesses rather than the admissibility of their opinion testimony. Defendant had ample opportunity on cross examination to attack

the witnesses' credibility. The admission of this opinion evidence was neither error nor abuse of discretion.

PLAINTIFFS' APPEAL

[4] The first issue is whether the trial court erred in refusing to permit plaintiffs to show an increase in number of overflights from opening, on or about 19 June 1979, of a *new* north-south runway, parallel to the runway extended in 1965 which is the basis of the claims plaintiffs alleged. Plaintiffs contend that in most inverse condemnation cases the time and extent of the taking can be readily established; but that cases involving avigation easements differ, because an increase in operations or the introduction of a new type of aircraft with louder noise characteristics influences the time and extent of the taking. Plaintiffs suggest that by excluding evidence of overflights from opening of the new runway, the court improperly required them to litigate their damages in a piecemeal fashion. They cite the following from *United States v. Dickinson*: "[W]hen the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken'." 331 U.S. 745, 749, 91 L.Ed. 1789, 1794, 67 S.Ct. 1382, 1385 (1947).

In most inverse condemnation cases this evidence would be admissible on the issue of *when* a taking occurred. This case, however, presents no such issue. Plaintiffs alleged that defendant took perpetual flight easements over their properties *as of October 1965*. At no time did plaintiffs seek to amend their complaint to allege a further taking upon opening of the new runway in June 1979. In view of this failure to seek amendment and of defendant's objection, the court had no basis for allowing the evidence on the theory that the issue of a further taking was being "tried by the express or implied consent of the parties." G.S. 1A-1, Rule 15(b). The issues with regard to takings, submitted without objection, were whether defendant had taken flight easements over plaintiffs' properties *on 11 October 1965*. While plaintiffs were not *required* to resort to piecemeal or premature litigation, they also were not prohibited from doing so. By alleging an October 1965 taking date, failing to seek amendment to allege further takings in June 1979, and failing to object to sub-

mission of issues setting a taking date of 11 October 1965, plaintiffs limited the scope of this action to the October 1965 takings. The court thus properly excluded evidence of overflights from opening of the new runway.[6] This evidence would be appropriate in subsequent actions to establish further compensable takings from opening of the new runway.

[5] The second issue is whether the court erred in instructing that takings by defendant over plaintiffs' properties occurred if the evidence satisfied the jury that the flights to and from the Airport "were so low and so frequent or regular as to be a direct and immediate invasion of and interference with the use and enjoyment of the plaintiffs' land . . . [such] that by reason of said overflights the reasonable market value of plaintiffs' property was substantially reduced on October 11, 1965." Again, there was no issue here as to *when* takings occurred. The instruction related to the first issue submitted, *viz.*, *whether* takings occurred on 11 October 1965. Because a taking of an avigation easement occurs when flights over private land directly and immediately interfere with the enjoyment and use of the land such that its fair market value is substantially impaired, the instruction was not erroneous. *United States v. Causby*, 328 U.S. 256, 90 L.Ed. 1206, 66 S.Ct. 1062 (1946); *Hoyle v. Charlotte*, 276 N.C. 292, 172 S.E. 2d 1 (1970).

[6] The third issue is whether the court erred in instructing that plaintiffs' damages would be the differences in the fair market values of their properties as of 11 October 1965, with and without jets and other aircraft flying over the properties regularly and repeatedly. Compensation in avigation easement cases is to be assessed at time of taking. *Hoyle*, 276 N.C. at 307, 172 S.E. 2d at 11. The court thus correctly instructed that the determination should be made as of 11 October 1965, the date of taking alleged by plaintiffs. The compensation to which landowners are entitled is the difference in value of their properties immediately before and immediately after the taking of the flight easement. *Hoyle*, 276 N.C. at 307, 172 S.E. 2d at 11. Thus, the instruction in this

6. We held with reference to the first issue in defendant's appeal, *supra*, that the trial court properly admitted evidence of overflights of plaintiffs' properties between adoption of the ordinance establishing the approach zone on 11 October 1965 and commencement of trial in August 1979. That evidence did not relate to overflights from opening of the new runway in 1979, however.

regard also accords with applicable law and was not in error. Further, by using the words "regularly and repeatedly," the court adequately characterized the evidence relating to frequency of overflights of plaintiffs' properties between adoption of the ordinance and commencement of trial. The record reveals no request for more specific instructions pursuant to G.S. 1A-1, Rule 51(b); and the instructions, as a whole, were in compliance with the requirements of G.S. 1A-1, Rule 51(a). *Redevelopment Comm. v. Stewart*, 3 N.C. App. 271, 164 S.E. 2d 495 (1968).

[7] The fourth issue is whether the court erred in refusing to permit plaintiff Ray Furr to testify regarding plane crashes in the vicinity of his property subsequent to opening of the runway, and regarding his resultant state of mind. Plaintiffs rely primarily on the following, in arguing the testimony should have been admitted:

> There is, unfortunately, no simple litmus test for discovering in all cases *when an avigation easement is first taken by overflights*. Some annoyance must be borne without compensation. [Citations omitted.] The point when that stage is passed depends on a particularized judgment evaluating such factors as the frequency and level of the flights; the type of planes; the accompanying effects, such as noise *or falling objects*; the uses of the property; the effect on values; the reasonable reactions of the humans below; and the impact upon animals and vegetable life.

Jensen v. United States, 305 F. 2d 444, 447 (Ct. Cl. 1962) (emphasis supplied).

The court in *Jensen* was enumerating factors to be considered to determine *when the taking of an avigation easement first occurs*. The language from *Jensen* thus is not directly applicable. The excluded evidence was relevant to the issue of damages. The only evidence excluded, however, related to three specific plane crashes in the general vicinity of plaintiffs' properties. Exclusion of evidence regarding specific crashes could not have deprived the jurors of the common knowledge that planes crash, that a high percentage of crashes occurs upon take-offs and landings, and that properties in close proximity to runways are thus more vulnerable to crashes than are other properties in the line of flight. Further, and more importantly, the record contains

evidence as to the diminution in fair market value of plaintiffs' properties and as to the inconvenience, fears and general state of mind of plaintiffs consequent upon the overflights. Additional evidence in this regard would have been merely cumulative in effect, and "[t]he exclusion of cumulative evidence will not be deemed prejudicial unless there is some reasonable likelihood that its admission would have changed the result of the trial." *In re Will of Hall*, 252 N.C. 70, 84, 113 S.E. 2d 1, 11 (1960). In view of the record as a whole, it is unlikely that admission of this evidence would have changed the result of the trial. We therefore find no prejudice to plaintiffs in its exclusion.

[8] The fifth issue is whether the court erred in refusing to admit opinion testimony from plaintiffs' witness, stipulated to be "an expert Mechanical and Aerospace Engineer, specializing in the field of Acoustics in Noise and Vibration Control," as to the effect of the noise impact from overflights on humans in the vicinity of plaintiffs' properties. The witness described his expertise as being "in the area of vibrations and acoustics, which is the science of sound, noise and its effects, ways of generating sound, sound radiation, the response of structures to sound, how to control and predict noise, how to measure noise." Nothing in the record established any special expertise on his part in the field of the effects of noise on humans, and he was neither stipulated nor found to be an expert in that area. The witness testified to sound level readings he had made of aircraft flying over plaintiffs' properties, he explained his measurements, and he played tapes producing the sound of some of these aircraft. Nothing in the record indicates that the witness was better qualified than the jury to draw conclusions from this evidence as to the effects of the noise on humans in the vicinity of the properties affected. The jurors would appear as qualified as the witness to listen to tapes of noise from aircraft and to appraise the plausible effects of that noise on vicinal persons. "[O]pinion [testimony] is inadmissible whenever the witness can relate the facts so that the jury will have an adequate understanding of them and the jury is as well qualified as the witness to draw inferences and conclusions from the facts." 1 Stansbury, § 124 at 388, and cases cited. We find no error in the exclusion of this testimony.

[9] The sixth issue is whether the court erred in refusing to admit testimony from a witness for plaintiffs that in the spring of

1979, at a meeting for the purpose of opening bids on houses defendant was selling which were located near the Airport, the assistant airport manager stated that no one could buy one of the houses unless he moved it at least a mile away from the Airport, because defendant had bought the houses once and did not want to buy them again. Plaintiffs contend the testimony should have been admitted under an exception to the hearsay rule for admissions of a party. The apparent ground is that the statement constituted an admission that defendant had to buy all houses within one mile of the Airport.

Evidence which has no logical tendency to prove a fact in issue is inadmissible. 1 Stansbury, § 77 at 234. This evidence had no logical tendency to prove either a taking from plaintiffs or their resultant damages. It related to a policy of defendant extant in the spring of 1979, a time too remote to have relevance to takings which occurred in October 1965. "[T]he general requirements of relevancy and materiality apply to admissions. Thus a statement by a party is not competent against him unless it can reasonably be interpreted as an acknowledgment of the existence of a relevant fact." 2 Stansbury, § 167 at 9-10 (footnotes omitted) and cases cited. The evidence was properly excluded.

[10] The seventh issue is whether the court erred in denying plaintiffs' motion for a directed verdict on the issue of a taking. Defendant offered evidence tending to show that no substantial diminution in the value of plaintiffs' properties resulted from the overflights. One witness testified, "I don't think the landing and taking off of aircraft in this approach . . . has had any effect at all on the fair market value of properties in the approach." This evidence was sufficient to take the case to the jury on the taking issue, and rendered directed verdict improper. *See Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 638, 272 S.E. 2d 357 (1980), and authorities cited. Further, because the jury found for plaintiffs on this issue, any error in denial of the motion was harmless. *See Key v. Welding Supplies*, 273 N.C. 609, 611, 160 S.E. 2d 687, 689 (1968); *Prevette v. Bullis*, 12 N.C. App. 552, 183 S.E. 2d 810 (1971).

[11] The eighth issue relates to the following portion of the charge, to which plaintiffs assign error:

> [A] plaintiff is entitled to just compensation, if you find him or her entitled to compensation at all, and I instruct you that should you find all or any of the plaintiffs to be entitled to compensation as of October 11, 1965, you are to add to that amount an award of interest at the rate of 6% per annum from that time to the date of your award.

Two elements of damages are legally cognizable in condemnation cases: (1) compensation for the diminution in fair market value of the property taken; and (2) compensation for any delay in paying for the property once it is taken. *DeBruhl v. Highway Commission*, 247 N.C. 671, 102 S.E. 2d 229 (1958).

> Ordinarily, the legal rate of interest, where the condemned property is located, upon the original sum fixed as compensation for the fair market value of the property on the taking date, is considered a fair measure of the amount to compensate the owner for the delay in paying the award, so as to make just compensation.

DeBruhl, 247 N.C. at 687, 102 S.E. 2d at 241. The legal rate of interest is six percent. G.S. 24-1. The court instructed in the language of *DeBruhl* and of G.S. 24-1. Its instruction was an adequate declaration of the law as to this aspect of the case. "If a more thorough or more detailed charge was desired it was incumbent upon plaintiff[s] to request it." *Prevette*, 12 N.C. App. at 554, 183 S.E. 2d at 811.

[12] The ninth and final issue relates to the judgment description of the easements acquired. Plaintiffs tendered judgments describing these easements as follows:

> a perpetual right and easement for the flight of a similar number of all types of aircraft, including piston and jet passenger aircraft, with similar noise characteristics to those operating at said airport on October 11, 1965 . . . which said right and easement shall be limited to no more than 62 passenger aircraft of all types, of which no more than 18 shall be pure jet during a 24 hour period.

The court declined to enter these judgments, and entered instead a judgment containing the following provision:

> IT IS FURTHER ADJUDGED AND DECREED that the defendant . . . be deemed to be vested as of October 11, 1965, with

perpetual easements over the properties of the [plaintiffs][7] and that said easements restrict and encumber said properties as follows:

1. By permitting the low, regular and frequent flight of heavy aircraft, both jet powered and propeller driven, commercial and military, of all types, (including the resulting noise, jar, vibration, bright lights, smoke and fumes) over said properties in landing on and taking off from that North-South Runway at Douglas Municipal Airport known as Runway 18L-36R at the following altitudes:

Cochran — From 225.99 feet and upwards above the ground;

Furr — From 175 feet and upwards above the ground;

Savage — From 232.49 feet and upwards above the ground.

Because the interest taken vests in the governmental entity, judgments in avigation easement cases should describe the easement acquired in terms of (1) frequency of flight, (2) permissible altitude, (3) type of aircraft, and (4) duration. *Causby*, 328 U.S. at 267-268, 90 L.Ed. at 1213-1214, 66 S.Ct. at 1069. As to frequency of flights, the judgment here described the permissible overflights as "regular and frequent." As to permissible altitude, the judgment set forth the distance above plaintiffs' properties at which flights would be allowed. As to type of aircraft, the judgment stated that "heavy aircraft, both jet powered and propeller driven, commercial and military, of all types" would be allowed. As to duration, the judgment described the easements as "perpetual."

Plaintiffs do not complain of, nor is there impropriety in, the entries as to permissible altitude and duration. Plaintiffs do contend, however, that the court erred with reference to frequency of flights and types of aircraft. For reasons set forth below, we decline to disturb the judgment as to the frequency of flights. The court did err with reference to types of aircraft, however; and the

7. See footnote 1, *supra*.

case is thus remanded with instructions for modification of the judgment.

"It is thoroughly settled in law that in all cases tried by a jury the judgment must be supported by and conform to the verdict in all substantial particulars." *Russell v. Hamlett*, 261 N.C. 603, 605, 135 S.E. 2d 547, 549 (1964). The description of the easements thus must conform to the verdict, and the verdict necessarily derived from the evidence presented and the instructions to the jury.

The judgments tendered by plaintiffs would have limited the frequency of flights in the easements acquired to a designated number by passenger aircraft, restricted still further as to jet aircraft. Plaintiffs' evidence, though, indicated that, commencing in July 1965 and continuing to the time of trial, their properties were subjected to regular and repeated low overflights by both jet and propeller driven aircraft taking off from and landing on the runway. It further indicated a steady increase in the number of overflights from 1965 until the time of trial. In defendant's appeal, *supra*, we held this evidence properly admitted. Defendant's evidence also indicated regular and repeated overflights, differing significantly from plaintiffs' only with respect to the increase in their number. The evidence thus was not restricted to the number of overflights on 11 October 1965, nor was the jury instructed to consider only that number. Consequently, the judgment would not conform to the verdict if it restricted the easements acquired to the number of overflights as of that date. The court therefore properly rejected the judgments tendered by plaintiffs.

The description of the frequency of flights permitted as "regular and frequent" comported with the evidence and the instructions on the basis of which the jury reached its verdict. It was thus proper and adequate, though admittedly but necessarily vague in terms of future interpretations of the extent of the easements acquired. If the frequency of flights over the easements acquired increases beyond that reasonably contemplated upon determination of the extent of the takings here, thereby causing substantial further diminution in the values of plaintiffs' properties, subsequent takings will have occurred entitling plaintiffs to additional compensation. *See Avery v. United States*, 330 F. 2d

640 (Ct. Cl. 1964). Future triers of fact must then resolve the extent of the easements taken in each instance, with reference to the record here and to the evidence adduced at the trials of those actions. In view of the evidence and instructions from which the verdict here derived, the judgment in this case, however voluminous or specific, could not obviate that necessity.

The judgment permitted overflights by "heavy aircraft, both jet powered and propeller driven, commercial and military, *of all types*." (Emphasis supplied.) Because it precludes a finding of subsequent takings from introduction of new types of aircraft, this provision is improper. If additional compensation is precluded for substantial further diminution in or total destruction of the values of plaintiffs' properties from introduction within the easements here acquired of overflights by new types of aircraft with different noise and vibration propensities, plaintiffs would be denied their constitutional entitlement to just compensation. *Avery*, 330 F. 2d 640. Consequently, the judgment must be modified to limit the reference to types of aircraft to those shown by the evidence adduced at trial and thus within the contemplation of the jury in reaching its verdict. As with the frequency of flights question, upon assertion of subsequent takings by introduction of new types of aircraft within the easements acquired, future triers of fact must resolve the extent of the easements taken in each instance, with reference to both the record here and the evidence adduced at the trials of those actions.

RESULT

No error in the trial. Remanded with instructions for modification of judgment.

Chief Judge MORRIS and Judge HEDRICK concur.

Worthington v. Bynum and Cogdell v. Bynum

BEN F. WORTHINGTON v. WILLIAM ANDERSON BYNUM

AND

JESSE COGDELL, JR. v. WILLIAM ANDERSON BYNUM

No. 803SC1021

(Filed 18 August 1981)

Damages § 16; Rules of Civil Procedure § 59— verdict set aside for excessive damages—error

In an action to recover damages for personal injuries sustained in an automobile accident, the trial court erred in setting aside as excessive a verdict for one plaintiff of $175,000 and a verdict for the second plaintiff of $150,000, since evidence of the amount of medical expenses, the severity and diversity of the injuries, the permanent disabilities, and the extensive evidence of pain and suffering of each plaintiff was sufficient to show that the verdicts were clearly within the maximum limit of a reasonable range; there was no evidence to support or suggest that the verdicts were given under the influence of either passion or prejudice, that the jury disregarded the trial court's instructions, or that the verdicts were contrary to law. Furthermore, the trial court erred in concluding that evidence of plaintiffs' sex life before and after the accident, evidence that one plaintiff lost teeth as a result of the accident, and evidence that one plaintiff had visual problems and psychiatric problems as a result of the accident were "improper things" that "kept coming up" and that the jury completely disregarded his instructions with respect to such evidence.

Judge WHICHARD concurring.

Judge MARTIN (Robert M.) dissenting.

APPEAL by plaintiffs from *Peel, Judge*. Judgment entered 27 May 1980 in Superior Court, PITT County.[1] Heard in the Court of Appeals 29 April 1981.

Plaintiffs filed separate complaints seeking to recover compensatory and punitive damages for personal injuries which they allegedly received when defendant's automobile negligently collided with the vehicle in which the plaintiffs were passengers on 23 May 1977. The two cases were consolidated for trial, and the defendant stipulated negligence. The damage trial began on 12 May 1980. After all the evidence was presented, the trial court granted defendant's motions for directed verdict on the punitive

1. By consent, judgment was entered out of session in the Lenoir County Superior Court.

damages claims in both cases. After receiving the court's instructions on compensatory damages, the jury deliberated for approximately thirty minutes and then returned verdicts for plaintiff Worthington in the amount of $175,000.00 and for plaintiff Cogdell in the amount of $150,000.00. Defendant moved to set aside the verdicts and for a new trial under Rule 59 of the Rules of Civil Procedure. The plaintiffs moved for a judgment in accordance with the jury verdicts. The trial court entered an order setting aside the verdicts and awarding a new trial.

James, Hite, Cavendish & Blount, by M. E. Cavendish and Marvin Blount, Jr., for plaintiff appellants.

Gaylord, Singleton & McNally, by Louis W. Gaylord, Jr., for defendant appellee.

BECTON, Judge.

Plaintiffs phrased their sole question for review thusly: "Did the trial court err in granting defendant's motion to set aside the jury's verdicts in favor of each plaintiff and in failing to enter order denying said motion and in refusing to enter judgment in favor of each plaintiff in accordance with the jury's verdicts?" On the facts of this case, the answer to the question is "yes."

We are not unmindful of the long line of cases suggesting that few, if any, legal principles are more firmly entrenched in the law of this State than the one which vests a trial judge with the power and authority to set aside a verdict when to do so is necessary for the proper administration of justice. Indeed, the cases upholding this principle are legion.

> We have held repeatedly since 1820 in case after case, and no principle is more fully settled in this jurisdiction, that the action of the trial judge in setting aside a verdict in his discretion is not subject to review on appeal in the absence of an abuse of discretion.

Goldston v. Chambers, 272 N.C. 53, 59, 157 S.E. 2d 676, 680 (1967). One of those many cases is *Settee v. Electric Ry.*, 170 N.C. 365, 367, 86 S.E. 1050, 1050-51 (1915) in which the Supreme Court said:

> The discretion of the judge to set aside a verdict is not an arbitrary one to be exercised capriciously or according to

> his absolute will, but reasonably and with the object solely of [preventing] what may seem to him an inequitable result. The power is an inherent one, and is regarded as essential to the proper administration of the law. It is not limited to cases where the verdict is found to be against the weight of the evidence, but extends to many others. While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited.

In determining whether a trial judge abused his discretion in setting aside a jury award of damages, we are not only guided by case law, but we are also guided by the will of the people through the legislature. G.S. 1A-1, Rule 59(a) sets out nine grounds upon which the trial court may grant a new trial. Two of the grounds are applicable to this case, and we set them out below:

> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
>
> (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law; . . .[2]

We recognize two separate and distinct standards "for determining what is a sufficient abuse of discretion to warrant a reversal of a trial court's ruling on a Rule 59 motion." *Howard v. Mercer*, 36 N.C. App. 67, 69, 243 S.E. 2d 168, 170, *disc. rev. granted*, 295 N.C. 466, 246 S.E. 2d 9 (1978) (petition withdrawn on motion by defendant). First, when a motion for a new trial has been denied, deference to the trial court and deference to the jury's determination combine and compel us to a restricted review of the trial court's ruling. However, under the second standard, when a motion for a new trial is granted, deference to the trial court's determination is counterbalanced by deference to

2. Prior to the enactment and effective date of the North Carolina Rules of Civil Procedure, G.S. Chapter 1A (effective 1 January 1970), trial judges could set aside a verdict and grant a new trial "upon exceptions, or for insufficient evidence, or for excessive damages" under the then existing law, G.S. 1-207.

the jury's determination of matters of fact. This court in *Howard* approved the following guidelines which were first set forth in *Taylor v. Washington Terminal Co.*, 409 F. 2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835, 24 L.Ed. 2d 85, 90 S.Ct. 93 (1969)[3] for determining when an abuse of discretion has occurred:

> Where the jury finds a particular quantum of damages and the trial judge refuses to disturb its finding on the motion for a new trial, the two factors [the jury's determination and the judge's determination] press in the same direction, and an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial. However, where, as here, the jury as primary fact-finder fixes a quantum, and the trial judge indicates his view that it is excessive by granting a remittitur, the two factors oppose each other. The judge's unique opportunity to consider the evidence in the living courtroom context must be respected. But against his judgment we must consider that the agency to whom the Constitution allocates the fact-finding function in the first instance—the jury—has evaluated the facts differently.
>
> . . .
>
> [W]e will reverse the grant of a new trial for excessive verdict only where the quantum of damages found by the jury was *clearly* within "the maximum limit of a reasonable range." 409 F. 2d at 147-149.

Howard v. Mercer, 36 N.C. App. at 70-71, 243 S.E. 2d at 171.

Our determination that the quantum of damages found by the jury was clearly within the "maximum limit of a reasonable range" is based on the following facts.

At the time of the accident, Worthington was sixty years of age and in good health; he had a life expectancy of 17.61 years. He was out of work a total of twenty-five and one-seventh weeks as a result of the accident, but did not sustain any loss of income. Worthington's major injuries can be summarized as follows:

3. The *Taylor* case was decided under Federal Rule 59 which is similar to North Carolina Rule 59.

1. Broken back—The left first lumbar vertebrae was fractured, and a spinal fusion was performed on 6 June 1977. Worthington was held motionless in a frame until approximately one month after the accident. At that time, he was placed in a body cast for approximately two months. Thereafter, Worthington was required to wear a Jewitt brace, a padded metal device that immobilizes the spine.
2. Cerebral concussion.
3. Contusions and abrasions of the left knee—The knee became infected, but was treated and required no surgery.
4. Tardy ulnar nerve palsy—As a likely result of either the accident or the lengthy bed rest required of him, Worthington developed tardy ulnar nerve palsy of the left hand, which initially caused severe loss of grip and loss of sensation in the left hand. Ultimately, Worthington's left elbow was operated on to relieve pressure on the nerve.

As a result of the accident, Worthington had to learn to walk again. He presently has difficulty doing some of the maintenance, repair work, and gardening around his house which he did prior to the accident, and he has to rest at work because he gets tired and hurts occasionally. As a result of the accident, Worthington has suffered a 30% permanent partial disability of his back; a 7% permanent partial disability of the left knee; and a 5% permanent partial disability of his left hand, including a permanently crooked little finger. Worthington's medical bills were $9,893.45. He was hospitalized for the periods of 23 May 1977 through 25 June 1977, 26 August 1977 through 1 September 1977, and 10 January 1978 through 12 January 1978.

At the time of the accident, Cogdell was forty-two years old and in good health. As a result of the accident, Cogdell was out of work twenty-four and one-seventh weeks but sustained no loss of income.

Cogdell suffered the following major injuries:

1. Broken neck—Cogdell suffered from a broken bone in his neck which required an operation involving a spinal fusion which included the removal of the disk between the C-6 and C-7 vertebrae. The disc was replaced with a bone from

Cogdell's hip. In order to immobilize Cogdell's neck, thirty to forty-pound metal tongs were placed in his skull. As a result of the spinal fusion and subsequent treatment, the vertebrae in his neck returned to the proper place and, although there was no damage to the spinal cord, there was injury to the nerve roots in Cogdell's neck. The metal tongs which were placed in Cogdell's head remained there for approximately one and one-half months during which time Cogdell could not move.

2. Neurological deficit of arm and hand—After the accident Cogdell suffered from a weak grip in both hands (at times his hands were numb) and from weak triceps in both arms.

As a result of the accident, Cogdell had to learn to walk again. He also suffered a 20% permanent partial disability of his whole person, including 20% permanent partial disability of his neck and 10% permanent partial disability of his right arm. The healed fusion in Cogdell's neck does not allow complete, normal neck movement. Indeed, his neck injury may cause degenerative arthritis. Even now, Cogdell experiences pain in his neck when he works, and the fingers on his right hand are always numb and have a tendency toward cramping. Further, as a result of the bone graft taken from his right hip, Cogdell suffered pain and discomfort in that area. Cogdell's medical bills totalled $7,740.65.

Applying the considerations outlined in *Howard* to the plaintiffs' cases, we hold that both verdicts were clearly within the maximum limits of a reasonable range. That, however, does not end the inquiry. When a motion is made under Rule 59(a)(6) an appellate court must also determine if the verdict was given under the influence of passion or prejudice. Defendant's argument on this issue is bottomed upon the trial court's statement just prior to entering the Order on 27 May 1980:

> Gentlemen, I don't intend to catalog, but time and again I tried to instruct that jury to disregard things that seemed to me to be improper that kept coming up. It was an extremely volatile situation. I am satisfied that that jury completely disregarded many of my instructions. I don't understand that in view of all the evidence. It is my opinion that the verdict in each of the cases was excessive and I am, therefore, order-

ing Mr. Gaylord to prepare an order preparing [sic] a new trial as to each plaintiff.[4]

Defendant argues that the "improper" things that "kept coming up" were plaintiffs' efforts to get before the jury (1) evidence of their sex lives before and after the accident; (2) evidence that plaintiff Worthington lost teeth as a result of the accident; and (3) evidence suggesting that plaintiff Worthington had visual problems and psychiatric problems as a result of the accident. We have a two-fold response to defendant's argument: (1) the proffered evidence was admissible; and (2) the trial judge's feeling that the jury completely disregarded many of his instructions is not enough, standing alone, to support a conclusion that the verdicts were given under the influence of passion or prejudice.

We now address the allegedly improper things that kept coming up and demonstrate that the evidence which defendant now challenges was admitted (without objection), or was admissible, or was non-prejudicial.

a) Sexual Function

In instructing the jury the trial court said: "The question of sexual function was mentioned a few times . . . I instruct you that there is no evidence before you to this effect, and you are not to consider anything relating to sexual function [in arriving at your verdict] . . . ." First, we find from our review of the record, testimony relating to "sexual function" to which neither an objection was lodged nor a motion to strike made. For example, Dr. Timmons testified on direct examination: "I referred [plaintiff Cogdell] to Dr. Walsh and Dr. Gavigan because Jesse was complaining then of abnormal sex function." On cross-examination Dr. Timmons testified: "I also stated that the only problems are some persisting weakness in his right hand . . . and the diminution of

4. We note that the trial court expressed a different sentiment immediately after the jury had been excused and following defendant's motion to set the verdict aside on 16 May 1980. The trial court said: "I will tell you what I am going to do. I am going to consider this and am going to make a ruling at 2:00 p.m. Tuesday. I don't know whether you all would care to be present or not. I am going to be in Kinston and I will decide on this at that time. And if you all would be in touch with me it may be that you all would care to be heard further.

I would like to think about it a little bit. *That is what juries are for, but it is a fairly sizeable verdict. But, again, well within what they asked.*" (Emphasis added.)

sex function." Clearly, then, there was evidence before the jury relating to sexual function. Second, the record does not fully support defendant's assertion that the trial court felt that evidence of sexual function was incompetent. Indeed, all of record pages 170 and 171 deal with the following question: "Mr. Worthington, will you describe your sex life with your wife *prior* to May 23, 1977?" The trial court on seven different occasions overruled the objections. It was only because Mr. Worthington on each separate occasion sought to tell about his sex life *after* the accident that the trial court then sustained the objection and struck the answer as being unresponsive. Finally, after the third unrecorded conference at the bench on this matter, the Court said:

> Ladies and gentlemen, these last three questions and answers relating to sexual relations, the motions to strike are allowed and I instruct you that you are not to consider the questions and answers to those.

We cannot say, in view of the trial court's initial decision to admit responsive answers to properly phrased questions relating to sexual function and in view of the subsequently admitted testimony relating to sexual function, that the trial court was convinced that evidence of sexual function was incompetent.

Third, and more important, evidence of loss of "sexual function" is clearly relevant and should have been considered by the jury. We reject outright defendant's argument that expert medical testimony, that plaintiff's "sex life, or some part thereof, could or might have been damaged on account of the injuries received by him in the collision complained of," is needed.

b) Teeth

In instructing the jury, the trial court said: "[T]here has been some reference made to Mr. Worthington's teeth. I instruct you that you are not to consider such evidence in arriving at your verdict in this case." During the trial, however, the following transpired:

Q. [To Mrs. Worthington] You say two of his teeth were out?

A. That is right.

. . .

> COURT: I believe I am going to—there is no evidence that they were not out before. I am going to sustain that. Don't consider that about the teeth.
>
> [Mrs. Worthington continued]: I saw my husband that morning before he went to work and before he went to work he had all of his teeth. That night when I saw him I saw that two of his teeth were out and two were hanging.

While the trial court properly sustained an earlier objection that had initially been overruled because the question assumed a fact not in evidence, Mrs. Worthington later gave competent and relevant testimony about Mr. Worthington's loss of teeth. Consequently, the court should not have instructed the jury to disregard the references made to teeth. Defendant's argument that this evidence was improper because plaintiff Worthington did not mention loss of teeth in his Complaint or his Answers to Interrogatories is rejected.

c) Visual Problems and Psychiatric Problems

According to defendant, "[t]he jury could well have thought—and probably did—that since Dr. Sudor [an optometrist] testified regarding the sight of Mr. Worthington that some damage must have been sustained by Mr. Worthington with respect to his sight—else why would the doctor be testifying." We find no evidence in the record to suggest that defendant is doing anything more than speculating with respect to this argument. The trial court's instructions which follow are dispositive of this issue:

> Likewise, there was evidence relating to Mr. Worthington's eyes. That evidence is admitted, as it may go to the reasonableness of the medical expenses incurred when Dr. Bowman referred him to Dr. White. But it has been stipulated, you will recall, members of the jury, that there were no damages to his eyesight as a result of the collision. So, of course, you would not consider any such evidence as damages in this case.

We find nothing in the record to suggest that the jury disregarded this instruction. And even if the jury disregarded this instruction, we do not see how such evidence could have increased the

verdicts which we have already found to be within the maximum limits of a reasonable range.

Defendant suggests that the jury may have been inflamed because plaintiff Worthington testified that "Dr. Bowman, during the time I was under his care, referred me to Dr. Robert Sammons." Although no objection or motion to strike the testimony was made at trial, defendant argues on appeal that "[t]hough no mention was made of Dr. Sammons' medical specialty, Greenville (N.C.) is a relatively small city and it is reasonable to assume that many persons serving on the jury knew Dr. Sammons to be a psychiatrist." We refuse to indulge in such speculation or surmise. Even if it is not a sufficient answer to say that defendant did not object to the testimony, it is clearly a sufficient answer to say that similar, and by defendant's obvious standard, more damaging testimony was given by Dr. Bowman himself. Dr. Bowman referred plaintiff Worthington to five different specialists and testified: "I also referred Mr. Worthington to Dr. Phillip Nelson *whose specialty is psychiatry.*" (Emphasis added.)

We find no evidence to support or suggest (a) that the verdicts in these cases were given under the influence of either passion or prejudice; (b) that the jury disregarded the trial court's instructions; or (c) that the verdicts were contrary to law. Indeed, the amount of medical expenses, the severity and diversity of the injuries, the permanent disabilities, and the extensive evidence of pain and suffering of each plaintiff impel us to conclude that the verdicts were clearly within the maximum limit of a reasonable range. The fact that the jury considered its verdict for approximately thirty minutes simply shows the degree of unanimity as to the verdicts and adds emphasis to the fact that the jury unanimously believed that both Worthington and Cogdell had sustained substantial damages.

The trial court abused its discretion in setting aside the verdict for Cogdell in the amount of $150,000.00 and in setting aside the verdict for Worthington in the amount of $175,000.00. Therefore, we reverse and remand to the trial court for entry of judgment in accordance with the verdicts.

Reversed and remanded.

Judge WHICHARD concurs.

Judge MARTIN (Robert M.) dissents.

Judge WHICHARD concurring.

In my view, *Howard v. Mercer* controls the decision here. 36 N.C. App. 67, 243 S.E. 2d 168, *disc. rev. granted*, 295 N.C. 466, 246 S.E. 2d 9 (1978) (petition withdrawn on motion of defendant). That case establishes, as the standard for granting or denying a motion to set aside a verdict and order a new trial on the issue of damages, the test of whether the verdict was within the maximum limit of a reasonable range. If the verdict was within the maximum limit of a reasonable range, the motion should be denied. If not, the motion should be granted. Considering the evidence in the record here, I find the verdicts clearly within the maximum limit of a reasonable range; and consequently I vote with Judge Becton to reverse the judgment below, and I concur in his able opinion except as hereinafter stated.

I write this concurring opinion solely to state my view that under *Howard* it is no longer accurate to express the result of appellate review of trial court action on motions to set aside verdicts and grant new trials on the issue of damages in terms of the presence or absence of abuse of discretion. *Howard* establishes the legal test set forth above for determination of such motions. The trial court thus, in determining the motion, is not exercising its discretion. Rather, it is applying a legal standard. The appellate court is reviewing, not for abuse of discretion, but for error in applying the legal standard.

Judge (now Justice) Britt recognized this in *Howard* by stating the issue as "whether the trial court *erred* in setting aside the verdict" and the holding as "that the court *erred*." 36 N.C. App. at 68, 243 S.E. 2d at 169 (emphasis supplied). I believe that terminology is proper; and that to continue to speak in these cases in terms of abuse of discretion improperly perpetuates ancient language which the holding in *Howard* renders inapplicable and inaccurate.

MARTIN (Robert M.), Judge, dissenting.

In his order granting defendant's post-trial motions by setting aside the verdicts and granting defendants new trials on the

issues of damages, Judge Peel recited the grounds for defendants' motions as follows:

(1) That there was a manifest disregard by the jury of the instructions of the Court,

(2) Excessive damages appearing to have been given in each case under the influence of passion or prejudice, and

(3) The insufficiency of the evidence to justify the verdict in each case and that said verdict in each case is contrary to law.

While a trial court is not required to specify grounds for its order allowing a *litigant's* motion to set aside the verdict and grant a new trial, *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 176 S.E. 2d 851 (1970), Judge Peel adopted the reasons stated in defendants' motions as his own by reciting them in his order and by giving no further or contrary reason for granting defendants' motions. The three grounds stated are listed in N.C. Gen. Stat. § 1A-1, Rule 59(a) in subsections (5), (6) and (7), respectively. Unless an abuse of discretion is shown, any *one* of these reasons justified Judge Peel's action in allowing defendants' motions.

As Chief Justice Sharp stated in *Britt v. Allen*, 291 N.C. 630, 635, 231 S.E. 2d 607, 611-612 (1977),

> The adoption of the Rules of Civil Procedure (N.C. Sess. Laws 1967, ch. 954, § 4, effective 1 January 1970; N.C. Sess. Laws 1969, ch. 803, § 1) and the repeal of G.S. 1-207 (1953) did not diminish the trial judge's traditional discretionary authority to set aside a verdict. The procedure for exercising this traditional power was merely formalized in G.S. 1A-1, Rule 59, which lists eight specific grounds and one "catch-all" ground on which the judge may grant a new trial.

Chief Justice Sharp also stated, " '[t]he power of the court to set aside the verdict as a matter of discretion has always been inherent, and is necessary to the proper administration of justice.' *Bird v. Bradburn*, 131 N.C. 488, 489, 42 S.E. 936 (1902)." *Id.* at 634, 231 S.E. 2d at 611. This Court has held many times that a motion to set aside the verdict and for a new trial on grounds other than some question of law or legal inference which the judge decides is addressed to the sound discretion of the trial judge, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal.

Land Co. v. Wood, 40 N.C. App. 133, 252 S.E. 2d 546 (1979); *Hoover v. Kleer-Pak*, 33 N.C. App. 661, 236 S.E. 2d 386, *rev. denied*, 293 N.C. 360, 237 S.E. 2d 848 (1977); *Board of Transportation v. Harvey*, 28 N.C. App. 327, 220 S.E. 2d 815 (1976); *Glen Forest Corp. v. Bensch, supra.*

The record discloses that after hearing evidence for five days, the jury determined the issues in thirty minutes. In my opinion the record does not show that the able and conscientious trial judge abused his discretion.

I vote to affirm.

STATE OF NORTH CAROLINA v. CHARLES MELVIN

No. 8015SC1134

(Filed 18 August 1981)

1. **Searches and Seizures § 15— standing of passenger to object to search and seizure of items from automobile**

An individual's Fourth Amendment rights are personal rights and standing is based upon the "legitimate expectations of privacy" of the individual asserting that right in the place which has allegedly been unreasonably invaded; therefore, defendant failed to establish standing to object to seizure of items from an automobile in which he was only a passenger and in which he asserted neither an ownership nor a possessory interest.

2. **Criminal Law § 84; Searches and Seizures § 47— police officers outside territorial jurisdiction—evidence from search of automobile admissible**

Evidence obtained in the search and seizure of an automobile in which defendant was a passenger properly was admitted even though the arresting police officers were outside their territorial jurisdiction as prescribed by G.S. 15A-402 and defendant's arrest may have been unlawful.

3. **Arrest and Bail § 4— territory in which officer may arrest—arrest after "immediate and continuous" flight from territory**

There was authority to arrest defendant under the "immediate and continuous" flight exception of G.S. 15A-402(b) where defendant was suspected of recently completing an armed robbery, was arrested 1.67 miles outside an officer's territory, and where the arresting officer had followed the automobile in which defendant was traveling inside his territory but waited until he received assistance before stopping the automobile.

4. Criminal Law § 66.9— photographic identification—no suggestiveness

There was no suggestiveness in a photographic identification procedure whereby a witness chose defendant's photograph from a series of seven photographs and none of the photographs contained names or other distinguishing markings.

5. Criminal Law § 66.16— independent origin of in-court identification

Where a witness looked directly at defendant's face and had an opportunity to observe defendant from a distance of one and one-half to two feet under good lighting conditions for a period of from two to three minutes, this is evidence from which the trial court could find the witness's in-court identification was not tainted by any pretrial identification procedures.

6. Robbery § 1.1— armed robbery—sufficiency of the evidence

In a prosecution for armed robbery, evidence was sufficient to be submitted to the jury on the element of endangering or threatening the life of a person where the evidence showed the witness was robbed while defendant held a pistol in his hand.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 2 July 1980 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 1 April 1981.

Defendant was charged in two separate bills of indictment with the crime of armed robbery. Both of the alleged offenses occurred on 21 January 1980, one within a short time of the other. Defendant was accused of the armed robbery of $300.11 from Russell Worley the attendant at the Best Western Burlington Inn in Burlington, and with the armed robbery of $44.82 from Eugenia O. Leonard the attendant of the Seven-Eleven Store on East Harden Street in Graham. Defendant pleaded not guilty to both of these charges. Following the trial of the consolidated cases, a jury found defendant guilty of both counts of armed robbery. The trial court consolidated the cases for judgment and sentenced defendant to a term of 40 years imprisonment. Defendant appealed from this judgment.

Attorney General Edmisten, by Special Deputy Attorney General David S. Crump, for the State.

Thomas V. Aldridge, Jr., for the defendant appellant.

MORRIS, Chief Judge.

Before trial defendant made a motion to suppress certain items of evidence. These items consisted of money, a coat, a cap,

and a pair of gloves, all of which had been seized by the police from the automobile in which defendant had been a passenger at the time of his arrest for the offenses charged. The basis for the motion to suppress was defendant's contention that the items were illegally seized by the police following the unreasonable search of the vehicle in which he was riding.

At the hearing on this motion and other pretrial motions, evidence was presented with respect to the circumstances surrounding the alleged unreasonable search and seizure. In summary, this evidence tended to show that on the evening of 21 January 1980 Police Officer A. L. Adams, a patrolman with the Burlington Police Department, was on duty in the vicinity of the robberies. Officer Adams was on the alert for a gray or silver Ford Thunderbird, having received a radio message that a car fitting that description was believed to be the getaway car used by the robber of the Best Western Motel. He spotted a Thunderbird similar to the description of the robber's vehicle and pursued it down I-85 toward Durham leaving the city limits of Burlington. Officer Adams was joined in this chase by another patrol car which was driven by Officer Shields also of the Burlington police. With his blue light and siren, Officer Adams signaled for the Thunderbird to stop. The Thunderbird did not come to an immediate stop, but continued travelling down the interstate for approximately three-fourths of a mile. Before it was stopped, near the intersection of I-85 and highway 54, the Thunderbird pulled over to the right side of the road and weaved in and out of some posts. When it finally stopped, the door on the passenger's side of the Thunderbird flew open, and an occupant of the vehicle tossed a quantity of money out of the car. The police approached the car and ordered the occupants to get out. The evidence indicated that defendant was not the driver of the automobile, but he was the passenger.

The police searched the car and surrounding area. They collected and seized a quantity of paper money and coins which were scattered along the shoulder of the road adjacent to the Thunderbird. They discovered a brown zipper bag inside the car containing more money, and they observed more money scattered about the car in the area of the front seat and floorboard. A green parka, maroon cap, and pair of brown gloves were observed in the rear of the car.

After considering all of the evidence, the trial court entered its order denying defendant's motion to suppress the evidence seized from the Thunderbird, and the evidence was used at trial to identify defendant as the perpetrator of the armed robberies.

Defendant's initial assignment of error is addressed to the trial court's denial of his motion to suppress this evidence. He argues that the police procured this evidence by means of an unreasonable search and seizure in violation of his Fourth Amendment rights, and submits that his constitutional rights were violated because the search of the car was conducted without a search warrant and in the absence of probable cause and exigent circumstances. Additionally, he argues that the search and seizure was illegal because the arresting officers were not within their territorial jurisdiction as set forth in G.S. 15A-402. Therefore, defendant maintains they lacked the authority to stop the vehicle and make the search and seizure.

[1] We need not address defendant's argument as to whether his Fourth Amendment rights were violated by this search and seizure for he does not possess the standing required to assert it. In its order denying defendant's motion to suppress, the trial court concluded as a matter of law that, "defendant, Charles Melvin, has shown no standing to object to a search of said vehicle." We are in agreement with this result.

In *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed. 2d 387 (1978), *rehearing denied*, 439 U.S. 1122, 99 S.Ct. 1035, 59 L.Ed. 2d 83 (1979), the Supreme Court of the United States held that a defendant who was aggrieved by a search and seizure through the introduction of damaging evidence secured by a search of an automobile in which the defendant was only a passenger and not the owner or driver of the car nor the owner of the items seized therefrom did not suffer violation of his Fourth Amendment rights. This determination was based on the premise that the defendant did not have the right to assert contentions based on the violation of constitutional rights which were not his own, but were the rights of the owner or possessor of the automobile. Put in other words, an individual's Fourth Amendment rights are personal rights which may not be vicariously asserted by another. In so holding the Court explained:

> "[R]ights assured by the Fourth Amendment are personal rights, [which] . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." *Simmons v. United States*, 390 U.S., at 389, 19 L.Ed. 2d 1247, 88 S.Ct. 967.

Rakas v. Illinois, supra, at 138, 99 S.Ct. at 428, 58 L.Ed. 2d at 398, *quoting, Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968).

Standing to claim the protection of the Fourth Amendment guaranty of freedom from unreasonable governmental searches and seizures is based upon the "legitimate expectations of privacy" of the individual asserting that right in the place which has allegedly been unreasonably invaded. *Rakas v. Illinois*, supra, *citing, Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). There exists a close relationship between the concept of "standing" and that of "legitimate expectations of privacy." Indeed they seemed to have been merged into each other. In *Rakas*, the Supreme Court shifted its analysis away from the label "standing" to focus more upon whether an individual has a "legitimate expectation of privacy" in the location where incriminating evidence is discovered and seized. *Accord, State v. Jones*, 299 N.C. 298, 261 S.E. 2d 860 (1980); *State v. LeDuc*, 48 N.C. App. 227, 269 S.E. 2d 220 (1980). Thus, it is this analysis we must apply when examining charges of unreasonable search and seizure to determine in each case whether the individual asserting these constitutional rights actually possesses them.

A defendant has the burden of demonstrating the infringement of his Fourth Amendment rights in these cases. *State v. Greenwood*, 301 N.C. 705, 273 S.E. 2d 438 (1981); *State v. Jones*, supra; *State v. Taylor*, 298 N.C. 405, 259 S.E. 2d 502 (1979). In order for the defendant to establish that he has standing, he must demonstrate that he had a "legitimate expectation of privacy" in the premises searched. *Rakas v. Illinois*, supra; *accord, State v. Jones*, supra; *State v. Alford*, 298 N.C. 465, 259 S.E. 2d 242 (1979). In the case *sub judice* defendant, who is claiming an infringement of his Fourth Amendment rights, has asserted neither an ownership nor a possessory interest in the automobile which was searched. The evidence presented at the pretrial hearing

established that defendant did not own the car in which he was riding and he was not driving the car, but he was merely a passenger therein when he was arrested. Nor did the items of evidence seized by the police from the car belong to defendant. Defendant testified on cross-examination:

> I wasn't the operator of the car; I was the passenger. The green parka, the maroon cap, and the brown gloves are not mine. . . . Arland Braswell owned the green parka, maroon cap and brown gloves. I do not claim ownership to a brown zipper bag. . . . The owner of the car is Arland Braswell.

Rakas v. Illinois, supra, involved a factual situation practically identical to that in the case *sub judice*. In *Rakas* evidence consisting of a rifle and shells was admitted in the trial of two defendants despite the codefendants' motion to suppress its admission. The rifle and shells were discovered during the police search of an automobile in which the codefendants had been passengers. The rifle was found under the car seat and the shells in the glove compartment. In examining the facts of *Rakas* to determine whether the defendants had shown an expectation of privacy in the areas where the evidence was located, Justice Rehnquist reasoned:

> They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. And as we have previously indicated, the fact that they were "legitimately on [the] premises" in the sense that they were in the car with the permission of its owner is not determinative of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched. It is unnecessary for us to decide here whether the same expectations of privacy are warranted in a car as would be justified in a dwelling place in analogous circumstances. We have on numerous occasions pointed out that cars are not to be treated identically with houses or apartments for Fourth Amendment purposes. See *United States v. Chadwick*, 433 US, at 12, 53 LEd 2d 538, 97 SCt 2476; *United States v. Martinez-Fuerte*, 428 US 543, 561, 49 LEd 2d 1116, 96 SCt 3074 (1976); *Cardwell v. Lewis*, 417 US 583, 590, 41 LEd 2d 325, 94 SCt 2464, 69 Ohio Ops 2d 69 (1974) (Plurality opinion). But here petitioners' claim is one which would fail even in an

> analogous situation in a dwelling place, since they made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers. Like the trunk of automobile, these are areas in which a passenger quo passenger simply would not normally have a legitimate expectation of privacy. Supra, at 142, 58 LEd 2d, at 400.

Rakas v. Illinois, 439 U.S. at 148-49, 99 S.Ct. at 433, 58 L.Ed. 2d at 404. The Justice's statement is equally applicable to the case before us. By simply showing that he was a passenger in the car from which the police seized the incriminating evidence, defendant did not demonstrate that he possessed any "legitimate expectation of privacy" in the area searched. The disputed search and seizure did not infringe upon any interest of defendant which the Fourth Amendment was designed to protect. Since defendant has failed to show that his own Fourth Amendment rights were violated by this search and seizure, he cannot gain standing by asserting the constitutional rights of others. Accordingly, this assignment of error is overruled.

[2] As a further ground for his argument that the trial court erred by denying his motion to suppress, defendant alleges that the arresting police officers were not within their territorial jurisdiction as established in G.S. 15A-402 and, therefore, were without authority to stop and search the vehicle in which the incriminating items were found.

As stated by Judge Hedrick in *State v. Mangum*, 30 N.C. App. 311, 226 S.E. 2d 852 (1976):

> The technical violation of this statute [G.S. 15A-402] . . . does not necessarily require exclusion of evidence obtained in the search incident to the arrest. The Fourth Amendment only protects the defendant against *unreasonable* searches. (Citations omitted.) "An unlawful arrest may not be equated, as defendant seeks to do, to an unlawful search and seizure." *State v. Eubanks*, 283 N.C. 556, 560, 196 S.E. 2d 706, 709 (1973).

30 N.C. App. at 314, 226 S.E. 2d at 854. In *Mangum* the Court held that the arresting officer did not have the authority to make

the arrest under G.S. 15A-402. However, the Court held that the items of evidence seized pursuant to that arrest were admissible.

[3] In this instance defendant is asserting that the items of evidence seized from the car in which he was a passenger should have been excluded at trial because his arrest was illegal. For the same reasons stated in *Mangum* we think defendant's assertion is invalid. The evidence obtained in this search and seizure need not be excluded even if the arrest out of which the search and seizure arose was unauthorized under G.S. 15A-402. Moreover, we do not think that defendant's arrest was illegal. The arresting officers were authorized by the statute to pursue and arrest.

G.S. 15A-402 provides:

> (c) City Officers, Outside Territory.—Law-enforcement officers of cities may arrest persons at any point which is one mile or less from the nearest point in the boundary of such city.
>
> (d) County and City Officers, Immediate and Continuous Flight.—Law-enforcement officers of cities and counties may arrest persons outside the territory described in subsections (b) and (c) when the person arrested has committed a criminal offense within that territory, for which the officer could have arrested the person within that territory, and the arrest is made during such person's immediate and continuous flight from that territory.

Glenn Wilson who was employed by the Alamance County Tax Department testified that he estimated that the distance from the closest point in the boundary of the Burlington city limits to the point where Officer Adams halted the car in which defendant was riding at the intersection of I-85 and highway 54 was 1.67 miles. This was outside the one-mile limit prescribed by G.S. 15A-402(c). However, the facts surrounding this arrest bring it within the exception for "immediate and continuous flight" of G.S. 15A-402(d). The evidence reveals that Officer Adams was informed of the armed robbery of the Burlington Best Western, and he was aware that the perpetrator of this crime was driving or riding in a silver Thunderbird. Officer Adams spotted the car which fit that description in which defendant was riding and he followed it down I-85. Officer Adams testified that he did not im-

mediately stop the Thunderbird as it moved further away from the corporate limits of Burlington so that another police officer could enter I-85 to give him assistance in stopping the Thunderbird. This was prudent police procedure in light of the fact that the occupant of the Thunderbird was suspected of just having committed an armed robbery. As soon as Officer Shields of the Graham Police joined Officer Adams at the intersection of I-85 and highway 87, Officer Adams attempted to stop the Thunderbird by using his siren and blue light. The Thunderbird continued to travel approximately three-fourths of a mile before stopping. We think that these facts demonstrate that the police suspected that the occupants of this silver Thunderbird had just completed an armed robbery within the City of Burlington and they stopped the Thunderbird to arrest its occupants while they were in "immediate and continuous" flight from Burlington. Furthermore, we think that the facts amply show that the police had probable cause to arrest defendant. A description of an automobile may furnish reasonable grounds for detaining and arresting a criminal suspect. *See State v. Jacobs*, 277 N.C. 151, 176 S.E. 2d 744 (1970); *State v. White*, 25 N.C. App. 398, 213 S.E. 2d 394, *cert. denied*, 287 N.C. 468, 215 S.E. 2d 628 (not reported in S.E. 2d) (1975). Therefore, under G.S. 15A-402(d) the arresting officers did have authority to arrest defendant even though the car in which he was riding was stopped over one mile from the Burlington city limits.

Defendant's second assignment of error is to the trial court's denial of his pretrial motion to suppress evidence of both the out-of-court and in-court identification of defendant as the perpetrator of these armed robberies by state's witness Eugenia Leonard.

[4] The evidence introduced at the pretrial hearing with regard to Mrs. Leonard's involvement in one of the armed robberies with which defendant was charged and of her subsequent identification of defendant tended to show the following: On 21 January 1980 Mrs. Leonard was on duty at the Seven-Eleven Store in Graham where she was employed. The lighting conditions in the store were good. At approximately 10:30 or 10:45 p.m. defendant entered the store and stood directly across the counter from her. He was about one and one-half to two feet from her. Defendant had a handgun and he demanded that Mrs. Leonard give him all of the money she had. This she did. Defendant took the money

and left the store. He was inside the store for a total of from two to three minutes.

Following the robbery and at the behest of the police, Mrs. Leonard participated in a pretrial photographic identification procedure which was designed to identify the person who had robbed her. Soon after the robbery Officer Perdue of the Graham Police Department exhibited to Mrs. Leonard a series of seven photographs, one of which was of defendant. All of these photographs were in color and none of them had visible distinguishing names or markings on them. Mrs. Leonard selected defendant's photograph from this series and identified him as the man who had robbed her. Mrs. Leonard subsequently testified at defendant's trial describing how she had chosen defendant's picture out of the series in the photographic identification test.

The trial court, by order entered on 18 June 1980, denied defendant's motion to suppress evidence of Mrs. Leonard's out-of-court photographic identification and in-court identification of defendant. Defendant submits that the court's order was erroneous, because the pretrial photographic identification procedure used by the Graham Police was impermissibly suggestive and, thus, gave rise to a substantial likelihood of irreparable misidentification of the defendant as perpetrator of the robbery in the subsequent in-court identification. Defendant alleges that the photographic identification procedure was impermissibly suggestive because the series of photographs used in the out-of-court procedure was prejudicial to such an extent as to leave Mrs. Leonard little choice but to pick the photograph of defendant.

The introduction at trial of testimony concerning an out-of-court photographic identification should be excluded when the procedure used was impermissibly suggestive. *State v. Long*, 293 N.C. 286, 237 S.E. 2d 728 (1977); *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972). We must review the totality of the circumstances as found by the trial court surrounding the photographic identification procedure to determine whether that procedure used by the Graham Police was impermissibly suggestive. The trial court made these findings of fact in this regard:

> [T]hat on the morning of January 21, 1980, an officer of the Graham Police Department exhibited to Mrs. Leonard a series of some seven photographs, one of which was a

photograph of the defendant; that these photographs had been selected by Officer Perdue from photographs available to him in his office; that a polaroid photograph of the defendant was made by the officer on the evening of January 21 or 22, 1980, and that photograph was combined with the others; that all of said photographs were in color and that none of them contained names or other markings thereon which would in any way distinguish the photograph of the defendant from the other photographs; that Officer Perdue did not make any suggestion to Mrs. Leonard when the photographs were given to her or tell her anything about the photographs; that Mrs. Leonard selected from these photographs the photograph of the defendant; that she looked at the defendant on several occasions while he was in her presence on the 21st of January.

They are supported by the evidence. Neither the evidence nor the findings based thereon contains anything to indicate that the collection of photographs or the manner in which they were exhibited to Mrs. Leonard was unduly suggestive or contributed to her selection of defendant's photograph. For cases where similar procedures were approved see: *State v. Dunlap*, 298 N.C. 725, 259 S.E. 2d 893 (1979); *State v. Davis*, 294 N.C. 397, 241 S.E. 2d 656 (1978); *State v. Long*, supra; *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977). We find the procedure was not impermissibly suggestive.

It follows, therefore, that the witness's in-court identification of defendant was not tainted thereby. However, in this instance even if the pretrial photographic identification of defendant had been impermissibly suggestive, Mrs. Leonard's in-court identification of defendant would have been properly admitted into evidence.

[5] An in-court identification is competent when it is independent in origin from an improper out-of-court identification procedure. *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977); *State v. Gray*, supra. The trial court made the following findings of fact with regard to Mrs. Leonard's confrontation with defendant during the crime:

[L]ighting conditions in the store were good; that at about 10:30 to 10:45 p.m. the defendant entered the store where Mrs. Leonard was working and stood directly across the

counter from her, a distance of about one and a half or two feet; that he carried with him a bag which had a zipper; that she looked at his face; that the defendant had a gun and that he demanded of Mrs. Leonard that she give him all of the money; that he was on that occasion wearing a dark jacket which had a hood with fur around it; that she looked directly at his face; that the defendant was in the store for not more than two or three minutes; . . .

These findings show that Mrs. Leonard had ample opportunity to view defendant at the time of the crime and that she was alert and observant of defendant. The findings support the court's conclusion that, "based on clear and convincing evidence any in-court identification of the defendant made by Mrs. Leonard is of independent origin based solely upon what she saw at the time of the robbery on January 21, 1980, and is not tainted by any pretrial identification procedure." Its order is accordingly affirmed. We note that defendant did not object to the witness's identification testimony at trial.

[6] Defendant's fourth assignment of error is directed to the court's denial of his motions to dismiss the charges against him. Defendant submits, with regard to the charge of armed robbery of Mrs. Leonard, that the evidence did not reveal that at any time during the commission of the robbery defendant ever actually threatened the victim with harm nor did the evidence reveal that he endangered the victim by the use or threatened use of a firearm. Therefore, defendant contends the evidence presented was not sufficient to warrant its submission to the jury and to support a verdict of guilty of armed robbery. *See, State v. Barrow*, 292 N.C. 227, 232 S.E. 2d 693 (1977). The question for the court is whether, upon consideration of all the evidence in the light most favorable to the state, there was reasonable basis upon which the jury might find that the offense charged in the indictment had been committed and that the defendant was the perpetrator of the armed robbery. *See, State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976).

In defendant's case the evidence was sufficient to raise more than a suspicion or conjecture that defendant was the perpetrator of the armed robbery with which he was charged. The elements of the offense of robbery with a firearm are delineated in G.S. 14-87 as follows:

> Any person or persons who, *having in possession* or with the use or threatened use of any firearm or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business. . . . (Emphasis added.)

See also, State v. May, 292 N.C. 644, 235 S.E. 2d 178, *rehearing denied*, 293 N.C. 261, 247 S.E. 2d 234, *cert. denied*, 434 U.S. 928, 98 S.Ct. 414, 54 L.Ed. 2d 288 (1977). As noted, defendant contends that there was no proof that he actually threatened or endangered the life of Mrs. Leonard with a firearm or dangerous weapon. The Supreme Court has interpreted this particular element of the crime as meaning whether the victim's life "was in fact endangered or threatened by defendant's possession, use or threatened use of a dangerous weapon, not whether the victim was scared or in fear of his or her life." *State v. Joyner*, 295 N.C. 55, 63, 243 S.E. 2d 367, 373 (1978); *State v. Evans* and *State v. Britton* and *State v. Hairston*, 279 N.C. 447, 183 S.E. 2d 540 (1971); *State v. Moore*, 279 N.C. 455, 183 S.E. 2d 546 (1971).

The evidence presented by the state in the instant case was sufficient to show that during the course of the robbery, there was a threatened use of firearm which endangered or threatened Mrs. Leonard's life. Mrs. Leonard testified:

> When he first came into the store he asked me for a dollar's worth of change . . . When I looked up and opened the cash register drawer to give him the dollar's worth of change, he told me that he wanted the money that I had in the store. I looked down and he had his hand over a gun on the counter . . . . All I know is that it was a small black gun.

The evidence shows that defendant robbed Mrs. Leonard while holding a pistol in his hand. We think this is ample proof of this element of the crime. There was sufficient evidence of each of the elements of armed robbery and that defendant was the perpetrator of the armed robbery to justify the trial court's denial of his motion to dismiss.

Defendant's remaining assignment of error with regard to whether the trial court's denial of defendant's motion to sever the two offenses with which defendant was charged for trial is

deemed abandoned, because it was not brought forward and argued in his brief. Rule 28(a), N.C. Rules of Appellate Procedure. We find that defendant received a fair trial free from error.

No error.

Judges MARTIN (Harry C.) and HILL concur.

EDDIE JONES, PETITIONER v. JULIE McDOWELL AND TRENDA JUNAE McDOWELL, BY AND THROUGH HER GUARDIAN AD LITEM ERNESTINE McDOWELL, RESPONDENTS v. DR. SARAH MORROW, SECRETARY OF HUMAN RESOURCES AND DR. RONALD H. LEVINE, STATE REGISTRAR OF VITAL STATISTICS, THIRD-PARTY PETITIONERS

No. 8014SC1000

(Filed 18 August 1981)

1. **Bastards § 13; Constitutional Law § 23— liberties protected by the Due Process Clause—retaining surname of illegitimate child**

The mother of an illegitimate child has a Fourteenth Amendment due process interest in retaining the surname given her child at birth and the father, seeking to legitimize the child, the Secretary of Human Resources, and the State Registrar of Vital Statistics can be enjoined from changing the child's name to the father's by issuing a new birth certificate upon legitimation.

2. **Bastards § 13; Constitutional Law §§ 20, 23— requiring surname of illegitimate child be changed to that of father—denies mother equal protection**

Petitioners failed to meet the burden of advancing an "exceedingly persuasive justification" in requiring the surname of an illegitimate child to be changed to that of the father in legitimation proceedings pursuant to G.S. 49-10 and 49-13, and such a requirement denies the mother of an illegitimate child the equal protection of the laws and a protected liberty interest without due process of law.

APPEAL by respondents from *Jolly, Judge.* Judgment entered 25 June 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 28 April 1981.

Petitioner brought this special proceeding pursuant to G.S. 49-10 to legitimate the child Trenda Junae McDowell (Trenda), born out of wedlock on 19 May 1977 to respondent Julie McDowell with whom the child resides. The respondent, Julie McDowell, answered, admitting that Jones was the father of

Trenda, seeking to join the Secretary of Human Resources and the Registrar of Vital Statistics as parties to the proceeding, seeking to enjoin these third-party petitioners from changing Trenda's surname to Jones by issuing a new birth certificate pursuant to G.S. 49-13, and alleging that the statutory scheme, G.S. 49-10 and 49-13, which would cause Trenda's surname to be changed to the surname of the father following legitimation, violates respondent's rights under the constitutions of North Carolina and the United States. The Secretary of Human Resources and the Registrar of Vital Statistics were joined as third-party petitioners and petitioners moved for summary judgment.

In granting petitioner's motion for summary judgment, the trial judge concluded as follows:

> 1. Petitioner is the father of the minor child, Trenda Junae McDowell, and the child should be legitimated pursuant to N.C. Gen. Stat. § 49-10.
>
> 2. North Carolina's statutory scheme for legitimation, N.C. Gen. Stat. §§ 49-10 and 49-13, is constitutional and therefore the North Carolina Secretary of Human Resources and the Registrar of Vital Statistics of the State of North Carolina should not be enjoined from changing the surname of the minor child to the surname of the father.
>
> 3. Respondents do not have a property interest in the name of the child.
>
> 4. The changing of the surname of the child to the surname of the father does not deprive respondents of property without due process of law under the Constitutions of the United States and North Carolina.
>
> 5. Any procedural and substantive due process rights of respondents and the minor child are protected under Gen. Stat. §§ 49-10 and 49-13.
>
> 6. Gen. Stat. §§ 49-10 and 49-13 are not arbitrary or capricious.
>
> 7. Gen. Stat. §§ 49-10 and 49-13 do not violate the equal protection clauses of the Constitutions of the United States and North Carolina.

8. Gen. Stat. §§ 49-10 and 49-13 are not special legislation and do not violate the Constitution of North Carolina, Article II, § 24.

Respondents have appealed.

North Central Legal Assistance Program, by Charles A. Bentley, Jr., for petitioner-appellee.

Attorney General Rufus L. Edmisten, by Associate Attorney Sarah C. Young, for third-party petitioners-appellees.

Thompson & McAllaster, by Sharon A. Thompson, for respondents-appellants.

WELLS, Judge.

[1] The initial question to be determined in this appeal is whether respondents have a constitutionally protected liberty or privacy interest in retaining Trenda Junae McDowell's surname, of which they cannot be deprived without due process of law.[1] The Supreme Court of the United States has held in a number of recent cases that the "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Smith v. Organization of Foster Families,* 431 U.S. 816, 842, 97 S.Ct. 2094, 2108, 53 L.Ed. 2d 14, 33 (1977), *quoting with approval Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed. 2d 52 (1974). *See also Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973); *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965). We hold that this constitutional protection of certain matters of family life extends to the interest of the mother of an illegitimate child in retaining the surname given the child at birth. *See Jech v. Burch,* 466 F. Supp. 714 (D. Haw. 1979); *Secretary of the Commonwealth v. City Clerk of*

1. Although respondents contend otherwise, the question of respondents' interest in *choosing* Trenda's name was not before the trial court and is not before us. Trenda's surname was established at birth under pertinent provisions of Chapter 130 of the General Statutes dealing with birth registration. Our opinion is confined to the narrow and specific question of respondents' interest in *retaining* Trenda's surname in the context of a legitimation proceeding under the applicable provisions of Chapter 49 of the General Statutes.

Lowell, 373 Mass. 178, 366 N.E. 2d 717 (1977); *Roe v. Conn*, 417 F. Supp. 769 (M.D. Ala. 1976); *see also dissenting opinion in Rice v. Dept. of Health & Rehabilitative*, 386 So. 2d 844 (1980). The petitioners contend that the statutory scheme of notice and hearing under G.S. 49-10 and 49-13 satisfies the dictates of the due process clause. Mere notice and hearing, however, is not enough to supply due process if the statutory scheme also predetermines the outcome, as is the case here. It is arbitrary action by the State, however accomplished, that the due process clause guards against.

[2] The second question for our determination, therefore, is whether the statutory scheme for changing an illegitimate child's surname upon legitimation pursuant to the provisions of G.S. 49-10 and 49-13 utilizes a gender based classification repugnant to respondent's rights under the Fourteenth Amendment to equal protection of laws.[2] The question of the validity of gender based statutory classification has been before the United States

2. § 49-10. Legitimation.—The putative father of any child born out of wedlock, whether such father resides in North Carolina or not, may apply by a verified written petition, filed in a special proceeding in the superior court of the county in which the putative father resides or in the superior court of the county in which the child resides, praying that such child be declared legitimate. The mother, if living, and the child shall be necessary parties to the proceeding, and the full names of the father, mother and the child shall be set out in the petition. A certified copy of a certificate of birth of the child shall be attached to the petition. If it appears to the court that the petitioner is the father of the child, the court may thereupon declare and pronounce the child legitimated; and the full names of the father, mother and the child shall be set out in the court order decreeing legitimation of the child. The clerk of the court shall record the order in the record of orders and decrees and it shall be cross-indexed under the name of the father as plaintiff or petitioner on the plaintiff's side of the cross-index, and under the name of the mother, and the child as defendants or respondents on the defendants' side of the cross-index.

§ 49-13. New birth certificate on legitimation.—A certified copy of the order of legitimation when issued under the provisions of G.S. 49-10 shall be sent by the clerk of the superior court under his official seal to the State Registrar of Vital Statistics who shall then make the new birth certificate bearing the full name of the father, and change the surname of the child so that it will be the same as the surname of the father.

When a child is legitimated under the provisions of G.S. 49-12, the State Registrar of Vital Statistics shall make a new birth certificate bearing the full name of the father upon presentation of a certified copy of the certificate of marriage of the father and mother and change the surname of the child so that it will be the same as the surname of the father.

Supreme Court in a number of recent cases. We will begin our review of those cases with *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 2d 225 (1971). In *Reed*, the Court ruled invalid a provision of the Idaho Probate Code that males must be preferred to females where persons of equal entitlement seek to administer an estate. We quote in pertinent part from the opinion of the Court:

> In such situations, § 15-314 provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.
>
> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted.] The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." [Citation omitted.]

404 U.S. at 75-76, 92 S.Ct. at 253-54, 30 L.Ed. 2d at 229. The Court concluded that no such legitimate objective was advanced by the disputed provisions of the Idaho Probate Code.

In *Stanley v. Illinois*, *supra*, the Court considered, in light of the fact that Illinois law allows married fathers whether divorced, widowed or separated, and mothers even if unwed, the benefit of the presumption that they are fit to raise their children, the validity of certain provisions of Illinois law which created a presumption that the father of an illegitimate child is unfit for parenthood. The Court concluded there was both a due process violation in that unwed fathers were denied a hearing on the question of fitness and an equal protection violation in that unwed fathers were treated differently from other parents whose custody of their children was challenged by the State.

In *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed. 2d 397 (1976), the Court considered the question of whether an Oklahoma

statutory scheme prohibiting the sale of 3.2 percent beer to males under the age of twenty-one and females under the age of eighteen constituted a gender based discrimination that denied to males 18-20 years of age the equal protection of the laws. For a summary of pertinent decisions in point and for a restatement of the rule enunciated in *Reed, supra*, we quote in pertinent part from the Court's opinion:

> Analysis may appropriately begin with the reminder that Reed emphasized that statutory classifications that distinguish between males and females are "subject to scrutiny under the Equal Protection Clause." 404 US, at 75, 30 L Ed 2d 225, 92 S Ct 251. To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Thus, in Reed, the objectives of "reducing the workload on probate courts," . . . and "avoiding intrafamily controversy," . . . were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of administrators of intestate decedents' estates. Decisions following Reed similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications. *See, e.g., Stanley v. Illinois*, 405 US 645, 656, 31 L Ed 2d 551, 92 S Ct 1208 (1972); *Frontiero v. Richardson*, 411 US 677, 690, 36 L Ed 2d 583, 93 S Ct 1764 (1973); *cf. Schlesinger v. Ballard*, 419 US 498, 506-507, 42 L Ed 2d 610, 95 S Ct 572 (1975). And only two Terms ago, *Stanton v. Stanton*, 421 US 7, 43 L Ed 2d 688, 95 S Ct 1373 (1975), expressly stating that *Reed v. Reed* was "controlling," 421 US, at 13, 43 L Ed 2d 688, 95 S Ct 1373, held that Reed required invalidation of a Utah differential age-of-majority statute, notwithstanding the statute's coincidence with and furtherance of the State's purpose of fostering "old notions" of role typing and preparing boys for their expected performance in the economic and political worlds. 421 US, at 14-15, 43 L Ed 2d 688, 95 S Ct 1373.
>
> *Reed v. Reed* has also provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. Hence, "archaic and overbroad" generalizations,

Schlesinger v. Ballard, supra, at 508, 42 L Ed 2d 610, 95 S Ct 572, concerning the financial position of servicewomen, *Frontiero v. Richardson*, supra, at 689 n 23, 36 L Ed 2d 583, 93 S Ct 1764, and working women, *Weinberger v. Wiesenfeld*, 420 US 636, 643, 43 L Ed 2d 514, 95 S Ct 1225 (1975), could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. *Stanton v. Stanton*, supra; *Taylor v. Louisiana*, 419 US 522, 535 n 17, 42 L Ed 2d 690, 95 S Ct 692 (1975). In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact. *See, e.g., Stanley v. Illinois*, supra, at 658, 31 L Ed 2d 551, 92 S Ct 1208, *cf. Cleveland Bd. of Ed. v. LaFleur*, 414 US 632, 650, 39 L Ed 2d 52, 94 S Ct 791, 67 Ohio Ops 2d 126 (1974).

In this case, too, "Reed, we feel, is controlling . . . ." *Stanton v. Stanton*, supra, at 13, 43 L Ed 2d 688, 95 S Ct 1373. We turn then to the question whether, under Reed, the difference between males and females with respect to the purchase of 3.2% beer warrants the differential in age drawn by the Oklahoma statute. We conclude that it does not.

429 U.S. at 197-99, 97 S.Ct. at 457-58, 50 L.Ed. 2d at 407-408.

In more recent cases, the Court has restated the rules laid down in *Craig* and *Reed*. "Gender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause. [Citations omitted.]" *Caban v. Mohammed*, 441 U.S. 380, 388, 99 S.Ct. 1760, 1766, 60 L.Ed. 2d 297, 304-305 (1979). "Classifications based upon gender . . . have traditionally been the touchstone for pervasive and often subtle discrimination. [Citation omitted.] This Court's recent cases teach that such classifications must bear a close and

substantial relationship to important governmental objectives [citation omitted] and are in many settings unconstitutional. [Citations omitted]" *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273, 99 S.Ct. 2282, 2293, 60 L.Ed. 2d 870, 883-84 (1979). *See also Kirchberg v. Feenstra*, --- U.S. --- , 101 S.Ct. 1195, 67 L.Ed. 2d 428 (1981).

Petitioners' argument that the statutory scheme for establishing the filial relationship between illegitimate children and their natural fathers serves a valid state interest and purpose cannot be questioned. The underlying validity of the statutory scheme cannot, however, serve to answer respondents' contentions that the requirement of change of surname causes this otherwise valid statutory purpose to operate in an invalid way. Petitioner has not met the burden of advancing an "exceedingly persuasive justification"; *Kirchberg v. Feenstra, supra*, for the name change requirement. Petitioners argue that because children born of married parents have recorded on their birth certificates the surname of the husband of their mother, the requirements of G.S. 49-10 and 49-13 promote consistency and administrative convenience. This argument is not persuasive justification. We see no convenience to the State in requiring the surname of the child to be changed to that of the father in proceedings pursuant to G.S. 49-10 and 49-13. Petitioners cite *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed. 2d 31 (1977); *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed. 2d 503 (1978); *Mitchell v. Freuler*, 297 N.C. 206, 254 S.E. 2d 762 (1979); and *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd* 405 U.S. 970, 92 S.Ct. 1197, 31 L.Ed. 2d 246 (1972) in support of their "administrative convenience" argument. *Trimble* must be distinguished. It dealt with the balancing of the rights to inherit as between illegitimate and legitimate children. *Lalli* and *Mitchell* fall into the same category. *Forbush*, however, must be further distinguished. In *Forbush*, the female plaintiff challenged the requirement of the Alabama Department of Public Safety that married females use their husband's surname in seeking and obtaining a driver's license. The *Forbush* Court recognized the inherent gender-based discrimination in such a requirement, but held that it served a substantial State interest: the State's need to maintain control over persons issued driver's licenses. Petitioners have not asserted, much less demonstrated, any com-

parable interest of the State of North Carolina in maintaining control over illegitimate children who may become the beneficiaries of proceedings under G.S. 49-10 and 49-13.

We hold that the valid purpose served by the provisions of G.S. 49-10 and 49-13 of establishing the filial relationship between illegitimate children and their fathers is not enhanced, advanced, or served in any useful or justifiable way by the additional requirement that the child's surname be changed to that of the father. Such a requirement does not bear a close and substantial relationship to the important governmental objective underlying the statutes disputed here. Such a requirement denies the mother of an illegitimate child the equal protection of the laws, and because it requires arbitrary action on the part of an agency of the State, it denies such mothers a protected liberty interest without due process of law.

A proceeding under G.S. 49-10, while being entirely voluntary on the part of the putative father of the child born out of wedlock, nevertheless carries with it results affecting the putative father in two profound respects as provided by G.S. 49-11.[3] It is apparent, therefore, that petitioner Eddie Jones, the putative father in this proceeding has such a property interest at stake as will afford him due process. *Mitchell v. Freuler, supra.* In the light of our opinion that the name change *requirement* of G.S. 49-13 is invalid, petitioner Jones must be afforded the choice of either continuing this action with the knowledge that Trenda Junae will continue to bear her mother's surname upon legitimation, or withdrawing his petition by voluntary dismissal. Accordingly, it is our opinion that the judgment of the trial court must be reversed in its entirety and that this matter must be remanded for further proceedings consistent with this opinion.

3. § 49-11. Effects of legitimation.—The effect of legitimation under G.S. 49-10,shall be to impose upon the father and mother all of the lawful parental privileges and rights, as well as all of the obligations which parents owe to their lawful issue, and to the same extent as if said child had been born in wedlock, and to entitle such child by succession, inheritance or distribution, to take real and personal property by, through, and from his or her father and mother as if such child had been born in lawful wedlock. In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the Intestate Succession Act as if he had been born in lawful wedlock.

Reversed and remanded.

Judges HEDRICK and CLARK concur.

BOND PARK TRUCK SERVICE, INC. v. DEWITT HILL

No. 8029DC1121

(Filed 18 August 1981)

1. **Evidence § 29.2— statement not verified—admissibility as business record**

In an action to recover for labor and materials supplied by plaintiff in repairing defendant's truck, plaintiff's exhibit which consisted of itemized statements of account for materials supplied and labor performed by plaintiff upon defendant's truck was not admissible pursuant to G.S. 8-45 because it was not verified; however, the exhibit was admissible under the business records exception to the hearsay rule where there was testimony that the exhibit properly reflected the work done by plaintiff's shop foreman and charges made pursuant to the work he performed.

2. **Rules of Civil Procedure § 50— directed verdict denied—waiver of right to complain on appeal**

Defendant waived the right to complain on appeal about the denial of his motion for directed verdict at the close of plaintiff's evidence by offering evidence at trial.

3. **Corporations § 1; Rules of Civil Procedure § 9— plaintiff's legal existence—general denial by defendant insufficient**

The general denial entered by defendant against plaintiff corporation's allegations failed to place plaintiff's legal existence in issue, since G.S. 1A-1, Rule 9(a) requires a defendant to plead specifically lack of capacity to sue; furthermore, headings on bills submitted to defendant and testimony of plaintiff's employees was evidence of plaintiff's corporate status.

APPEAL by defendant from *Gash, Judge.* Judgment entered 9 July 1980 in District Court, RUTHERFORD County. Heard in the Court of Appeals 8 May 1981.

Plaintiff brought this suit to recover $3,620.12 for labor and materials supplied by plaintiff in repairing defendant's White Freightliner tractor. Defendant counterclaimed for $5,000 for breach of contract to repair and for negligent repairs to the motor vehicle.

Plaintiff's complaint alleged that it was a corporation organized and existing in South Carolina; that in March, at defendant's

request, plaintiff repaired defendant's White Freightliner tractor and that defendant refused to pay for these repairs. Plaintiff sought $3,620.12, the amount for which defendant was billed, plus interest.

Defendant answered, moving to dismiss plaintiff's action for failure to state a claim and denying any breach of contract. Defendant counterclaimed, alleging that plaintiff had contracted to repair his truck and had repaired his truck in February for $4,426.58; that the crankshaft broke the day he received the truck from plaintiff; and that plaintiff had negligently repaired his truck. Defendant sought $5,000.00 in damages for loss of use of his truck and for negligent repairs. Plaintiff answered defendant's counterclaim, denying any negligence.

Plaintiff's evidence was as follows: Jack Bailey, employed by plaintiff as shop foreman and mechanic, testified that defendant brought his truck in for a complete overhaul of the engine in February. A work order dated 21 February 1979 indicated that defendant was billed for $4,426.58 worth of work and parts in February. Mr. Bailey described in detail the work done on the engine in February. The crankshaft was polished and checked. It was not magnafluxed, which reveals any cracks, or line bored, which determines if the crankshaft had done any damage to the block. The crankshaft had previously been turned to 10,000 and Mr. Bailey informed defendant that a standard crankshaft was preferred because they had to guarantee their work. Also, a crankshaft that has been turned has heat on it from the previous bearing and is likely to cause damage. Mr. Bailey and Gordon Boatwright, a mechanic's helper employed by plaintiff, testified that defendant did not want to change to a standard crankshaft because he had just had the 10,000 shaft put in and was satisfied with it. Defendant paid the $4,465.58 bill and picked his truck up on 7 March. Mr. Bailey testified that when he saw defendant's truck later on 7 March, the crankshaft was broken in two places. The bearings had not damaged the crankshaft and it was not clear what caused it to break, and Mr. Bailey did not feel that it was their fault. A new standard crankshaft was put in the truck, as were new bearings. Defendant had told them to do what was necessary to fix the truck. The bills, totaling $3,620.12, sent to defendant for the repair work done in March, accurately reflect the work done and the parts repaired. The bills were introduced

into evidence over defendant's objection. These bills were prepared by a Mr. Grimes, the co-owner of Bond Park Truck Service, Inc., from "dummy" work orders prepared by Mr. Bailey at the time the work was performed. Mr. Bailey did not compare his work orders with those prepared by Mr. Grimes. The bills sent to defendant were dated 7 March, 12 March, 20 March, 23 March and 16 April. The truck left the shop 12 March. Defendant again objected to the admission of these bills on the grounds that they were prepared by a party who had not testified and had not been properly identified and qualified. The court left the exhibit in evidence.

Defendant testified that he owned the truck he brought to plaintiff for repairs in February. Plaintiff took two and a half weeks to overhaul the engine and charged more than it had estimated. When he picked up the truck on 7 March, Mr. Grimes informed him that the work was guaranteed for 90 days or 10,000 miles, whichever occurred first. Defendant put less than 300 miles on the truck before the crankshaft broke on 7 March. Because the first repair job was to be a major overhaul, defendant assumed that the crankshaft would be magnafluxed as well as polished and would be replaced if necessary. Mr. Bailey never recommended that he get a standard crankshaft. The second repair job by plaintiff was only to fix what had broken. Defendant assumed he would not have to pay for the last repair bill because he was told by plaintiff's employees not to have the work done anywhere else. During the second repair job, the mechanics broke the tachometer and speedometer, which they did not replace, and had to replace the starter, alternator, regulator and two batteries because they had wired the starter up backwards. Defendant had the tachometer and speedometer replaced at a cost of $187. Since March of 1979, defendant has had constant problems with his truck. It started burning oil. In June, he spent $453.36 because bolts were missing from the bellhousing. In August, a breather was sucked into the oil pan, costing $231.12 to repair. Defendant's sole income is from driving his truck. He introduced evidence of his income from driving the truck under a lease agreement with Chemical Leamon. Defendant missed five weeks of work while plaintiff was repairing his truck. He did not rent another truck during this time because of the expense. Mr. Hennessey, an expert in the field of diesel engines, testified that a line bore on a

crankshaft is not normally done unless there is some indication that it is necessary. A standard crankshaft is the best, and there is a greater risk with a 10,000 crankshaft. He could not say why defendant's crankshaft broke.

On rebuttal, Mr. Bailey and Mr. Boatwright testified that before the first overhaul, Mr. Bailey told defendant that a standard crankshaft would be better, but defendant replied that the crankshaft had been put in recently and was in good shape.

At the close of all of the evidence, both plaintiff and defendant moved for a directed verdict on the counterclaim and on the complaint, respectively. Both motions were denied.

The jury returned a verdict in favor of plaintiff on its action for breach of contract and in favor of defendant on his counterclaim. Plaintiff recovered $3,620 and defendant $848.62. Both plaintiff and defendant moved for a judgment notwithstanding the verdict and for a new trial. Their motions were denied by the trial court. Both parties appealed from the judgment.

Hamrick, Bowen, Nanney & Dalton by Walter H. Dalton, for the plaintiff-appellee.

Robert W. Wolf, for the defendant-appellant.

MARTIN (Robert M.), Judge.

[1] Defendant contends that the court erred by admitting plaintiff's Exhibit One into evidence. Plaintiff's Exhibit Number One, which consisted of itemized statements of account for materials supplied and labor performed by plaintiff upon defendant's truck, was not verified. Therefore it was not admissible pursuant to N.C. Gen. Stat. § 8-45 which reads, in pertinent part, as follows:

> In any actions instituted in any court of this State upon an account for goods sold and delivered, . . . for services rendered, or labor performed, . . . a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness.

We must determine whether plaintiff's Exhibit Number One was admissible under the business records exception to the hearsay rule. In *Supply Co. v. Ice Cream Co.*, 232 N.C. 684, 685-686, 61 S.E. 2d 895, 896-897 (1950), the Supreme Court said:

> The rule of evidence formerly observed by the courts limiting proof of items of business transactions to matters within the personal knowledge of a witness, has undergone revision in the light of modern business conditions and methods. (Citations omitted.) The impossibility of producing in court all the persons who observed, reported and recorded each individual transaction gave rise to the modification which permits the introduction of recorded entries, made in the regular course of business, at or near the time of the transaction involved, and authenticated by a witness who is familiar with them and the method under which they are made. This rule applies to original entries made in books of account in regular course by those engaged in business, when properly identified, though the witness may not have made the entries and may have had no personal knowledge of the transactions. (Citations omitted.)

In 1 Stansbury's N.C. Evidence § 155 (Brandis rev. 1973), after reviewing the business entries rule in this State and its liberalization due to changing business conditions, the author on pages 522 and 523 says:

> It would be futile to attempt to produce all of the persons who observed, reported and recorded a particular transaction, and even if they were produced they could seldom testify to anything except their habit of reporting correctly — a fact which may well be taken for granted without proof. This habit, strengthened by the discipline which develops within a business group, furnishes a sufficient guaranty of trustworthiness to justify the admission of regular business entries when properly identified and explained.
>
> . . . If the entries were made in the regular course of business, at or near the time of the transaction involved, and are authenticated by a witness who is familiar with them and the system under which they were made, they are admissible.

Plaintiff's Exhibit Number One was prepared by Mr. Grimes, a co-owner of plaintiff corporation. It was identified by Mr. Bailey, the shop foreman, who was familiar with it in that he had personally performed the work and had made the original entries on the "dummy orders," work orders used in the shop, from which

the exhibit was made. He testified on cross-examination in reference to the exhibit "this copy was made from my copy I have in my shop. This reflects what we did and the dates we did it on." On direct examination Mr. Bailey testified that Exhibit Number One properly reflected the work done and the charges made pursuant to the work he performed.

He further testified "[w]e got the tractor on Thursday morning and the tractor left on Tuesday morning; the following Tuesday evening. Everything on these bills reflects the work and the parts we repaired."

A careful review of the testimony discloses that the entries were made in the regular course of business. Mr. Bailey, the witness who authenticated the bills, was familiar with them and the system under which they were made. The only possible question with regard to their admissibility was whether they were made at or near the time of the transaction involved. The evidence discloses that the work was performed between 7 March and 12 March. The "dummy" orders were prepared by Mr. Bailey during this period of time. The bills admitted into evidence were dated 7, 12, 20 and 23 March and 16 April. In our opinion, the exhibit meets the requirement of being made at or near the time of the transaction involved.

Plaintiff argues that even if admission of the exhibit into evidence was error, the error was harmless for the reason that the defendant at no time questioned the charges made for the services rendered or parts supplied. We note, however, that in his answer defendant denied plaintiff's allegation that the amounts stated in the bills accurately reflected the cost of services and materials supplied, although he did not contest the charges in his testimony at trial. Plaintiff had the burden of proving at trial the value of the materials and services rendered in order to recover those amounts in the action. If admission of the exhibit was error, it was not rendered harmless for the reason argued by plaintiff.

Any possible error in admission of the evidence in question was rendered harmless, however, by the fact that Mr. Bailey testified that $3,620.12 was the amount of the labor and material supplied by plaintiff in repairing defendant's truck. Defendant's first assignment of error is therefore overruled.

By his second and third assignments of error, defendant contends the court erred by denying his motions for directed verdict at the close of plaintiff's evidence and at the close of all the evidence because there was a material variance between plaintiff's allegations and plaintiff's evidence. Plaintiff alleged in its complaint that it was a duly organized South Carolina corporation which defendant denied. Defendant argues there was no evidence, documentary or testamentary, offered at trial that plaintiff was in fact a corporation.

[2] With regard to the defendant's second assignment of error, we note that defendant waived the right to complain on appeal about the denial of his motion for directed verdict at the close of plaintiff's evidence by offering evidence at trial. *Overman v. Products Co.*, 30 N.C. App. 516, 227 S.E. 2d 159 (1976); *Woodard v. Marshall*, 14 N.C. App. 67, 187 S.E. 2d 430 (1972). Defendant's second assignment of error is therefore overruled.

[3] With regard to defendant's third assignment of error, we find no error in the trial court's denial of defendant's motion for directed verdict, made at the close of all the evidence. The general denial entered by defendant against plaintiff's allegations fails to place plaintiff's legal existence in issue. Rule 9(a) of the North Carolina Rules of Civil Procedure requires a defendant to specifically plead lack of capacity to sue. Furthermore, the headings on the bills submitted to defendant and the testimony of plaintiff's employees were evidence of plaintiff's corporate status. Defendant's action in filing a counterclaim against "Bond Park Truck Service, Inc." and in presenting into evidence a check made payable to "Bond Park Truck Service, Inc." are admissions of plaintiff's corporate existence. Thus, we must also overrule defendant's fourth assignment of error which was directed to the trial court's statement in its instructions to the jury that "plaintiff has offered evidence tending to show that Bond Park Truck Service, Inc. is a corporation."

Defendant abandoned his fifth assignment of error in his appellate brief.

By his sixth and final assignment of error, defendant contends the trial court erred in its instruction on the measure of damages in plaintiff's action by failing to instruct on the theories of *quantum meruit* or part performance. Neither the pleadings

nor the evidence raised the issues of whether plaintiff was entitled to recover on theories of *quantum meruit* or part performance. We find that the trial court correctly instructed the jury on the measure of damages, *see Financial Corp. v. Transfer, Inc.*, 42 N.C. App. 116, 256 S.E. 2d 491 (1979), and we therefore overrule defendant's sixth assignment of error.

On cross-appeal, plaintiff contends that the court erred by denying its motion for directed verdict on defendant's counterclaim at the close of defendant's evidence and by denying its motion for judgment notwithstanding the verdict on the issues related to defendant's counterclaim. Plaintiff argues that the court improperly submitted the third issue, which was related to defendant's counterclaim, because the issue was framed in the law of contract, whereas defendant's counterclaim alleged negligence rather than breach of contract or warranty. Defendant's counterclaim alleged negligence and breach of a contract to repair and evidence was presented that plaintiff failed to perform repairs as agreed, which constituted a breach of contract. This assignment of error is overruled.

In the trial, we find no prejudicial error.

No error in defendant's appeal.

No error in plaintiff's cross-appeal.

Judges CLARK and HILL concur.

STATE OF NORTH CAROLINA v. RAPHAEL BIZZELL

No. 808SC1172

(Filed 18 August 1981)

1. Criminal Law §§ 99, 170— pretrial comments to jury pool—failure to advise of possible not guilty verdict

A pretrial comment by the trial judge that it would be the duty of the jury selected "to find the defendant guilty of one of the charges set forth in the bill of indictment or possibly some lesser included charge" was rendered harmless error beyond a reasonable doubt by repeated instructions to the jury chosen that they could return a verdict of not guilty.

2. Receiving Stolen Goods § 5— non-felonious possession of stolen property—sufficiency of the evidence

The State has a higher burden than merely showing the defendant was in possession of stolen property to convict defendant of non-felonious possession of stolen goods. It must prove beyond a reasonable doubt that defendant knew or should have known the goods were stolen. Evidence that: (1) defendant had established a part-time residence at the mobile home where the goods were found; (2) he visited the robbery victim's home several days prior to the robbery and had an opportunity to know what valuable goods were there; (3) he told the woman with whom he was living that he was helping a friend move and asked if he could store some of his friend's possessions in their mobile home; (4) he never identified the friend or made an effort to return the goods to the friend; (5) he told the woman with whom he was living not to box the clothes for storage but rather to hang them in the closet; and (6) he was wearing an article of stolen clothing at the time of his arrest was insufficient evidence of knowledge, and the State failed to meet its burden. G.S. 14-71.1 (Cum. Supp. 1979).

Judge WHICHARD dissenting.

APPEAL by defendant from *Small, Judge.* Judgment entered 16 September 1980 in Superior Court, WAYNE County. Heard in the Court of Appeals 8 April 1981.

Defendant was convicted of non-felonious possession of stolen property. The State offered evidence tending to show that on 18 January 1980, Charles Sutton returned home from work to find that his house had been burglarized and that several items of personal property had been stolen. The stolen items included a television, stereo, several articles of clothing and approximately $178 in cash. The police conducted an investigation, and as a result they obtained a search warrant, based on information supplied by a confidential informer, to search the residence of a Margie Lewis. A search of Ms. Lewis' mobile home on 21 January 1980 resulted in the discovery of the property taken from Charles Sutton.

At all times relevant, the defendant, Raphael Bizzell, was living with Ms. Lewis. On the night of the burglary, the defendant's neighbor, Ken Robinson, came to Ms. Lewis' mobile home looking for the defendant. At that time, the defendant was not home. When the defendant returned, Ms. Lewis told him that Robinson had been looking for him. The defendant left and returned later that night. When he returned this second time, he asked Ms. Lewis if he could store some furniture in her mobile home for a

friend who was in the process of moving. Ms. Lewis agreed, and a few minutes later the defendant and Robinson brought inside the television, stereo and clothes which were later identified as belonging to Charles Sutton.

Shortly after the search of the mobile home, the defendant was taken into custody. Charles Sutton, who had been with the police at the time of the search, accompanied the police to the sheriff's department and, at that time, identified a sweater being worn by the defendant as one that was stolen from his house. At trial, the defendant did not testify nor present any evidence in defense.

Upon the jury finding the defendant guilty of non-felonious possession of stolen property, the trial court sentenced him to a two-year active prison term and ordered defendant to pay restitution of $140.00. From this judgment, defendant appeals.

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

Duke & Brown, by John E. Duke, for the defendant appellant.

BECTON, Judge.

I

[1] The defendant first takes exception to the pretrial comments of the trial judge made to the jury pool. In those comments, the trial judge said:

> It would be the duty of the jury selected to hear this case and to find the defendant guilty of one of the charges set forth in the bill of indictment or possibly some lesser included charge.

The judge never told the prospective jurors at that time that they could also find the defendant not guilty. Defendant contends that this omission was so highly prejudicial that the jury, once empaneled, was predisposed to find him guilty even before the State's evidence was presented. Under G.S. 15A-1222, the trial judge is specifically admonished "not [to] express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury."

Based on the record, however, we find the failure of the trial judge to advise the jury pool in his pre-trial comments that the jury ultimately chosen could find the defendant not guilty was an obvious inadvertence. More importantly, in his charge to the jury chosen, the judge clearly and repeatedly indicated that the jury could return a verdict of not guilty. The following excerpts from the charge are pertinent:

> 1. [I]n the last count that will be submitted to you the defendant is charged with the misdemeanor of possession of stolen property knowing it to have been stolen and again the defendant has entered a plea of not guilty and you may return either a verdict of guilty as charged *or not guilty.*
>
> 2. [T]he defendant *having entered a plea of not guilty* to each of these charges, I would instruct you that the defendant is presumed to be innocent.
>
> 3. As to this charge [possession of stolen property] the defendant contends that you *should return a verdict of not guilty* and the State contends that you should return a verdict of guilty.
>
> 4. The defendant contends that you *should return a verdict of not guilty.*
>
> 5. So I instruct you that if you find from the evidence beyond a reasonable doubt that on or about January 18, 1980, that a Magnavox color t.v. set, Airline component set, certain articles of clothing and coins were stolen and that the defendant Raphael Bizzell possessed these articles of personal property and that he knew or had reasonable grounds to believe that these articles of personal property were stolen and that the defendant Raphael Bizzell possessed these articles or personal property for a dishonest purpose it would be your duty to return a verdict of guilty of nonfelonious possession of stolen property.
>
> If you do not so find or have a reasonable doubt as to one or more of these things *it would be your duty to return a verdict of not guilty.*
>
> 6. When you have arrived at a verdict I would ask your Foreman to draw a line through either the word *guilty or not guilty* as to each of the charges. . . . (Emphasis added.)

The court also specifically instructed the jury that the court was prohibited by law from expressing any opinion about the case, and that it had not done so. In view of these and other portions of the charge, and of the record as a whole, we do not believe a different result would have been reached at the trial had the inadvertent comment in question not been made. The comment thus, in our view, was harmless error beyond a reasonable doubt. G.S. 15A-1443(b); *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967).

II

[2] The defendant next argues that the State's evidence was insufficient to establish that he possessed the stolen goods with knowledge that the goods had been feloniously taken. At the close of the State's case, defendant moved to dismiss all of the counts against him on the grounds of insufficiency of the evidence. A motion for nonsuit made by an accused requires a consideration of all the evidence in a light most favorable to the State. All of the State's evidence must be taken as true, and "there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss." *State v. Stephens*, 244 N.C. 380, 383, 93 S.E. 2d 431, 433 (1956). *See also State v. Bass*, --- N.C. ---, 278 S.E. 2d 209 (filed 2 June 1981); *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971); *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979).

The defendant was convicted of non-felonious possession of stolen goods in violation of G.S. 14-71.1 (Cum. Supp. 1979). This statute requires the State to prove beyond a reasonable doubt (1) that the defendant possessed stolen property; (2) that the property was taken pursuant to a larceny or felony; and (3) that the defendant knew or had reasonable grounds to believe that the property had been stolen. After a careful and thorough review of the record, we agree with the defendant that no substantial evidence was presented by the State to establish that he knew or had reason to know that the property in his possession had been stolen.

The key evidence relied upon by the State to show the requisite knowledge of the defendant was that (1) he had established a part-time residence at the mobile home where the goods were found; (2) he visited the robbery victim's home several days

prior to the robbery and had an opportunity to know what valuable goods were there; (3) he told Margie Lewis that he was helping a friend move and asked if he could store some of his friend's possessions in their mobile home; (4) he never identified the friend or made an effort to return the goods to the friend; (5) he told Margie Lewis not to box the clothes for storage but rather to hang them in the closet; and (6) he was wearing an article of the stolen clothing at the time of his arrest.

The defendant's failure to return the goods to the "unidentified" friend who was storing them in no way establishes that he knew the goods were stolen; defendant had only been in possession of the goods for two days before his arrest and every indication was that Ken Robinson was the "unidentified" friend. Similarly, hanging the clothes in a closet rather than boxing them, and wearing an article of the clothing provide no inference that the defendant knew or should have known that the goods had been feloniously stolen. It is also merely speculation that the defendant knew the goods were stolen because he lived part-time in the mobile home where the goods were found and because he visited the robbery victim for a few minutes several days before the burglary. Considering all of this evidence as true, the State established that the goods were indeed in defendant's possession, but failed to prove that the defendant knew, or had reasonable grounds to know, that the goods were stolen.

The only evidence of defendant's knowledge about the ownership of the property is exculpatory in nature. Margie Lewis testified that:

> He [the defendant] came to my house and I told him that Ken had been looking for him and he asked me what for and I told him I didn't know . . . . [H]e left and he went to the Quick Way down the road . . . [and] [h]e came back and he stopped at Ken's house. He stopped at Ken's and then he came back. When he came inside he asked me if it was all right to leave some furniture in the house for someone, that they were moving and I told him it was okay.

As a corroborative matter, testimony was given indicating that Ken Robinson did in fact move from Margie Lewis' neighborhood shortly after this incident. No evidence was presented to the jury concerning the defendant's knowledge that

the goods in his possession had been stolen. Defendant never told Margie Lewis that the property being moved into her house was stolen, nor did he ever make such a statement to the police. When accused of stealing the property by Charles Sutton, the defendant maintained his innocence and denied that the shirt belonged to Sutton. Moreover, Ken Robinson was never called to testify about the events of the night he helped move the stolen goods into Margie Lewis' house. Based on the State's evidence, then, not even a reasonable inference was established to show that the defendant knew or should have known that the goods were stolen. A much stronger inference is that the goods were originally in Ken Robinson's possession on the night of 18 January 1980, and that he asked the defendant to store them for him. The State has a higher burden than merely showing that the defendant was in possession of stolen property; it must prove beyond a reasonable doubt that the defendant knew or should have known the goods were stolen.

While the State's evidence in this case may "beget suspicion in imaginative minds," *State v. Palmer*, 230 N.C. 205, 214, 52 S.E. 2d 908, 914 (1949), this is not enough to support a conviction for possession of stolen property. As previously held by our Supreme Court, "[w]hen the evidence most favorable to the State is sufficient only to raise a suspicion or conjecture that the accused was the perpetrator of the crime charged in the indictment, the motion for judgment . . . of nonsuit should be allowed." *State v. Poole*, 285 N.C. 108, 119, 203 S.E. 2d 786, 793 (1974). Because we find the State's evidence insufficient to establish each and every essential element of the crime charged, we reverse the defendant's conviction and order the charges against him.

Dismissed.

Judge MARTIN (Robert M.) concurs.

Judge WHICHARD dissents.

Judge WHICHARD dissenting.

G.S. 14-71.1, the statute under which defendant was charged and convicted, is of recent origin;[1] and as a consequence there is

1. 1977 Sess. Laws ch. 978 § 1.

little case law interpreting and applying it. It would seem, however, that the standard of proof established in cases of receiving stolen goods would be equally applicable to cases involving possessing stolen goods. With regard to the question of proof that a defendant had knowledge that the goods had been stolen, that standard is as follows:

> [G]uilty knowledge need not be shown by direct proof of actual knowledge, as by proof that defendant witnessed the theft, or that such theft was acknowledged to him by the person from whom he received the goods; rather, such knowledge may be implied by evidence of circumstances surrounding the receipt of the goods. [Citation omitted.] The test is whether defendant knew, or *must have known*, that the goods were stolen. [Citation omitted.]

State v. Scott, 11 N.C. App. 642, 645, 182 S.E. 2d 256, 258 (1971) (emphasis in original). As stated in *State v. Hart*, 14 N.C. App. 120, 122, 187 S.E. 2d 351, 352, *cert. denied*, 281 N.C. 625, 190 S.E. 2d 469 (1972): "Guilty knowledge may be inferred from incriminating circumstances." I find the circumstances here, viewed in the light most favorable to the State, sufficiently incriminating to permit a reasonable inference that defendant knew or must have known that the goods in question were stolen, and thus sufficient to support a finding to that effect by the jury. I therefore vote to find no prejudicial error in defendant's trial, and I respectfully dissent from the majority opinion reversing the conviction and dismissing the charge.

RONALD JENNINGS FURR AND THOMAS JENNINGS FURR, BY HIS GUARDIAN AD LITEM, RONALD JENNINGS FURR v. PINOCA VOLUNTEER FIRE DEPARTMENT OF PAW CREEK TOWNSHIP, INCORPORATED AND RICHARD D. GUINEY, JR.

LILLIAN JANE BROOME FURR v. PINOCA VOLUNTEER FIRE DEPARTMENT OF PAW CREEK TOWNSHIP, INCORPORATED AND RICHARD D. GUINEY, JR.

No. 8026SC725

(Filed 18 August 1981)

1. Automobiles § 56.2— parking vehicle in highway—proximate cause—jury question

In an action to recover damages for personal injuries sustained by plaintiffs in a rear end collision with a fire truck parked by the individual defendant in the highway, the trial court did not err in denying plaintiffs' motions for directed verdict and judgment n.o.v., though the uncontroverted act of the individual defendant in the course and scope of his agency for the corporate defendant violated G.S. 20-161(a) and violation of this statute constituted negligence *per se*, since a determination of whether defendants' negligence was a proximate cause of plaintiffs' injuries was a question for the jury.

2. Automobiles § 90— concurring negligence—failure to declare and explain law error

In an action to recover damages for personal injuries sustained in a rear end collision, the trial court erred in failing to declare and explain the law of concurring negligence as requested and to apply it to the evidence presented.

3. Automobiles § 76.2— rear end collision—contributory negligence—jury question

In plaintiff's action to recover for personal injuries sustained when she collided with the rear of defendants' fire truck which was parked in her lane of travel, the trial court erred in directing a verdict for defendants where the evidence tended to show that no lights were burning on the fire truck at the time of the collision; plaintiff was driving well within the posted speed limit with her headlights on; visability ahead of her was not clear because of an incline; the line of headlights in the oncoming lane coupled with some lights in a parking lot ahead of plaintiff created "a black hole" of darkness in her lane of travel; plaintiff first observed the fire truck when her headlights reflected from its unlighted rear; plaintiff immediately "slammed on [her] brakes" but was unable to avoid the collision; and the jury could have found from this evidence that a person exercising ordinary care under the circumstances could not reasonably have expected the presence of defendants' truck on the highway and could not reasonably have perceived that presence in time to avoid the collision.

4. Trial § 8— mother and son injuried in accident—consolidation of personal injury actions improper

It would be better to try personal injury actions brought by a mother and son separately since, at the time of the collision in question, the statute abolishing parent-child immunity in motor vehicle cases had not been enacted; plaintiff's son therefore could not recover from his mother for any negligence on her part which may have caused or concurred in causing the collision; and consolidation of the minor's case with the mother's case created a trial setting in which the jury could easily be confused as to the parties from whom the minor plaintiff could recover.

APPEAL by plaintiffs from *Friday, Judge.* Judgment entered 24 April 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 February 1981.

Civil actions to recover damages for personal injuries sustained by plaintiff Lillian Furr and her minor son, plaintiff Thomas Furr, when an automobile driven by plaintiff Lillian Furr in which her son was a passenger collided with the rear of a fire truck owned by the corporate defendant, which the individual defendant, acting in the course and scope of his agency as a volunteer for corporate defendant, had parked in the left, south bound lane of a four lane highway for the purpose of preventing oncoming traffic from hitting a fallen utility wire.

In plaintiff Lillian Furr's action the trial court directed a verdict for defendants at the close of plaintiffs' evidence. In the action on behalf of plaintiff Thomas Furr the jury answered the issue of defendants' negligence in the negative.

From a judgment for defendants, dismissing the actions with prejudice, plaintiffs appeal.

Hicks, Harris and Sterrett, by Richard F. Harris, III, for plaintiff-appellants.

Fairley, Hamrick, Monteith and Cobb, by S. Dean Hamrick and F. Lane Williamson, for defendant-appellees.

WHICHARD, Judge.

The issues presented are:

FIRST: Whether the court erred in denying the motion by plaintiffs for directed verdict and judgment notwithstanding the

verdict in the action on behalf of plaintiff Thomas Furr? It did not.

SECOND: Whether the court erred in its charge to the jury in the action on behalf of plaintiff Thomas Furr? It did, and accordingly a new trial is granted.

THIRD: Whether the court erred in granting the motion by defendants for directed verdict in the action by plaintiff Lillian Furr? It did, and accordingly the judgment is reversed.

FOURTH: Whether the court erred to the prejudice of plaintiffs in consolidating for trial the action by plaintiff Lillian Furr and the action on behalf of plaintiff Thomas Furr? Because the cases must be retried, it is unnecessary to determine the question here. Upon remand separate trials are recommended.

APPEAL OF PLAINTIFFS
RONALD JENNINGS FURR
AND
THOMAS JENNINGS FURR

[1] FIRST: Plaintiffs contend the evidence established, as a matter of law, negligence of defendants and absence of insulating negligence; and that consequently the court should have granted their motions for directed verdict and judgment notwithstanding the verdict. The uncontroverted act of the individual defendant, in the course and scope of his agency for the corporate defendant, violated G.S. 20-161(a), which provides:

> No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled portion of any highway . . . unless the vehicle is disabled to such an extent that it is impossible to avoid stopping and temporarily leaving the vehicle upon the paved or main-traveled portion of the highway . . . .

Violation of this statute constitutes negligence *per se*. *Hughes v. Vestal*, 264 N.C. 500, 142 S.E. 2d 361 (1965). Proximate cause, nevertheless, remains a question for the jury.

> [W]here the violation of a statute, intended and designed to prevent injury to person or property, which is negligence *per se*, is admitted or established by the evidence, it is ordinarily

a question for the jury to determine whether such negligence is a proximate cause of injury which resulted in damages.

Barrier v. Thomas and Howard Co., 205 N.C. 425, 427, 171 S.E. 626, 626 (1933). The court thus properly allowed the case to go to the jury for determination of whether defendants' negligence was a proximate cause of plaintiffs' injuries.

[2] SECOND: Plaintiffs contended at trial that defendants' negligence proximately caused injuries to plaintiffs father and son, and that any negligence of plaintiff Lillian Furr merely concurred with defendants' negligence and did not insulate it. Defendants contended plaintiff Lillian Furr's negligence was the sole proximate cause, thus insulating the negligence of defendants.

In *Caulder v. Gresham*, plaintiff was a passenger in a car which collided with a truck defendant had parked partially on the highway. 224 N.C. 402, 30 S.E. 2d 312 (1944). Defendant contended the car driver's negligence was the sole proximate cause of plaintiff's injuries. The Supreme Court set forth the rule that the negligence of a second actor insulates that of an original tortfeasor, so as to relieve the original tortfeasor of liability, if the second actor has become aware of a potential danger created by the negligence of the original tortfeasor, and thereafter, by an independent act of negligence, brings about the accident. The negligence of the second actor does not insulate that of the original tortfeasor, however, when the second actor does not become apprised of the danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable. In that event "the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties." *Id.* at 404, 30 S.E. 2d at 313. The court stated that the driver of the car in which plaintiff was a passenger "was not under the duty of anticipating defendant's negligent parking of his truck in violation of the statute and in such manner as to partially block that portion of the highway he was required to use." *Id.*

The court here refused plaintiffs' request for instructions which stated the law in the language of *Caulder*. In explaining proximate cause as it related to plaintiffs' evidence the court instructed:

> Proximate cause . . . is a real cause, a 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. Foreseeability, then, is an element of proximate cause. Now there may be more than one proximate cause of injuries. Therefore, the person seeking damages need not prove that the other party's negligence was the sole proximate cause of the injury. He must prove by the greater weight of the evidence only that the other party's negligence was a proximate cause of the injury.
>
> . . . .
>
> . . . [A] violation of a safety statute does not alone entitle the person injured or damaged to recover. To justify recovery it must be proved [sic], by the greater weight of the evidence, that such violation was a proximate cause of the injury.

With regard to defendants' contention of plaintiff Lillian Furr's insulating negligence, the court instructed:

> [I]f the Defendant has proved [sic], by the greater weight of the evidence, . . . that [Mrs. Furr's] negligence was the sole proximate cause of the minor Plaintiff's injuries and damages, then it would be your duty to answer . . . in favor of the Defendant.

These instructions failed adequately to differentiate between concurring proximate causes and a sole proximate cause. They also failed to relate the law of concurring proximate causes and insulating negligence to the evidence presented. Plaintiff Lillian Furr testified, "[B]y the time I saw the fire truck it was too late. *When I first saw the fire truck* I slammed on brakes." (Emphasis supplied.) From this evidence the jury could have found that any negligence on the part of plaintiff Lillian Furr concurred with defendants' negligence to cause the accident, rather than that the accident was caused by an independent act of negligence on her part after she became aware of the potential danger created by defendants' negligence. The failure to declare and explain the law of concurring negligence as requested and to apply it to the evidence presented was error entitling plaintiffs to a new trial. G.S. 1A-1, Rule 51(a).

Because the question may arise upon retrial, we comment on one further error assigned by these plaintiffs. Both plaintiffs and defendants submitted one issue on the question of negligence, *viz.*, was the minor plaintiff injured by the negligence of the defendants. The court submitted two issues on the question, *viz.:*

1. Was the minor plaintiff . . . injured by the negligence of the defendants as alleged in his Complaint?

2. Was the negligence of Lillian Jane Broome Furr the sole proximate cause of the injuries and damages of the plaintiffs?

Upon proper instructions on the doctrines of concurring and insulating negligence, the jury's answer to the first issue alone resolves the negligence question. Thus, upon retrial, only the first issue should be submitted.

APPEAL OF PLAINTIFF
LILIAN JANE BROOME FURR

[3] As noted above, plaintiffs' evidence established negligence *per se* by defendants; and when evidence establishes negligence *per se*, "it is ordinarily a question for the jury to determine whether such negligence is a proximate cause of injury." *Barrier v. Thomas and Howard Co.*, 205 N.C. 425, 427, 171 S.E. 626, 626 (1933). Thus, the directed verdict against this plaintiff can be sustained only if plaintiffs' evidence, considered in the light most favorable to this plaintiff, so clearly established her own negligence as one of the proximate causes of her injuries "that no other reasonable inference or conclusion may be drawn therefrom." *Rappaport v. Days Inn*, 296 N.C. 382, 384, 250 S.E. 2d 245, 247 (1979).

The uncontroverted evidence established that defendants' truck was parked in violation of G.S. 20-161. This plaintiff testified that no lights were burning on the truck at the time of the collision. She also testified that she was driving well within the posted speed limit with her headlights on; that visibility ahead of her was not clear because of an incline; that the line of headlights in the north bound lanes coupled with some lights in a parking lot ahead of her created "a black hole" of darkness in her lane of travel; that she first observed the truck when her headlights reflected from its unlighted rear; and that she im-

mediately "slammed on [her] brakes" but was unable under these circumstances to avoid the collision.

"Plaintiff's inability to stop [her] vehicle within the radius of [her] lights cannot be considered contributory negligence *per se*." *Meeks v. Atkeson*, 7 N.C. App. 631, 637, 173 S.E. 2d 509, 512, *aff'd per curiam*, 277 N.C. 250, 176 S.E. 2d 771 (1970). In discussing the duty of a motorist to exercise ordinary care for his or her own safety, Justice Ervin has stated:

> The duty . . . does not extend so far as to require that [the motorist] must be able to bring his automobile to an immediate stop on the sudden arising of a dangerous situation which he could not reasonably have anticipated. Any such requirement would be tantamount to an adjudication that it is negligence to drive an automobile on a highway in the nighttime at all. The law simply decrees that a person operating a motor vehicle at night must so drive that he can stop his automobile or change its course in time to avoid collision with any obstacle or obstruction whose presence on the highway is reasonably perceivable to him or reasonably expectable by him. It certainly does not require him to see that which is invisible to a person exercising ordinary care.

Chaffin v. Brame, 233 N.C. 377, 380, 64 S.E. 2d 276, 279 (1951). The jury could have found that a person exercising ordinary care under the circumstances here could not reasonably have expected the presence of defendants' truck on the highway and could not reasonably have perceived that presence in time to avoid the collision. Plaintiffs' evidence thus did not establish the contributory negligence of plaintiff Lillian Furr as a matter of law, and the court erred in directing a verdict against her.

CONSOLIDATION
ISSUE

[4] Plaintiffs in both cases assign error to consolidation of the cases for trial.

> The trial court possesses the power to order consolidation of actions for trial when the actions involve the same parties and the same subject matter, if no prejudice or harmful complications will result therefrom. This power is vested in the trial judge so as to avoid multiplicity of suits,

> unnecessary costs, delays, and to afford protection from oppression and abuse. To sustain an exception to the court's discretionary consolidation of the actions, injury or prejudice to the appealing party arising from such consolidation must be shown, *Peeples v. R.R.*, 228 N.C. 590, 46 S.E. 2d 649.

Kanoy v. Hinshaw, 273 N.C. 418, 423, 160 S.E. 2d 296, 300 (1968). At the time of the collision here G.S. 1-539.21, abolishing parent-child immunity in motor vehicle cases, had not been enacted. Consequently, plaintiff Thomas Furr cannot recover from his mother, plaintiff Lillian Furr, for any negligence on her part which may have caused or concurred in causing the collision. Consolidation of the minor's case with the mother's creates a trial setting in which the jury might easily be confused as to from whom the minor plaintiff can recover. Further, the court here in its charge on insulating negligence referred to plaintiff Lillian Furr several times as "the Defendant." While ordinarily a *lapsus linguae* of this nature might be immaterial, under the circumstances here the possibility of prejudice is considerable.

Under the circumstances presented "it would be better to try the actions brought by these plaintiffs . . . separately." *Dixon v. Brockwell*, 227 N.C. 567, 571, 42 S.E. 2d 680, 682 (1947).

RESULT

In the appeal of plaintiffs Ronald Jennings Furr and Thomas Jennings Furr, new trial.

In the appeal of plaintiff Lillian Jane Broome Furr, reversed and remanded.

Judges MARTIN (Robert M.) and WEBB concur.

STATE OF NORTH CAROLINA v. MACK H. JONES

No. 8028SC1190

(Filed 18 August 1981)

1. **Counties § 5.1; Municipal Corporations § 30.3— county zoning ordinance—fencing of automobile wrecking yard—vagueness**

A county zoning ordinance requiring junkyards or automobile graveyards to be surrounded by an opaque fence or by a wire fence with vegetation, requiring the owner to utilize "good husbandry techniques with respect to said vegetation, including but not limited to, proper pruning, proper fertilization and proper mulching," exempting garages and repair shops which had the primary purpose of repair and requiring junkyards not be within 100 yards of the center line of a public road is not considered unconstitutionally vague as a man of common intelligence would understand what is meant and required by the ordinance's provisions.

2. **Counties § 5.1; Municipal Corporations § 30.4— county zoning ordinance—aesthetic consideration only—lawful exercise of police power**

An ordinance requiring junkyards or automobile graveyards to be surrounded by an opaque fence or by a wire fence and vegetation does not violate the Fourteenth Amendment to the United States Constitution or the Law of the Land Clause of Art. I, § 19 of the North Carolina Constitution because it regulates for aesthetic purposes only.

APPEAL by the State from *Kirby, Judge.* Judgment entered 22 October 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 9 April 1981.

Defendant operates an automobile graveyard known as Mack's Used Car and Truck Parts. On 29 July 1980 a warrant was issued charging him with a violation of Buncombe County Ordinance Number 16401. This ordinance provides in part:

"SECTION FOUR. PROHIBITIONS

Except as hereinafter provided, it shall be unlawful after the effective date of this Ordinance for any person, firm or corporation, or other legal entity to operate or maintain in any unincorporated area of Buncombe County a junkyard or automobile graveyard within one hundred yards of the center line of any "public road" within one quarter mile of any "school" or within any residential area. For the purposes of this Ordinance, a junkyard or automobile graveyard shall be within a residential area if there are twenty-five (25) or more housing units within a geographical area comprised of a one-fourth (¼) mile wide strip contiguous and parallel to the ex-

ternal boundary lines of the tract of real property on which said automobile graveyard or junkyard is located.

SECTION FIVE. EXCEPTIONS

A. This Ordinance shall not apply to service stations, repair shops or garages.

* * *

"B. Junkyards or automobile graveyards may be operated and/or maintained without restrictions if and providing that said junkyard or automobile graveyard shall be entirely surrounded by a fence, or by a wire fence and vegetation. In the event that a junkyard or automobile graveyard shall be surrounded by a wire fence, vegetation shall be planted on at least one side of the wire fence and continguous [sic] to the wire fence. The vegetation shall be of a type that will reach a minimum height of six (6) feet at maturity and shall be planted at intervals evenly spaced and in close proximity to each other so that a continuous, unbroken hedgerow will exist to a height of at least six (6) feet along the length of the wire fence surrounding the junkyard or automobile graveyard when the vegetation reaches maturity. In the event that white pine or hemlock trees are chosen for use as vegetation, such white pine or hemlock trees may be planted as seedlings provided that the seedlings have an average height of at least six (6) inches. Each owner, operator, or maintainer of a junkyard or automobile graveyard to which this Ordinance applies and who chooses to surround said junkyard or automobile graveyard with a wire fence and vegetation shall utilize good husbandry techniques with respect to said vegetation, including but not limited to, proper pruning, proper fertilizer and proper mulching, so that the vegetation will reach maturity as soon as possible and will have maximum density and foliage. Dead or diseased vegetation shall be replaced at the next appropriate planting time."

On 25 September 1980, Judge Styles granted a motion to quash the warrant on the ground that the ordinance was unconstitutional. The State appealed to superior court and on 22 October 1980 the superior court granted a motion to quash on the ground the ordinance was unconstitutional.

The State appealed.

County Attorney Floyd D. Brock and Assistant County Attorney Stanford K. Clontz, for Buncombe County.

Penland and Barden, by Stephen L. Barden, III, and Talmadge Penland, for defendant appellee.

WEBB, Judge.

The appellee contends the superior court must be affirmed for two reasons. He argues first that the ordinance is unconstitutionally vague and second, that the ordinance violates his substantive due process rights by attempting to regulate for aesthetic values only.

[1] We consider first the question of vagueness. An ordinance "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process." *State v. Vestal*, 281 N.C. 517, 521, 189 S.E. 2d 152, 155 (1972). The defendant contends that the requirement that junkyards or automobile graveyards be surrounded by an opaque fence or by a wire fence and vegetation which will reach a height of six feet at maturity and shall be planted so that a continuous unbroken hedge will exist, requires the owner to guess at the type of tree to plant and the manner of planting. We believe men of common intelligence would know the type of hedge that is required by this ordinance. He also contends the requirement that the owner must utilize "good husbandry techniques with respect to said vegetation, including but not limited to, proper pruning, proper fertilizer and proper mulching" sets a standard which would be difficult for an expert husbandryman to interpret. We believe a man of common intelligence would understand that he would be required to tend to the hedge in such a manner that it would grow to the required height and thickness in the normal growing period for the type of plants used.

The defendant also contends there is a problem of definition in that the ordinance does not apply to garages and repair shops which have the primary purpose of repair and receive 50 percent of their gross income from repair. We believe again that a man of common intelligence would not have to guess at the meaning of this exemption.

The defendant next says that the requirement that the junkyard not be within 100 yards of the center line of a public

road is unconstitutionally vague. We point out the ordinance in the case sub judice does not suffer from the deficiency of the ordinance in *State v. Vestal, supra.* In that case the Supreme Court of North Carolina held that an ordinance was unconstitutionally vague which required junkyards to be built "50 feet from the edge of any public road adjoining the yards." The Court held there was no way of determining what was intended by the term "edge of any public road." In the case sub judice we do not believe a man of common intelligence would have difficulty determining what is the center line of a public road. The defendant also contends the requirements that a junkyard or automobile graveyard not be built within one-quarter mile of any school or within a residential area are too vague to be constitutional. We believe men of common intelligence would understand that the regulated business may not be placed within a quarter mile of the edge of the school grounds. A residential area is defined as an area having "twenty-five (25) or more housing units within a geographical area comprised of a one-fourth (¼) mile wide strip contiguous and parallel to the external boundary lines of the tract of real property on which said automobile graveyard or junkyard is located." We do not believe a man of common intelligence would have difficulty understanding the meaning of this definition. We hold the ordinance is not unconstitutionally vague.

[2] The State concedes that the subject ordinance was enacted to promote aesthetic values only. Substantive due process requires that the General Assembly or a municipality may exercise its public power only as it promotes the public health, safety, morals or general welfare. The question posed by this appeal is whether this ordinance which requires action for aesthetic purposes only promotes the public welfare to such a degree that it is within the police power of the State. In *State v. Brown* and *State v. Narron*, 250 N.C. 54, 108 S.E. 2d 74 (1959), our Supreme Court held that a statute which prohibited placing "scrapped automobiles" within 150 yards of a paved highway was not within the police power of the State; the only purpose of the statute being to improve the aesthetic quality of the paved highway. In *Horton v. Gulledge*, 277 N.C. 353, 177 S.E. 2d 885 (1970), our Supreme Court reiterated this holding by way of dictum. The Court in that case recognized that the United States Supreme Court in *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) had held that the Fourteenth Amendment to the United States Constitution did not proscribe state action which regulated

for aesthetic purposes only but said that Art. I § 19, the Law of the Land Clause in the Constitution of North Carolina, does proscribe such action by the State.

In *State v. Vestal, supra,* the Court noted that the State did not contend it could regulate otherwise lawful activity for aesthetic reasons only and for that reason the question was not considered. The Court did observe that there was a growing body of authority from other jurisdictions which allowed this type of regulation. In *A-S-P Associates v. City of Raleigh,* 298 N.C. 207, 258 S.E. 2d 444 (1979) our Supreme Court held that the City of Raleigh could by zoning ordinance prohibit buildings which did not comply with the historical characteristics of a neighborhood. The Court recognized that this had the effect of allowing the City of Raleigh to regulate the appearance of buildings but held that historic preservation promoted the general welfare in several ways. The Court specifically declined to say that the promotion of aesthetic values alone came within the police power of the State. In *Cumberland County v. Eastern Federal Corp.,* 48 N.C. App. 518, 269 S.E. 2d 672 (1980) it was held that an ordinance regulating the size of highway signs could be based on aesthetic considerations. The Court was careful to limit the holding to the facts of that case and pointed out that there were other considerations upon which the ordinance could be based such as the economic effect of an unsightly sign on the adjoining property, the hazard to traffic, and the fact that the restriction on signs in that case was a part of a comprehensive zoning ordinance. We do not believe we can affirm the superior court in the case sub judice consistently with Cumberland County. We hold that Buncombe County Ordinance Number 16401, as amended, does not violate the Fourteenth Amendment to the United States Constitution or the Law of the Land Clause of the North Carolina Constitution because it regulates for aesthetic purposes only. In reaching this conclusion, we take into account that the duty on the defendant to build a fence or grow a hedge is not too burdensome as compared to the public benefit to Buncombe County in improving the appearance of the highways. If the automobile graveyard had been forbidden at this location, we might have reached a different result.

We realize that our opinion in the case sub judice is inconsistent with *State v. Brown, supra.* We believe the trend in the

cases decided by our Supreme Court is such that *Brown* no longer governs.

Reversed and remanded.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. RONALD TYREE FRONEBERGER

No. 8126SC53

(Filed 18 August 1981)

Kidnapping § 1— indictment—failure to allege lack of consent

Neither the slight misspelling of defendant's name nor the failure to allege the age of the victim made an indictment charging defendant with kidnapping defective; however, failure to allege the essential element of lack of consent constituted a fatal error.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 7 August 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 May 1981.

Defendant was indicted for the kidnapping of Ethell Wilson for the purpose of facilitating the felony of murder. He was found guilty as charged and sentenced to a term of imprisonment for not less nor more than 25 years.

The evidence for the State tends to show that early on the morning of 13 July 1979, Wilson and another man drove to James Pearson's house in Wilson's Cadillac. Wilson informed Pearson that he had to see his lawyer but would return to the house later. When Wilson returned, Charles Norwood was in the Cadillac with him and had a pistol pointed at his head. As Pearson attempted to enter his house to call the police, defendant, who had been standing in the yard when the Cadillac drove up, barred his way. Norwood then handcuffed Wilson, and defendant assisted him in removing Wilson from the car. Defendant then unlocked the trunk to the Cadillac at Norwood's direction. He and Norwood placed Wilson in the trunk and locked it. Norwood drove the Cadillac away, and defendant left soon thereafter. Defendant returned about thirty minutes later, handed Pearson $50 and indicated he

did not want to be in "that mess." On cross-examination Pearson indicated that Norwood and Wilson had been dealing in drugs and that Wilson owed Norwood money.

Sterling Keith Easter testified that he was present at Pearson's house on the date at issue. He observed defendant assist Norwood and another man, named Joe, in placing handcuffs on Wilson. He indicated that defendant did not help the two men place Wilson in the trunk. Sharon Lattimore was also present at Pearson's house. She testified that she saw defendant and several other men push a man into the trunk of the Cadillac and then sit on top of the trunk.

The parties stipulated that the body found in the trunk of a Cadillac in South Mecklenburg County on 21 August 1979 was the body of Wilson. The remaining testimony for the State involved certain items found in the trunk and the condition of Wilson's body. The body showed evidence of multiple gunshot wounds.

Larry Adams, testifying for defendant, indicated that defendant was in Pearson's yard on 13 July 1979, but that he was not involved in handcuffing Wilson or placing him in the trunk of the Cadillac. Adams indicated that after Wilson was placed in the trunk, Norwood and a companion drove for about 25 minutes until they reached a wooded area. Adams followed the Cadillac and saw Norwood shoot Wilson. On cross-examination he admitted that he did not see who handcuffed Wilson.

Defendant testified that he left Pearson's house when he saw Norwood pointing a gun at Wilson. He testified that Norwood owed him money and had requested that he follow him to Pearson's house so he could repay him.

From the sentence imposed, defendant has appealed.

Attorney General Edmisten, by Special Deputy Attorney General W. A. Raney, Jr., and Assistant Attorney General G. Criston Windham, for the State.

Public Defender Fritz Y. Mercer, by Assistant Public Defender Cherie Cox, for defendant appellant.

MARTIN (Robert M.), Judge.

Defendant has preserved 11 of his 14 assignments of error on appeal. He first assigns error to the indictment against him. He alleges that the indictment is fatally defective since it neither alleges the element of lack of consent, the age of the victim nor the correct name of the defendant. Defendant's motion in arrest of judgment was made after the verdict was entered and appears to have been based solely upon the misspelling of defendant's name in the indictment. We note, however, that pursuant to G.S. 15A-1446(d)(4), failure of an indictment to state the essential elements of an alleged violation may be raised for the first time on appeal. The indictment in question reads:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 13 day of July, 1979, in Mecklenburg County, Ronald Tyree Fronberger (sic), did unlawfully, wilfully and feloniously confine, restrain, and remove another person, Ethell Wilson, for the purpose of facilitating the commission of the felony of murder in teh (sic) first degree, adn (sic) said Ethell Wilson was killed as a result of said kidnapping, in violation of G.S. 14-39.

G.S. 14-39, in pertinent part provides:

> *Kidnapping.*—(a) 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 if such confinement, restraint or removal is for the purpose of:
>
> . . ..
>
> (2) Facilitating the commission of any felony. . ..

We agree with the State that neither the slight misspelling of defendant's name nor the failure to allege the age of the victim makes the indictment defective. Our Supreme Court has recently held that the victim's age is not an essential element of kidnapping. It noted that age is merely a factor relating to the State's burden of proof in regard to consent. *State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980). We do, however, find that the failure to

allege the essential element of lack of consent constitutes a fatal error. The North Carolina Supreme Court in a 1974 decision quoting *State v. McBane*, 276 N.C. 60, 170 S.E. 2d 913 (1969), summarized the requirements of a proper indictment:

> "'A valid warrant or indictment is an essential of jurisdiction.' *State v. Morgan*, 226 N.C. 414, 38 S.E. 2d 166; *State v. Thornton*, 251 N.C. 658, 660, 111 S.E. 2d 901, 902. The warrant or indictment must charge all the essential elements of the alleged criminal offense. *State v. Morgan, supra.* Nothing in G.S. 15-153 or in G.S. 15-155 [statutes dealing with certain informalities and defects that do not vitiate a warrant or indictment] dispenses with the requirement that the essential elements of the offense must be charged. *State v. Gibbs*, 234 N.C. 259, 261, 66 S.E. 2d 883, 885, and cases cited; *State v. Strickland*, 243 N.C. 100, 101, 89 S.E. 2d 781, 783."

State v. King, 285 N.C. 305, 308, 204 S.E. 2d 667, 669 (1974).

The State has emphasized in its brief that the indictment in the case *sub judice* should be upheld, since an indictment alleging that the defendant "unlawfully, wilfully, did feloniously and forcibly kidnap Susan Brogden" has been upheld by our Supreme Court. *See State v. Norwood*, 289 N.C. 424, 222 S.E. 2d 253 (1976). The State, though, has failed to note that the crime charged in Norwood occurred prior to the enactment of the 1975 amendment to the kidnapping statute. The kidnapping statute in effect at the time of the crime provided in pertinent part: "It shall be unlawful for any person . . . to kidnap . . . any human being . . .." Clearly the indictment at issue would have been sufficient under this statute. The amendment to this statute, however, defines the word "kidnapping" by specifying the essential elements of this crime.

We also disagree with the State's argument that the element of lack of consent is sufficiently included in the meaning of the words "confine" and "restrain" which are found in the indictment. This argument was refuted in *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). Justice Lake wrote:

> As used in G.S. 14-39, the term "confine" connotes some form of imprisonment within a given area, such as a room, a

> house or a vehicle. The term "restrain," while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without a confinement. Thus, one who is physically seized and held, or whose hands or feet are bound, or who, by the threatened use of a deadly weapon, is restricted in his freedom of motion, is restrained within the meaning of this statute. Such restraint, however, is not kidnapping unless it is (1) unlawful (*i.e.*, without legal right), (2) without the consent of the person restrained (or of his parent or guardian if he be under 16 years of age), and (3) for one of the purposes specifically enumerated in the statute. One of those purposes is the facilitation of the commission of a felony.

294 N.C. at 523, 243 S.E. 2d at 351.

Becuase of the fatal defect appearing on the face of the indictment in the present case, the verdict and sentence of imprisonment must be vacated. The State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment. *State v. Benton*, 275 N.C. 378, 167 S.E. 2d 775 (1969). The present case demonstrates the need for careful drafting of pleadings in criminal actions. In *State v. Thorne*, 238 N.C. 392, 394, 78 S.E. 2d 140, 141 (1953), Justice Ervin emphasized, "[I]t is impossible to overmagnify the necessity of observing the rules of pleading in criminal cases."

We deem it unnecessary to discuss defendant's remaining assignments of error in view of our ruling herein.

Reversed.

Judges CLARK and HILL concur.

JANET CHRISTINE McPHERSON v. GUY T. ELLIS

No. 8028SC861

(Filed 18 August 1981)

1. **Physicians, Surgeons and Allied Professions § 17.1— duty to warn patient of risks**

If there is some danger peculiar to a surgical procedure of which the patient is not aware, it is the duty of the physician to warn the patient of this danger; but if the likelihood of some adverse result is relatively slight, much must be left to the discretion of the physician or surgeon in determining what he should tell his patient as to adverse consequences.

2. **Physicians, Surgeons and Allied Professions § 17.1— arteriogram—failure to warn patient of possible paralysis**

A jury question was raised as to whether the standard of medical care in Asheville required defendant to inform plaintiff of the possibility of paralysis resulting from an arteriogram, and the trial court was correct in so charging the jury.

3. **Physicians, Surgeons and Allied Professions § 17.1— failure to inform patient of risks—patient election to undergo procedure**

In a medical malpractice action where plaintiff alleged that defendants failed to inform her of the risks involved in undergoing an arteriogram, the trial court did not err in charging the jury that, even if defendants did fail to inform plaintiff of the risks of paralysis, she would not be entitled to recover were they to find that, had she been so informed, she would have consented to the procedure in any event.

APPEAL by plaintiff from *Thornburg, Judge.* Judgment entered 11 February 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 31 March 1981.

Plaintiff has appealed from an adverse jury verdict in an action for medical malpractice. She brought this action against Dr. John Ledbetter, a neurologist, and Dr. Guy T. Ellis, a radiologist, alleging that they had failed to warn her of the risk of paralysis before obtaining her consent to perform an arteriogram. Plaintiff's evidence tended to show that she first went to Dr. Ledbetter in 1968 suffering from headaches and convulsions and that she was treated by him until 1975 during which time the headaches continued. In 1975 Dr. Ledbetter referred her to Dr. Ellis for the purpose of having an arteriogram performed. The plaintiff was partially paralyzed as a result of the arteriogram.

Dr. Ledbetter was called by the plaintiff as a witness and testified that "he never used the term paralysis in explaining the risks" of the procedure and that paralysis is a remote risk in the performance of an arteriogram. The depositions of several physicians were put in evidence. Dr. Stanley Hersh Appel testified by deposition that in order to comply with the standard of practice in Asheville and similar communities in 1975, both defendants should have informed the plaintiff of the risk of paralysis from an arteriogram. Dr. James Francis Toole testified by deposition that acceptable medical practice requires a "full and complete explanation of the risks."

The defendant Ledbetter offered as evidence the testimony of several physicians. Dr. Millard F. McKeel testified that, in his opinion, it was the duty of the radiologist and not Dr. Ledbetter to inform the patient of the risks involved in an arteriogram. He also testified that in his opinion "paralysis was a known risk of an arteriogram, but a rare occurrence." Dr. Tom Kennedy testified: "The risks [sic] of paralysis is a very rare risk in an arteriogram, 1 in 500, are the figures that he uses." Dr. Nelson Richards testified in part as follows:

> "In his experience, frequently when the radiologist or the neurosurgeon gets through explaining all the horrible details of what can happen, the patient is fairly emotionally destroyed, and it has happened that one must go back and see the patient and try to placate this. He personally thought it was unkind, the amount of explanation they have to give people when they're talking less than one percentiles. And it is the doctor's judgment that they may have to withhold some things from the patient. Because he doesn't think it's fair to some people who are terribly ill and have a very dangerous thing going on in their head to scare the daylights out of them when you're trying to help them. And frequently this does happen. When the radiologist explains everything to them, you have to go back and say: well, I understand all that, but the need for the test is greater than those risks; if you have a blood clot in your head that has to come out to save your life and keep you from getting paralyzed; we know that's a progressive disease most of the time; we should take this risk whatever it may be."

Dr. Ledbetter testified in his own behalf and called the defendant Dr. Guy T. Ellis as a witness. Dr. Ellis did not offer evidence.

The jury answered the issues favorably to both defendants, and the plaintiff appealed as to Dr. Ellis.

Wade and Carmichael, by J. J. Wade, Jr. and R. C. Carmichael, Jr., for plaintiff appellant.

Harrell and Leake, by Larry Leake, for defendant appellee.

WEBB, Judge.

[1] The appellate courts of this state have dealt with the duty of a physician to properly inform a patient of the risks of a surgical procedure in several cases. *See Starnes v. Taylor,* 272 N.C. 386, 158 S.E. 2d 339 (1968); *Brigham v. Hicks,* 44 N.C. App. 152, 260 S.E. 2d 435 (1979); *Butler v. Berkeley,* 25 N.C. App. 325, 213 S.E. 2d 571 (1975). If there is some danger peculiar to a surgical procedure of which the patient is not aware, it is the duty of the physician to warn the patient of this danger. If the likelihood of some adverse result is relatively slight, much must be left to the discretion of the physician or surgeon in determining what he should tell his patient as to adverse consequences.

[2] Plaintiff has brought forward five assignments of error, each of which pertains to the charge. He first contends the court erred in charging the jury that if they found the risk of paralysis is remote and unlikely as a result of the arteriogram and informing the plaintiff of such a risk would not have been required under the existing standard of medical care in Asheville, there would not have been a duty to disclose to the plaintiff the possibility of paralysis. The plaintiff contends this was error because all the evidence is that it was the duty of the physician to inform the plaintiff of the risk of paralysis. In *Brigham v. Hicks, supra,* we declined to pass on the question of whether expert medical testimony is required to establish the extent of a physician's duty to inform patients of the risks of proposed treatment. In the case sub judice, several medical experts testified it was the duty of one or both of the defendants to inform the plaintiff of the risk of paralysis. No medical expert testified it was not the duty of either defendant to so warn the plaintiff. There was substantial expert testimony that the chance of paralysis from an arterio-

gram was remote. Dr. Kennedy testified the chance of paralysis in this situation was 1 in 500. Dr. Richards testified as to the disadvantage of the amount of explanation that must be made to a patient. All of the medical experts did not testify the standard of medical care in Asheville requires a physician to inform a patient of the possibility of paralysis as a result of an arteriorgram. We believe with this information laymen are capable of determining whether good medical practice requires a physician to inform his patient of the possibility of paralysis as a result of an arteriogram. *See* 1 Stansbury's N.C. Evidence § 132 (Brandis rev. 1973) for the rule as to the necessity for expert testimony when the jury is not as capable of forming an opinion as the witness. *See also* 52 A.L.R. 3d 1084 as to how other jurisdictions have dealt with the problem of requiring expert medical testimony on the question of requiring that a patient be informed of the risks of a medical procedure. In this case the jury did not have to believe the experts. We hold it was a jury question as to whether the standard of medical care in Asheville required the defendant to inform the plaintiff of the possibility of paralysis resulting from the arteriogram. The court was correct in so charging the jury.

In her second assignment of error the plaintiff contends the court erred in instructing the jury that they could find defendant was not negligent if they found Dr. Ledbetter had the sole responsibility of advising plaintiff of the risk of paralysis. She contends there was no evidence to support this portion of the charge. Plaintiff offered into evidence the deposition of Dr. Appel in which he stated:

> "[I]t was the duty of the defendant Dr. Ledbetter . . . to explain to the plaintiff the risk of paralysis . . . .
>
> * * *
>
> In the case of a patient undergoing an arteriogram, the Neurologist is the responsible attending physician [whose responsibility it is] . . . to explain the normal risks of an arteriogram or angiogram, such as paralysis."

This testimony supported the instruction to the jury.

[3] In her third assignment of error the plaintiff contends the court improperly charged the jury that, even if the defendants

had not informed the plaintiff of risks of paralysis, she would not be entitled to recover were they to find that had she been so informed she would have consented thereto in any event. We believe this instruction was correct. The burden was on the plaintiff to prove that the defendant was negligent in not properly informing the plaintiff of the risks involved in the procedure and that this negligence was a proximate cause of the injury. If the plaintiff would have undergone the procedure after being properly informed, the failure to so inform would not be a proximate cause of the injury. We believe the evidence of the slight danger of paralysis, combined with the serious condition of the plaintiff, was evidence from which the jury could have concluded the plaintiff would have proceeded with the procedure whether or not she was properly informed.

We have examined the plaintiff's remaining assignments of error and find them to be without merit.

No error.

Judges HEDRICK and ARNOLD concur.

WENCO MANAGEMENT COMPANY, DUANE L. HOOVER AND CHARLES L. HILL v. TOWN OF CARRBORO

No. 8015SC1063

(Filed 18 August 1981)

1. **Constitutional Law § 11.1; Municipal Corporations § 30.3— town zoning ordinance—arbitrary—exceeding police power**

An amendment to a town zoning ordinance which prohibited restaurants with drive-in service and which was enacted the night after plaintiff had obtained a valid conditional use permit for that use arbitrarily singled out plaintiff's restaurant and thus contravened established constitutional limitations on the exercise of police power.

2. **Municipal Corporations § 30.4— ordinance regulating vehicular traffic—presumption of validity**

Evidence which indicated the intersection which was the subject of a town ordinance "is one of the busier if not the busiest traffic intersection within the Town of Carrboro" was sufficient to support the trial court's finding of the potential traffic hazard and conclusion that an ordinance which pro-

hibited left turns into and out of plaintiffs' property rationally related to the safety and general welfare of the citizens of Carrboro and was a valid exercise of the Town's police powers.

APPEAL by plaintiffs and defendant from *Brewer, Judge.* Judgment entered 9 June 1980 in Superior Court, ORANGE County. Heard in the Court of Appeals 4 May 1981.

Defendant appeals from judgment which declared that a zoning ordinance adopted by the Carrboro Board of Aldermen was "arbitrary, capricious and not a valid, legitimate exercise of the police power." Plaintiffs appeal from that portion of the judgment which declared a traffic ordinance amendment by defendant a valid exercise of the police power.

Findings of fact by the trial court, supported by evidence in the record, indicate that on 5 March 1980, plaintiffs obtained a conditional use permit from the Carrboro Board of Adjustment to construct a Wendy's Restaurant with a drive-in window in a B-1 zoning district.[1] On 14 March 1980 defendant filed an action attacking issuance of the permit to plaintiffs and obtained a temporary restraining order halting construction. The court dissolved the temporary restraining order on 25 March 1980 and dismissed the action.

That evening the Carrboro Board of Aldermen passed an ordinance which prohibited left turns into and out of plaintiffs' property and a portion of an adjoining property. The Board also set a public hearing to consider amendment of the zoning ordinances to create a B-4 district in which only restaurants with drive-in windows would be permitted, and to exclude restaurants with drive-in windows from districts B-1, -2, and -3. After receiving the Planning Board's recommendation against the B-4 amendment, the Board of Aldermen conducted a public hearing and on

1. The Carrboro Zoning Ordinance provided, in part:

B-1 General Business District

It is the purpose of this district to accommodate a wide variety of commercial wholesale and retail uses related to the town's central business area.

Carrboro also had B-2 and B-3 districts permitting more limited business uses. Restaurants were listed as conditional uses in all three business districts.

14 April 1980 adopted the amendment, which provided in part as follows:

> Section 1. Section 1 of Article VI of the Carrboro Zoning Ordinance is hereby amended by adding thereto a new subsection 1.81, to be placed between subsections 1.8 and 1.9. This new subsection shall read as follows:
>
> 1.81 B-4 General Business
>
> This district is established to accommodate the widest variety of commercial uses including many that are deemed inappropriate in other business districts.
>
> . . . .
>
> Section 4. Section 2.1 (Table of Permitted Uses) of Article VII of the Carrboro Zoning Ordinance is amended . . . to indicate that restaurants with drive-in service or drive-up window service are permissible in the B-4 zoning district (but only in the B-4 zoning district) with a conditional use permit issued by the Board of Adjustment.
>
> Section 5. All provisions of any town ordinance in conflict with this ordinance are repealed.

When it adopted this amendment, defendant did not designate a B-4 district on its zoning map. The day following adoption of the amendment defendant issued a stop work order to plaintiffs.

On 30 April 1980 plaintiffs filed a declaratory judgment action seeking a declaration that the B-4 amendment and the traffic ordinance were unconstitutional. The court entered judgment (1) declaring the B-4 amendment unconstitutional and permanently enjoining its enforcement, and (2) upholding the left turn ordinance. Plaintiffs and defendant appeal.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill and Hargrave, by Douglas Hargrave, for plaintiffs.

Michael B. Brough for defendant.

WHICHARD, Judge.

I. THE B-4 DISTRICT AMENDMENT

[1] G.S. 160A-381 and G.S. 160A-382 authorize towns to divide their territorial jurisdictions into districts and to regulate land uses therein to promote the health, safety, morals, or general welfare of the community. G.S. 160A-385 authorizes towns to amend ordinances adopted pursuant to this authority. Towns exercising this authority are, however, subject to constitutional limitations against "arbitrary and unduly discriminatory interference with the rights of property owners." *Zopfi v. City of Wilmington*, 273 N.C. 430, 434, 160 S.E. 2d 325, 330 (1968). The ordinances enacted must rationally relate to the valid police power objective of promoting the health, safety, morals, or general welfare of the public. *Id.* at 433, 160 S.E. 2d at 330. "Neither the legislature by statute nor a municipal corporation by ordinance or resolution nor an administrative board exercising delegated police powers may arbitrarily or capriciously restrict an owner's right to use his property for a lawful purpose." *In re Application of Ellis*, 277 N.C. 419, 424, 178 S.E. 2d 77, 80 (1970).

The B-4 amendment purported to create a new business classification which would accommodate the "widest variety of commercial uses" including "many . . . deemed inappropriate" for the existing business districts. The amendment as enacted, however, listed only one use, restaurants with drive-in service, for the new district. The amendment removed only restaurants with drive-in service from the list of conditional uses in districts B-1, -2, and -3, leaving both restaurants without drive-in service and non-restaurant drive-in businesses as permitted uses in those districts. Further, when it enacted the amendment, defendant did not designate any area within its territorial jurisdiction as a B-4 district, thereby effectively precluding construction of restaurants with drive-in service in the entire town. Finally, the chronology of events preceding passage of the amendment indicates that defendant amended its ordinances in direct response to plaintiffs' proposed construction of a restaurant with drive-in service after plaintiffs had obtained a valid conditional use permit.

The record fails to demonstrate any rational relation of the amendment to a legitimate police power objective. The fact that

the amendment constituted part of a comprehensive zoning ordinance under consideration by the town aldermen does not supply the necessary rational relation. The amendment as enacted arbitrarily singles out and renders impermissible that use proposed by plaintiffs, and it thus contravenes established constitutional limitations on exercise of police powers. *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974); *In re Application of Ellis*, 277 N.C. 419, 178 S.E. 2d 77 (1970).

The trial court's findings of fact, supported by evidence in the record, sustain its conclusion that the B-4 district amendment was unlawful as an arbitrary and unduly discriminatory interference with plaintiffs' property rights which lacked any rational relation to valid police power objectives. The judgment in this respect is therefore affirmed.

II. THE LEFT TURN ORDINANCE

[2] G.S. 160A-300 authorizes towns to adopt ordinances regulating vehicular traffic upon the public streets. Such ordinances are presumed to be valid and the courts will not declare them invalid unless clearly shown to be so. *Cab. Co. v. Shaw*, 232 N.C. 138, 59 S.E. 2d 573 (1950); *State v. Smedberg*, 31 N.C. App. 585, 229 S.E. 2d 841 (1976), *disc. rev. denied*, 291 N.C. 715, 232 S.E. 2d 207 (1977).

Evidence in the record indicates that the intersection which was the subject of this ordinance "is one of the busier if not the busiest traffic intersection within the Town of Carrboro." There is also evidence indicating that defendant's governing body had expressed "concern about traffic congestion at this particular intersection before the Wendy's application was made." This evidence was sufficient to sustain the trial court's finding that the "turns prohibited . . . would potentially constitute a traffic hazard and potentially result in substantial traffic congestion in the affected area." The finding supports the conclusion that the ordinance rationally relates to the safety and general welfare of the citizens of Carrboro and thus constitutes a valid exercise of defendant's police powers. The portion of the judgment upholding this ordinance is thus affirmed.

Affirmed.

Chief Judge MORRIS and Judge WEBB concur.

STATE OF NORTH CAROLINA v. W. D. CURRIE

No. 8016SC1161

(Filed 18 August 1981)

1. **Larceny § 7— larceny of tobacco and trailer—no consent of owner**

In a prosecution of defendant for felonious larceny of tobacco and a trailer, evidence was sufficient for the jury to conclude that the tobacco and trailer were taken without the consent of the owner or either of two bailees.

2. **Criminal Law § 34.1— defendant's guilt of other offense—evidence inadmissible**

In a prosecution of defendant for felonious larceny of a trailer and tobacco, the trial court erred in admitting testimony tending to show that defendant was guilty of insurance fraud, since the testimony had no relevancy except to show the character of the accused.

APPEAL by defendant from *Mills, Judge.* Judgment entered 1 April 1980 in Superior Court, ROBESON County. Heard in the Court of Appeals 7 April 1981.

Defendant and several other people were charged with the felonious larceny of 42,420 pounds of tobacco having a value of $44,822.00 and of a mobile trailer valued at $8,000.00. His case was consolidated for trial with co-defendants David Brock and Larry Babson.

Evidence at trial tended to show that on 11 August 1979 the defendant, Larry Babson, and Jerry Price took a load of tobacco and the trailer upon which it was loaded from a truck stop in Lumberton known as the "74 Truck Stop." The load of tobacco was removed from the truck stop by use of a truck owned by David Brock. The tobacco was owned by R. J. Reynolds Tobacco Company which had contracted with Bailor & Burton Lines, Inc., who in turn subleased for the transportation of the tobacco with H & J Harvester. H & J Harvester had possession of the tobacco at the time it was taken.

Alvin Hynes, who is a partner in H & J Harvester, testified that his firm was to deliver the tobacco to Davie County Storage in Davie County for R. J. Reynolds. He testified that it was parked at the 74 Truck Stop at his direction and that on 11 August 1979, he instructed his driver to deliver the load to Davie County. On Sunday, 12 August 1979, when Mr. Hynes saw the truck was

not at the truck stop, he assumed the load of tobacco had gone to Davie County as he had directed. The first time he had information "that the trailer load of tobacco had been taken by someone other than [his] driver was Monday morning." Marvin Pruitt, a manager with Burton Lines, Inc., testified that the load of tobacco did not reach its Davie County destination and that his company was "later presented a claim from R. J. Reynolds Tobacco Company for the load of tobacco."

Benjamin Foust pled guilty to the same crime with which the defendant was charged and testified for the State that the defendant contacted him on 11 August 1979 and told him he expected a load of tobacco that night; that the negotiated price was $.90 per pound; and that on 12 August 1979 a load of tobacco was delivered to the home of Mr. Foust's son. Mr. Foust testified that, as he unloaded the tobacco, he noticed R. J. Reynold's tags on the tobacco and that he pulled the tags off and burned them.

From a verdict of guilty as charged and a sentence imposed, defendant has appealed.

Attorney General Edmisten, by Assistant Attorney General Grayson G. Kelley, for the State.

Merriman, Nicholls and Dombalis, by Nicholas J. Dombalis, II, for defendant appellant.

WEBB, Judge.

[1] The defendant assigns as error the denial of his motion to dismiss. He contends the State did not prove each element of the crime because the State did not have direct testimony that the property was taken without the consent of the owner. Without discussing the evidence in detail we hold there was substantial evidence from which the jury could conclude that the trailer and the tobacco were taken without the consent of the owner or either of the two bailees.

[2] The defendant also assigns error to testimony elicited by the State from J. H. Pike. Mr. Pike had been indicted for the crime for which the defendant was being tried. He pled guilty and testified for the State. On direct examination Mr. Pike testified over the objection of the defendant as follows:

"Q. What did Mr. Currie tell you concerning that truck Mr. Foust got?

* * *

A. He said whoever owned the truck had got behind with some payments, and they had to get shove of it, get shed of it, to make some payments on other trucks.

* * *

Q. In your conversation before, and the remarks Mr. Currie made to you about the stolen Brock truck, was anything mentioned about insurance?

* * *

A. Yes, sir.

Q. What was said?

* * *

A. He said the man was behind with some payments, and he had to have some quick money.

Q. All right; so, what did he say about insurance, if anything?

* * *

A. Let's see, we had to give $3,000 or $4,000 for it, that was the first quick money. The next, I guess, was getting the insurance as far as I know.

Q. Well, did Mr. Currie say anything about insurance?

* * *

A. He said he could collect insurance."

The defendant contends this testimony tended to prove the defendant was guilty of insurance fraud, a crime unrelated to the crime for which he was being tried. We believe this assignment of error has merit. We do not believe this testimony had any relevancy except to show the character of the accused and it was error not to sustain the objections of the defendant. *See* 1 Stansbury's N.C. Evidence § 91 (Brandis rev. 1973) and *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). We cannot say that

the admission of this testimony was harmless to the defendant beyond a reasonable doubt, and we hold there must be a new trial.

The State contends the defendant had opened the door to this testimony by the defendant's cross-examination of Benjamin Foust, a witness for the State. Mr. Foust pled guilty to the crime for which the defendant was charged and testified for the State. On cross-examination by the defendant's attorney he stated that he had seen the defendant when he looked at the truck at the 74 Truck Stop. We do not believe this opened the door for testimony as to an insurance fraud. The State also contends that on cross-examination of Mr. Foust by the attorney for David Brock, testimony was given which entitled the State to question Mr. Pike as it did. During the cross-examination of Foust by Brock's attorney, Mr. Currie's name was not mentioned. There were some questions about a truck but no mention was made of insurance fraud. If a co-defendant's counsel by cross-examination could open the door to testimony against Mr. Currie, it was not done in this case.

We do not discuss the defendant's other assignments of error as they may not recur at a new trial.

New trial.

Judges HEDRICK and ARNOLD concur.

RUTH M. LEVY MACKLIN v. DR. JOHN DOWLER v. ROY J. ALLEY

No. 8117SC48

(Filed 18 August 1981)

1. Master and Servant §§ 23, 23.3— duty to warn employee of danger—summary judgment improper

Plaintiff, a veterinarian's receptionist who was bitten by a dog after being instructed to help the owner carry the dog to his car, raised questions which should have been decided by a jury when she alleged that the veterinarian knew, or at least in his professional capacity should have known, of the danger involved when a dog is in a strange place, is in a stressful situation and has just received shots for rabies.

2. Torts § 7— release of only one tortfeasor

Plaintiff's release of an owner of a dog from liability did not release the veterinarian for whom she worked where the allegations of plaintiff's complaint asserted the veterinarian was severally liable in negligently failing to warn plaintiff, his employee, of the potential dangers associated with his directive to help the owner carry the dog to the owner's car. G.S. 1B-4.

APPEAL by plaintiff from *Kivett, Judge.* Judgment entered 19 November 1980 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 4 June 1981.

Plaintiff, Ruth Macklin, alleges in her Complaint that on 21 June 1978, she was employed as a receptionist for the defendant Dr. John Dowler, a veterinarian. On that day, the third-party defendant, Roy Alley, brought his two German Shepherd dogs to Dr. Dowler's office for rabies shots. Dr. Dowler administered the shots and then directed his employee, Ruth Macklin, to assist Mr. Alley in getting the dogs into Mr. Alley's car. While providing assistance, Ms. Macklin was bitten by one of the dogs resulting in serious injuries to her face and nose.

Ms. Macklin contends (1) that Dr. Dowler was negligent in ordering her—an employee unskilled, untrained and inexperienced in handling animals—to assist in getting the dogs into Mr. Alley's car without warning her of the potential dangers of providing such assistance; (2) that Dr. Dowler knew, or reasonably should have known, that dogs in a strange and stressful environment after having just received rabies shots would likely attempt to bite a person trying to handle them; and (3) that Dr. Dowler failed to provide her with a safe place to work by directing her to perform a dangerous task—handling the dogs—when he knew that she was inadequately trained to perform such tasks and when he had available other employees with greater expertise in performing such a task.

Dr. Dowler, in his Answer, admitted much of what was alleged in Ms. Macklin's Complaint, but specifically denied that he ordered Ms. Macklin to assist in getting the dogs in the car, denied that she was acting within the scope of her employment at the time of her injury and denied that he knew she was unskilled in handling animals.

Ms. Macklin gave a covenant not to sue and a full release to Mr. Alley but specifically reserved in the release her right to pro-

ceed against Dr. Dowler. Dr. Dowler, however, joined Mr. Alley as a third-party defendant alleging that if he (Dr. Dowler) were found liable to Ms. Macklin, then Mr. Alley should indemnify him for all damages owing to Ms. Macklin.

At a pre-trial hearing, Dr. Dowler moved for summary judgment, and his motion was granted. Ms. Macklin is before us appealing from that grant of summary judgment.

Gwyn, Gwyn & Morgan, by Allen H. Gwyn, Jr., for plaintiff appellant.

Leigh Rodenbough, for defendant appellee.

BECTON, Judge.

I

At the outset, it should be noted that this is not a traditional dog-bite case in which the very old and out-dated rule of law—"every dog is entitled to one bite"—applies. Nor is this a case under the subsequently followed rule that "trial courts undertake to judge . . . the vicious propensities of animals by their behavior, although it may fall short of actual injury." *Hill v. Moseley*, 220 N.C. 485, 488-89, 17 S.E. 2d 676, 678 (1941). Knowledge of the natural, vicious propensities of the dog in question is *not* an essential element of Ms. Macklin's cause of action. Ms. Macklin has alleged, and would like the opportunity to prove, that Dr. Dowler, as her employer, had a duty to furnish her with a safe place to work, that he negligently ordered her to perform a known dangerous task, that he negligently failed to warn her of those dangers, and that his negligence proximately resulted in the injuries sustained by her.

[1] It is well-established in our jurisprudence that an employer must exercise the due care of a prudent person in like circumstances to provide a safe place for employees to work. *Bemont v. Isenhour*, 249 N.C. 106, 105 S.E. 2d 431 (1958). More significantly for this case, an employer also has a duty to warn an employee of dangers, which are known to the employer, inherent in the task the employee is directed to undertake. *Clark v. Roberts*, 263 N.C. 336, 139 S.E. 2d 593 (1965). This duty to warn should be exercised with greatest care when "by reason of youth, inexperience or incompetency the employees do not appreciate

[the danger]." *Watson v. Construction Company*, 197 N.C. 586, 590, 150 S.E. 20, 22 (1929); *Steeley v. Lumber Co.*, 165 N.C. 27, 80 S.E. 963 (1914).

Ms. Macklin alleged that Dr. Dowler knew, or at least in his professional capacity should have known, of the danger involved when a dog is in a strange place, is in a stressful situation and has just received shots for rabies. Ms. Macklin's allegations raise questions of fact which should have been decided by a jury. Summary judgment is appropriate only when no issue of material fact exists, and it should be granted sparingly in negligence cases in which juries are required to apply the reasonable person standard on the facts presented to them. *Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E. 2d 255, 257 (1979); *Willis v. Power Co.*, 42 N.C. App. 582, 590, 257 S.E. 2d 471, 477 (1979). An issue of fact exists as to whether Dr. Dowler was negligent in directing Ms. Macklin to assist with the loading of the dogs into Mr. Alley's car. An issue of fact exists as to whether Dr. Dowler knew of the dangers associated with his order and whether he should have warned Ms. Macklin of those dangers. For the foregoing reasons then, the trial court committed error in granting summary judgment for the defendant, Dr. Dowler.

II

[2] In defense on appeal, Dr. Dowler argues that the release given by Ms. Macklin to Mr. Alley also released him, Dr. Dowler, from any liability. Ms. Macklin contends, however, that the Uniform Contribution Among Tortfeasors Act as adopted by North Carolina is controlling in this situation. G.S. 1B-4 provides that when a release is given to one of two or more tortfeasors, it does not discharge any of the remaining tortfeasors unless its terms specifically provide for such a discharge. *Id.* No discharge of Dr. Dowler's potential liability appears in the release given to Mr. Alley.

Dr. Dowler contends that G.S. 1B-4 is inapplicable because the statute only applies to tortfeasors who are jointly and severally liable. Dr. Dowler argues that any liability he may have to Ms. Macklin is passive, secondary liability derived from the negligence of Mr. Alley. These contentions are without merit. The allegations in Ms. Macklin's Complaint assert that Dr. Dowler is severally liable for negligently failing to warn Ms. Macklin, his

employee, of the potential dangers associated with his directive to her. The theory of several liability prevents, in this case, the release to Mr. Alley from affecting Ms. Macklin's cause of action against Dr. Dowler.

The trial court's grant of summary judgment was in error. Therefore, we reverse that judgment and order a full trial on the merits.

Judge VAUGHN and Judge ARNOLD concur.

RUDOLPH L. EDWARDS, RECEIVER DURHAM WHOLESALE CATALOG COMPANY, INC. v. THE NORTHWESTERN BANK, ALPHA BETA CORPORATION, EMPIRE PROPERTIES, INC., VALCO, INC., PRESIDENTIAL APARTMENTS, INC., ROBERT L. LIPTON, ABE GREENBERG AND C. PAUL ROBERTS

No. 8014SC611

(Filed 18 August 1981)

1. **Banks and Banking § 11.1— wrongful payment of checks—directed verdict for bank**

In an action by the receiver of a company to recover allegedly wrongfully diverted corporate assets for the benefit of the company's creditors where plaintiff asserted liability of defendant bank on the ground of violation of G.S. 32-9, the trial court properly entered a directed verdict for the bank where plaintiff failed to carry its burden of showing that a fiduciary of the company, who was empowered to draw checks on the company's account, breached his fiduciary duty.

2. **Appeal and Error § 68.2— reversal of grant of summary judgment—subsequent directed verdict proper**

A prior reversal of a grant of summary judgment for defendant bank on the same claim did not render directed verdict for the bank improper under the "law of the case" doctrine, since the prior appeal was from the grant of a pretrial summary judgment motion; the prior appeal established that plaintiff was entitled to offer evidence to prove his claim; it did not establish that he had carried the burden of supporting his prima facie case in all its constituent elements, as he was required to do to withstand a motion for directed verdict; this appeal was from the grant of a motion for directed verdict made at the close of plaintiff's evidence; the evidence before the court on each appeal was different; and the "law of the case" doctrine thus did not apply.

Edwards v. Northwestern Bank

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 20 February 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 14 January 1981.

Plaintiff appeals from a directed verdict dismissing its action against defendant Northwestern Bank.

Randall, Yaeger, Woodson, Jervis & Stout, by John C. Randall, for plaintiff appellant.

Nichols, Caffrey, Hill, Evans & Murrelle, by Edward L. Murrelle and Robert D. Albergotti, for The Northwestern Bank, defendant appellee.

WHICHARD, Judge.

[1] Plaintiff, receiver of Durham Wholesale Catalog Company, Inc. (Durham Wholesale), seeks to recover allegedly wrongfully diverted corporate assets for the benefit of the company's creditors.

Defendant bank granted a $500,000 line of credit loan to Durham Wholesale secured by a floating lien on inventory. Durham Wholesale opened a checking account with the bank in which the bank placed a $400,000 advance on the loan. The same day defendant Greenberg, an officer of Durham Wholesale, transferred $250,000 from this deposit by a check payable to defendant Empire Properties, in which defendant Roberts was a principal. This check was converted by the bank at Greenberg's request into four cashier's checks payable to defendant Empire Properties in the sums of $100,000, $60,000, $50,000 and $40,000. The evidence indicates that the cashier's checks would not have been issued without approval by an officer of the bank.

Plaintiff predicates the asserted liability of the bank upon violation of G.S. 32-9, which provides in pertinent part:

> If a check is drawn upon the account of his principal by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith.

Defendant Greenberg, as an officer of Durham Wholesale, was in a fiduciary relationship with that company. He was also an authorized signatory of checks drawn on the company's account. Plaintiff, to establish that the bank paid the check either (1) with actual knowledge that Greenberg in drawing it was breaching his fiduciary duty, or (2) in bad faith, first had to establish the breach of fiduciary duty itself, *i.e.*, that Greenberg was securing the funds for a private purpose, or a purpose not authorized by the company. Knowledge on the part of the bank cannot be established without first establishing the fact of which it is alleged to have knowledge. The first fact to be established is breach by the fiduciary of a duty owed to his principal. Only then does knowledge on the part of the bank become a factor in establishing its liability under G.S. 32-9.

The record is devoid of evidence establishing absence of authorization from Durham Wholesale to Greenberg to draw the check. No evidence in any way suggests a breach therein by Greenberg of a duty to Durham Wholesale. The fact that the loan which created the account balance was secured by inventory does not establish that Durham Wholesale authorized use of account funds for purchase of inventory only. Nor does designation of Empire Properties as payee establish that the check was not drawn for an authorized purpose. The evidence indicates that Durham Wholesale acquired real property from Empire Properties. The check thus could have been drawn for the purchase of this real property. The evidence also indicates that Empire Properties owned a jewelry company. The check thus could have been drawn to purchase from Empire Properties a jewelry inventory for Durham Wholesale.

The bank's liability arose, if at all, when it paid the check by issuing cashier's checks in exchange therefor. There was no evidence that Greenberg was, by drawing the check, breaching a fiduciary duty. Hence, there was nothing of which the bank could have actual knowledge or knowledge that rendered its act in bad faith. Because the bank's liability arose, if at all, when it paid the check, evidence as to the endorsees of the cashier's checks issued in exchange for the check was not relevant to the question of the bank's liability.

[2] Plaintiff contends that a prior reversal of a grant of summary judgment for the bank on this claim[1] renders directed verdict for the bank improper under the "law of the case" doctrine, citing *Johnson v. R.R.*, 257 N.C. 712, 127 S.E. 2d 521 (1962) and *Stallings v. Insurance Co.*, 230 N.C. 304, 53 S.E. 2d 90 (1949). In those cases the Supreme Court held that reversal of a nonsuit or a directed verdict at an earlier trial barred nonsuit on substantially the same evidence at the new trial occasioned by the reversal. *Id.* The holdings in those cases are predicated on the *same evidence at post-evidence stages of the trials.* The prior appeal here was from the grant of a *pre-trial* summary judgment motion. This appeal is from the grant of a *post-plaintiff's evidence* motion for directed verdict. The stage of the trial is different. The evidence before the court is different. The "law of the case" doctrine thus does not apply.

The opinion in the prior appeal, reversing the grant of summary judgment, indicates that the bank supported its summary judgment motion only with the affidavit of a bank employee who merely denied the allegations of plaintiff's complaint. This court found that the bank had not adequately supported its motion and thus had not carried its summary judgment burden, stating that the motion should not be granted upon the mere denial of an opponent's allegations. *Edwards*, 39 N.C. App. at 269-270, 250 S.E. 2d at 657-658. The prior appeal thus established that plaintiff was entitled to offer evidence to prove his claim. It did not establish that he had carried the burden of supporting his prima facie case in all its constituent elements, as he was required to do to withstand a motion for directed verdict. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 638, 272 S.E. 2d 357 (1980), and authorities cited.

The following is pertinent: "[T]he earlier denial of a motion for summary judgment should not, in any way, be considered a barrier to later consideration of a motion for directed verdict." 5A J. Moore, Federal Practice § 50.03[4] (2d ed. 1980).

> The mechanics of the [motion for summary judgment and motion for directed verdict] differ at times, as, for example, where defendant is moving for summary judgment on the ground that plaintiff's claim lacks merit. At trial the plaintiff

1. *Edwards v. Bank*, 39 N.C. App. 261, 250 S.E. 2d 651 (1979).

has the burden of, and must take the initiative in, establishing the prima facie elements of his claim; and if he does not the defendant is entitled to a directed verdict. But if the defendant moves for summary judgment on the ground that plaintiff does not have an enforceable claim he has the burden of clearly establishing the lack of any triable issue of fact and must take the initiative of marshalling a record so showing.

6 J. Moore, Federal Practice § 56.04[2] (2d ed. 1976).

Plaintiff failed to establish a breach of fiduciary duty by defendant Greenberg. This was an essential constituent element of his prima facie case, absence of which entitles defendant bank to directed verdict dismissing the action. The questions before this court in this and the prior appeal differ significantly. Hence, the prior reversal of summary judgment for defendant bank does not bar directed verdict at the close of plaintiff's evidence here.

Affirmed.

Judges WEBB and MARTIN (Harry C.) concur.

RICHARD REAVIS, RALPH REAVIS, CHESTER P. MIDDLESWORTH, ALLAN JOHNSON, HENRY CONRAD, ROBERT GARRISON, J. L. HOPE, WILLIAM HOPE, WILLIAM CROSSWHITE, HOWARD BRYAN, AND AUTO EQUIPMENT, INC., A CORPORATION v. ECOLOGICAL DEVELOPMENT, INC., A CORPORATION

No. 8022SC1058

(Filed 18 August 1981)

Attorneys at Law § 7.4; Mortgages and Deeds of Trust § 32.1 — language in promissory note providing for attorneys' fees upon default — no violation of Anti-Deficiency Judgment statute — summary judgment proper

Where plaintiff, after foreclosing on defendant's property, brought suit to recover attorneys' fees and expenses incurred in the foreclosure proceedings and such right to attorneys' fees and expenses was expressly provided for in the promissory note executed by the parties and incorporated in the deed of trust, summary judgment was properly granted for plaintiff as the recovery is authorized by statute (G.S. 6-21.2) and does not represent a deficiency in violation of the Anti-Deficiency Judgment statute (G.S. 45-21.38).

Reavis v. Ecological Development, Inc.

APPEAL by defendant from *Collier, Judge.* Judgment entered 25 July 1980 in Superior Court, IREDELL County. Heard in the Court of Appeals 1 May 1981.

The facts in this case are not in dispute. On 2 August 1978, plaintiffs conveyed, by separate deeds, three tracts of land valued at $720,213.70 to the defendant. In return, defendant executed and delivered to the plaintiffs three promissory notes and three purchase money deeds of trust. Subsequently, defendant defaulted on the notes, and plaintiffs foreclosed on the property. After foreclosure, plaintiffs brought this action to recover attorneys' fees and expenses of $162,161.42. Plaintiffs moved for summary judgment relying on the following language in the promissory notes:

> Upon default, the holder of this note may employ an attorney to enforce the holder's rights and remedies and the maker . . . of this note hereby agree[s] to pay to the holder the sum of fifteen (15%) percent of the outstanding balance owing on said note for reasonable attorney's fees, plus all other reasonable expenses incurred by the holder in exercising any of the holder's rights and remedies upon default.

Based on the pleadings and supporting documents, the trial court granted summary judgment for the plaintiffs, and defendant appeals from that judgment.

McElwee, Hall, McElwee & Cannon, by John E. Hall and William F. Brooks, and Vannoy & Reeves, by Wade E. Vannoy, for defendant appellants.

Pope, McMillan, Gourley & Kutteh, by William P. Pope, and Bondurant & Lassiter, by T. Michael Lassiter, for plaintiff appellees.

BECTON, Judge.

The propriety of the trial court's grant of summary judgment depends upon whether the recovery of attorneys' fees and expenses in this case is against public policy and affected by North Carolina's Anti-Deficiency Judgment statute, G.S. 45-21.38.[1] De-

1. G.S. 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.—In all sales of real property by mortgagees and/or trustees

fendant argues that the language of the statute as well as certain provisions in the deeds of trust should limit plaintiffs' recovery to the encumbered property only, thereby precluding the separate recovery of attorneys' fees and expenses.

G.S. 45-21.38 essentially provides that upon default by a purchase-money mortgagor, the holder of the promissory note may foreclose only on the property; the holder is prohibited from also bringing suit to recover a "deficiency"—a decline in the value of the property. The historical purpose of the Anti-Deficiency Judgment statute was to protect purchasers in times of economic distress from losing their property as well as having to pay for the property's depreciated value. As our Supreme Court recently held, "the manifest intention of the Legislature was to limit the creditor to the property conveyed when the note and mortgage or deed of trust are executed to the seller of the real estate and . . . are for the purpose of securing the balance of the purchase price." *Realty Co. v. Trust Co.*, 296 N.C. 366, 370, 250 S.E. 2d 271, 273 (1979).

Defendant also directs our attention to the language in the deed of trust which provides: "[t]he parties of the third part [plaintiffs] agree to look solely to the real property encumbered by this instrument for their security and not to seek any deficiency judgment." Defendant contends that this language precludes plaintiffs from recovering, in a proceeding separate from foreclosure, attorneys' fees and expenses. Thus, from two bases—the Anti-Deficiency Judgment statute and the above-quoted language in the deed of trust—defendant argues that the trial court's order to pay plaintiffs' attorneys' fees and expenses

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under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.

is equivalent to a deficiency judgment. Under the facts and circumstances of this case, we disagree.

A deficiency under G.S. 45-21.38 refers to an indebtedness which represents the balance of the original purchase price for the real estate not recovered through foreclosure. The attorneys' fees and expenses in this case do not represent the unrecovered "balance of purchase money for [the] real estate," G.S. 45-21.38; the fees represent the costs of foreclosing on the property. Moreover, defendant—a corporation actively involved in land purchases and development, and represented by counsel—negotiated with plaintiffs for the purchase of the land and *agreed* to the provisions in the promissory note providing for the payment of attorneys' fees and expenses upon default. The defendant is not being held liable for a decline in the property value representing a deficiency; rather, defendant, as the party in default, is paying the agreed upon costs of plaintiffs in recovering the depreciated property. The defendant agreed to this arrangement, and should not now be permitted to escape liability. Our Anti-Deficiency Judgment statute does not control recovery in this case. Moreover, in accordance with, and not in derrogation of, the agreed upon language in the deed of trust, plaintiffs "look[ed] solely to the real property encumbered by [the] instrument for their security and [did not] seek any deficiency judgment."

Although "provisions calling for a debtor to pay attorney's fees incurred by a creditor in the collection of a debt" have long been considered against public policy, *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 290, 266 S.E. 2d 812, 815 (1980); *Tinsley v. Hoskins*, 111 N.C. 340, 16 S.E. 325 (1892), such provisions are enforceable when specifically authorized by statute. *Enterprises, Inc. v. Equipment Co.; Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E. 2d 120 (1976). G.S. 6-21.2 "represents a far-reaching exception to the well-established rule against attorney's fees obligations," *Supply, Inc. v. Allen*, 30 N.C. App. at 276, 227 S.E. 2d at 124, and specifically approves of an obligation to pay reasonable attorneys' fees found in *any* note "or other evidence of indebtedness." G.S. 6-21.2. G.S. 6-21.2 was enacted in 1967; G.S. 45-21.38 was enacted in 1933. In enacting G.S. 6-21.2, we presume the Legislature acted with care and deliberation and with full knowledge of prior and existing law. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970); *State v. Hutson*, 10 N.C. App. 653, 179 S.E. 2d 858 (1971). The

Legislature made no exceptions in G.S. 6-21.2 for purchase-money notes and made no reference to G.S. 45-21.38. Reasonable attorneys' fees under G.S. 6-21.2.(2) are construed to mean no more than 15% of the outstanding balance owing on the note or on other evidence of indebtedness. In the case at bar, the note signed by the defendant provided for the payment of 15% of the outstanding debt as attorneys' fees upon default. The note itself was specifically incorporated by reference in the Deed of Trust. In summary, then, the provision for attorneys' fees, found in the promissory note given by the defendant to the plaintiffs and incorporated in the Deeds of Trust, is properly authorized by statute (G.S. 6-21.2), and recovery of the fees does not represent a deficiency in violation of our Anti-Deficiency Judgment statute (G.S. 45-21.38).

For these reasons, we find the trial court's grant of summary judgment for plaintiffs proper in all respects. Therefore, we

Affirm.

Judge MARTIN (Robert M.) and Judge WHICHARD concur.

JAMES C. ELLER v. THE COCA-COLA COMPANY AND COCA-COLA COMPANY, U.S.A.

No. 8018SC1179

(Filed 18 August 1981)

1. Appeal and Error § 6.3— lack of jurisdiction—appeal proper

Defendants' appeal from the trial court's denial of their motion to dismiss was proper since an appeal lies immediately from the denial of a motion to dismiss for want of jurisdiction.

2. Master and Servant § 15.1— violation of right to work laws—jurisdiction

Where plaintiff alleged violation of N.C.'s right to work laws and malicious interference with an employment relationship, but defendants moved to dismiss for want of jurisdiction, contending that State court jurisdiction had been preempted by federal law, the determinative question was whether plaintiff and defendants had an employee-employer relationship, and the trial court should have considered matters outside the pleadings in order to determine the question of subject matter jurisdiction.

APPEAL by defendants from *Walker, Judge.* Order entered 30 October 1980, in Superior Court, GUILFORD County. Heard in the Court of Appeals 27 May 1981.

Plaintiff filed a complaint against defendants, alleging violation of North Carolina's right to work laws, specifically G.S. 95-81, and malicious interference with an employment relationship. According to his complaint, plaintiff, an employee of American Stevedoring Corporation, worked at defendants' syrup manufacturing plant in Greensboro, North Carolina, from 1976 to 1979. In 1979, Thomas Van Winkle, an employee of defendants, forced plaintiff's employer to discharge plaintiff solely in retaliation for plaintiff's efforts to organize a union at the defendants' Greensboro plant. This, according to plaintiff, violated the provisions of G.S. 95-81 and constituted the tort of malicious interference with plaintiff's contract of employment.

The defendants filed a motion to dismiss on the basis that the complaint failed to state a claim upon which relief could be granted and on the basis that the North Carolina courts lacked jurisdiction over the subject matter of this action. By order dated 30 October 1980, the trial court denied defendants' motion to dismiss. From the denial of their motion, defendants appealed.

Smith, Patterson, Follin, Curtis, James and Harkavy, by Norman B. Smith, for plaintiff-appellee.

Smith, Moore, Smith, Schell and Hunter, by Martin N. Erwin, for defendant-appellants.

MARTIN (Robert M.), Judge.

[1] Defendants assign as error the denial of their motion to dismiss and, as grounds for this assignment, assert that the courts of North Carolina lack jurisdiction over the subject matter of this action. In this matter, their appeal is proper since an appeal lies immediately from the denial of a motion to dismiss for want of jurisdiction. *Kilby v. Dowdle,* 4 N.C. App. 450, 166 S.E. 2d 875 (1969). We shall review, therefore, defendants' contention that State court jurisdiction has been preempted by federal law and that jurisdiction is reserved exclusively by the National Labor Relations Board.

[2] Under the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, the National Labor Relations Board has jurisdiction to consider and to act upon alleged violations of the substantive provisions of the Act. According to defendants, plaintiff should have proceeded under 29 U.S.C. §§ 157 and 158. Simply stated, 29 U.S.C. § 157 protects employees in their right to organize; on the other hand, 29 U.S.C. § 158 proscribes unfair labor practices (such as interference with an employee's § 157 rights) on the part of employers. Defendants correctly argue that in the case of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959), the Supreme Court established that, if an activity in question is arguably protected or prohibited by the National Labor Relations Act, the preemption doctrine applies to oust state courts of jurisdiction. In order for the National Labor Relations Act to apply to the case at bar, it is necessary that the plaintiff and the defendants have an employee-employer relationship.

By statutory definition, the term "employer" includes "any person acting as an agent of an employer, directly or indirectly. . . ." 29 U.S.C. § 152(2). The term "employee" includes "any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise. . . ." 29 U.S.C. § 152(3). The vagueness of these definitions has been remedied somewhat by judicial interpretation. In determining the question of employer-employee status in cases involving independent contractors, the courts have considered whether parties like defendants herein possessed sufficient "indicia of control" over the work of employees of the independent contractor. *See, e.g., Boire v. Greyhound Corp.*, 376 US. 473, 84 S.Ct. 894, 11 L.Ed. 2d 849 (1964); *N.L.R.B. v. Jewell Smokeless Coal Corp.*, 435 F. 2d 1270 (4th Cir. 1970). The question of the employer-employee relationship is, therefore, a factual one.

After having reviewed the record of the case *sub judice*, this Court is of the opinion that the court below failed to elicit sufficient facts upon which to make the determination of subject matter jurisdiction.

Whenever a trial court, on its own motion or on the motion of a party in the suit, must determine the question of subject matter jurisdiction, it "necessarily has inherent judicial power to inquire

into, hear and determine the question of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E. 2d 806, 808 (1964). *See also Kilby v. Dowdle, supra.* In *Tart v. Walker*, 38 N.C. App. 500, 248 S.E. 2d 736 (1978), this Court pointed out that matters outside the pleadings may be considered and weighed by the court in determining the question of subject matter jurisdiction. *See* Barron and Holtzoff, *Federal Practice and Procedure*, § 352.

In the case before us, it is difficult to determine what the trial court considered in ruling on defendants' motion to dismiss for lack of subject matter jurisdiction. It would appear, however, that the only documents before the judge were the complaint filed by the plaintiff and a letter from the National Labor Relations Board. The trial court made no findings of fact and no conclusions of law. Given the complexity of the question of subject matter jurisdiction, we believe, and so hold, that, in the case at bar, the trial judge should have considered matters outside the pleadings in order to determine the question of subject matter jurisdiction. Furthermore, although G.S. 1A-1, Rule 52 does not require the trial court to make findings of fact or conclusions of law on decisions of any motion (unless requested by a party or by Rule 41(b)), we believe the better practice in this case would be to set forth the findings and conclusions on which the court determines its order. If subsequent appeal from the order is taken, this Court would thereby have before it a record more susceptible to meaningful review.

Defendants also raise questions as to whether plaintiff's complaint states valid claims for relief. The appeal on these issues, however, is premature, *Hankins v. Somers*, 39 N.C. App. 617, 251 S.E. 2d 640, *disc. rev. denied*, 297 N.C. 300, 254 S.E. 2d 920 (1979), and is, therefore, dismissed.

For the reasons set forth above, the order from which appeal was taken is vacated and this case is remanded to the trial court for a hearing to determine the question of subject matter jurisdiction.

Vacated and remanded.

Judges CLARK and HILL concur.

ADVANCE PUBLICATIONS, INC. v. THE CITY OF ELIZABETH CITY AND TOMMY M. COMBS, CITY MANAGER

No. 801SC1209

(Filed 18 August 1981)

Municipal Corporations § 45— letter received by city—public record

A letter received by the manager of defendant-city from a consulting engineer whom defendant-city employed to inspect construction work on additions and modifications to its water treatment plant is a public record subject to disclosure pursuant to G.S. 132-1.

APPEAL by defendants from *Reid, Judge.* Judgment entered 11 December 1980 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 3 April 1981.

Defendant Combs, as manager of defendant-city, received a letter from a consulting engineer whom defendant-city employed to inspect construction work on additions and modifications to its water treatment plant. Plaintiff, a publisher of news events in defendant-city, was denied the right to inspect and copy the letter. By this action plaintiff seeks to compel disclosure.

The trial court granted summary judgment for plaintiff, ordering that defendants immediately disclose the letter. Defendants appeal.

Leroy, Wells, Shaw, Hornthal, & Riley, by Dewey W. Wells, for plaintiff appellee.

Wilson & Ellis, by M. H. Hood Ellis, for defendant appellants.

WHICHARD, Judge.

The issue is whether the letter is a public record subject to disclosure to this plaintiff. We hold that it is.

The letter is a public record. G.S. 132-1 provides the following definition:

> "Public record" or "public records" shall mean all . . . *letters* . . . made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions [which] shall mean and include every public office, public officer or official (State or *local,* elected or appointed) . . . .

(Emphasis supplied.) Defendant-city admits it is a subdivision of the State. As such, it is authorized to construct, establish, enlarge, improve, and maintain, as a public enterprise, a water supply and distribution system. G.S. 160A-311, 160A-312. The letter related to construction work on additions and modifications to its water treatment plant. Clearly, then, the letter was received pursuant to law in connection with the transaction of public business by a subdivision of the State. Hence, it falls within the statutory definition of a public record.

Plaintiff is entitled to disclosure and copying rights. G.S. 132-6 provides:

> Every person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision *by any person*, and he shall furnish certified copies thereof on payment of fees as prescribed by law.

(Emphasis supplied.) Further, G.S. 132-9 provides:

> *Any person* who is denied access to public records for purposes of inspection, examination or copying may apply to the appropriate division of the General Court of Justice for an order compelling disclosure, and the court shall have jurisdiction to issue such orders.

(Emphasis supplied.) Plaintiff does not fall without the scope of the phrase "any person" by being a corporation. Corporations are generally considered "persons" in contemplation of law. The United States Supreme Court has stated: "[I]t leads nowhere to call a corporation a fiction. If it is a fiction, it is a fiction created by law with intent that it should be acted on as if true. *The corporation is a person . . . .*" *Klein v. Board of Tax Supervisors*, 282 U.S. 19, 24, 75 L.Ed. 140, 143, 51 S.Ct. 15, 16 (1930) (emphasis supplied). A leading treatise states:

> It is said that a private corporation may be defined as an association of persons to whom the sovereign has offered a franchise to become an artificial, juridical *person* . . . .
>
> Other judicial definitions of a corporation [include]: . . . an artificial being created by law, and composed of individuals who subsist as a body politic under a special

> denomination, with the capacity of perpetual succession, and of acting, within the scope of its charter, as a natural *person* . . . .

18 Am. Jur. 2d, *Corporations*, § 1 at 548-549 (1965) (emphasis supplied). We do not believe the General Assembly intended to exclude corporate entities from the scope of the phrase "any person" in G.S. 132-6 or G.S. 132-9. Nor do we believe it would be sound public policy to do so, especially when the function of the corporate entity seeking access to public records is that of informing the public. "[W]here records deal with how the government is operated, a desire to publish the information in a newspaper to inform the public is a legitimate purpose for seeking to inspect them." 66 Am. Jur. 2d, *Records and Recording Laws*, § 16 at 352-353 (1973).

Public policy considerations do not dictate, as defendants contend they do, that this court create an exemption to mandatory disclosure of communications such as this letter. With the sole exception of confidential communications by legal counsel to governmental bodies,[1] the General Assembly engrafted no exemptions on the provisions mandating disclosure of public records.[2] We thus presume it intended only the exemption set forth.

> The terms of the statute being clear, no construction of its provisions by this Court is required. [Citations omitted.] In such event, it is our duty to apply the statute so as to carry out the intent of the Legislature, irrespective of any opinion we may have . . ., unless the statute exceeds the power of the Legislature under the Constitution.

Peele v. Finch, 284 N.C. 375, 382, 200 S.E. 2d 635, 640 (1973).

Further, "[g]ood public policy is said to require liberality in the right to examine public records." 66 Am. Jur. 2d, *Records and Recording Laws*, § 12 at 349 (1973). "While some degree of confidentiality is necessary for government to operate effectively, the general rule in the American political system must be that the affairs of government be subject to public scrutiny." Com-

1. *See* G.S. 132-1.1.

2. *See* G.S. 132-1 *et seq.*

ment, 55 N.C.L. Rev. 1187, 1188 (1977). Thus, even absent legislative intent expressed as clearly as here, we would be reluctant to engraft the exemption requested, without more compelling policy considerations than defendants have presented.

Defendants contend the purpose of G.S. 132-1 *et seq.* is to provide for preservation of public records, not for disclosure. A presumed legislative intent to mandate the extensive preservation of public records prescribed by these statutes, with storage at public expense, but to which the public is denied access, is untenable. Preservation for its own sake, absent access, 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).

The trial court correctly concluded that the statutes render the letter a public record subject to disclosure to this plaintiff.

Affirmed.

Judges MARTIN (Robert M.) and BECTON concur.

JENNIE L. MINGES v. MILES A. MINGES

No. 803DC1132

(Filed 18 August 1981)

1. Divorce and Alimony § 24.2— child support—award greater than separation agreement provision

Evidence of a change in the circumstances and needs of the parties' children was sufficient to support the trial court's order directing defendant to make child support payments greater than those provided for in the parties' separation agreement.

2. Divorce and Alimony § 27— child custody and support—attorney's fees

The fact that the parties agreed that plaintiff should have custody of their children did not remove the question of custody from the trial court's consideration, and the suit was therefore one involving issues of child custody and support so that an award of attorney fees to plaintiff's counsel was proper.

APPEAL by defendant from *Phillips, Judge.* Judgment entered 3 July 1980 in District Court, CRAVEN County. Heard in the Court of Appeals 8 May 1981.

Plaintiff brought this action on 19 April 1979 for custody of the minor children of the parties, child support and counsel fees. Defendant answered, denying the principal allegations of plaintiff's complaint, and pleading a separation agreement entered into by the parties on 20 May 1977 in defense of plaintiff's claim for child support.

After hearing the evidence of both parties, the court entered an order awarding plaintiff custody and ordering defendant to pay an amount of child support greater than that required by the separation agreement and also counsel fees to plaintiff's attorney. Defendant appealed.

Beaman, Kellum, Mills, Kafer & Stallings by Charles William Kafer and J. Randal Hunter, for the plaintiff-appellee.

Ward and Smith, by Michael P. Fanagan, for the defendant-appellant.

MARTIN (Robert M.), Judge.

[1] Defendant contends there was insufficient evidence of a change in the children's circumstances and needs to support the order directing him to make child support payments greater than provided in the separation agreement.

The terms of a separation agreement providing for payments by a parent for the support of his or her children are not binding on a court. *Williams v. Williams,* 261 N.C. 48, 134 S.E. 2d 227 (1964). In *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487 (1963), the Supreme Court held that in the absence of evidence to the contrary, there is a presumption that the amount mutually agreed upon in a separation agreement is just and reasonable and that a trial judge may not order an increase in the absence of any evidence of a change in conditions. Plaintiff's burden, when requesting an order increasing the amount of child support agreed upon by the parties in a separation agreement, is to show the amount reasonably required for the support of the children at the time of the hearing. *Williams v. Williams, supra.* In determining this amount, the trial court must consider the relative abilities of

the parties to provide support for the children and "the reasonable needs of the child[ren] for health, education and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child[ren] and the parties, and other facts of the particular case." N.C. Gen. Stat. § 50-13.4(b) and (c). The amount of support for the children ordered is in the discretion of the trial court and will not be disturbed absent manifest abuse of discretion. *Williams v. Williams, supra.*

Defendant concedes in his brief that he is financially able to pay the amount of child support ordered. The record clearly supports this concession by defendant. Defendant, however, argues the trial court improperly determined the reasonable needs of the children by accepting and incorporating into its order the plaintiff's financial affidavits which included a two-thirds/one-third allocation of many expenses and by failing to require the plaintiff to show the reasonable needs of the children with "specificity." We disagree.

The trial court made detailed findings as to the needs of the children and as to the relative abilities of the parties to provide for those needs. Although the trial court included plaintiff's financial affidavits in its order, it found, after hearing the evidence, that the expenditures listed by plaintiff were reasonable, with certain exceptions, and adjusted the figures accordingly. This is precisely what the Supreme Court stated a trial court should do in *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980).

The trial court also found sufficient change in circumstances to justify increasing the amount of child support required under the separation agreement after carefully and in great detail comparing the expenditures required for support of the children in 1977 with those required in the year preceding the hearing.

We find that the trial court's findings are fully supported by evidence presented. In turn, the court's factual findings support its conclusions and its order directing defendant to pay increased child support payments.

[2] Defendant also assigns as error the order of the court requiring him to pay attorney fees to plaintiff's counsel. In particular, defendant argues the trial court erred by finding that the suit involved issues of child custody and child support. We disagree.

Plaintiff's complaint requested both an award of custody and of child support. In his answer, defendant denied plaintiff's allegation that she was a fit, suitable and proper person to have the care, custody and control of the minor children and that it was in the best interests of the children that plaintiff have custody. At the hearing, the parties stipulated that plaintiff was fit to have custody and that it was in the best interests of the children for plaintiff to have custody. For this reason, defendant contends custody was not in issue.

Although plaintiff and defendant agreed plaintiff should have custody, this was a matter for the court to decide. The initiation of the action for the custody of the children placed the issue of custody of the children with the court. *Walker v. Walker*, 38 N.C. App. 226, 247 S.E. 2d 615 (1978). The trial court's findings of fact, which are supported by the evidence, comply with the requirements for an award of attorney fees in a child custody and support suit as stated by the Supreme Court in *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980). The trial court did not err by awarding plaintiff counsel fees.

Defendant's remaining assignments of error are without merit and are overruled.

Judge Phillips' order was based on sufficient evidence and he made proper findings and conclusions on the pertinent issues. Under such circumstances, the trial court's order should not be disturbed on appeal.

The order of the trial court is

Affirmed.

Judges CLARK and WELLS concur.

BOARD OF TRANSPORTATION v. LYCKAN DEVELOPMENT COMPANY

No. 8014SC897

(Filed 18 August 1981)

Eminent Domain § 6.5— testimony of witness as to value—factors used in arriving at opinion—city's plan of development

An expert witness, testifying as to the value of the land condemned, may testify with regard to a plan for future development devised by a City Planning Department if that plan was used by him in arriving at his opinion.

APPEAL by defendant from *Battle, Judge.* Judgment entered 21 April 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 2 April 1981.

The plaintiff brought this action under Chapter 136 of the General Statutes to condemn the defendant's right of access to U.S. Highway 15-501 in Durham County. The only issue was the damage to defendant by losing the right to enter the highway from its property and to enter the property from the highway. After the taking, the access was by a road to the rear of the property. The defendant's evidence was to the effect that the highest and best use of the property prior to the taking was commercial and after the taking its highest and best use was for multi-family residences. The damage to defendant according to the defendant's witnesses was from $237,688.00 to $325,000.00.

The plaintiff's evidence was to the effect that the highest and best use of the property before and after the taking was for multi-family residences. The plaintiff's evidence was that the damage to the defendant was $11,000.00. The jury awarded the defendant $22,000.00 in damages.

Defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General James B. Richmond, for plaintiff appellee.

Powe, Porter and Alphin, by Charles R. Holton, for defendant appellant.

WEBB, Judge.

The appellant assigns error to the testimony of Thomas Hay, an expert witness for the plaintiff. In his testimony Mr. Hay

stated that he did not think there was a reasonable possibility that the subject property would be rezoned for commercial use. He testified that the Southwest Durham Plan of 1974 was devised by the City Planning Department for the future development of the area in which the subject property was located and the subject property was designated multi-family residential under the Plan. The appellant contends it was error to allow the witness to refer to the Southwest Durham Plan. It contends the Plan was not an ordinance but a recommendation by members of the City Planning Department and other citizens; that its effect was too remote and speculative to have any probative value; that the testimony was hearsay as to the Plan; and that if the testimony of the witness as to the Plan was admissible, an authenticated copy of the Plan should have been first put in evidence. An expert witness may testify as to the factors he used in arriving at an opinion although evidence as to those factors would not otherwise be admissible. *Highway Commission v. Conrad*, 263 N.C. 394, 139 S.E. 2d 553 (1965). One factor Mr. Hay used in reaching his opinion as to the highest and best use of the property was his information as to the existence of the Southwest Durham Plan, which affected the probability of rezoning the subject property. The fact that the Plan was not an ordinance would not exclude his testimony but would go to the weight given his testimony. It was a plan in existence and evidence of it was not too remote or speculative to be considered by the jury for what they thought it was worth. As to the appellant's argument that Mr. Hay's testimony as to the Southwest Durham Plan was hearsay, we believe it was offered by him to show the basis for his forming his opinion and not to prove the truth of the existence of the Plan. It was not hearsay. The Southwest Durham Plan was not in issue except as Mr. Hay referred to it as one factor in forming his opinion. It was not necessary to introduce an authenticated copy of the Plan into evidence.

Defendant contends the court erred in failing to strike an answer of an employee of the Planning Department regarding the probability of a zoning change to permit commercial use of defendant's property. Defendant contends the answer was nonresponsive. We have reviewed this exception and find no prejudicial error.

Defendant lastly contends that the court erred in allowing the same witness to refer to the Plan as an ordinance in response to a question. Upon objection, the court instructed plaintiff's attorney to rephrase the question. He did, and we find no prejudicial error.

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. RICKY ALLEN KNIGHT

No. 806SC1204

(Filed 18 August 1981)

Criminal Law § 73.1— hearsay testimony—prejudicial error

If there is a reasonable possibility that hearsay evidence complained of might have contributed to defendant's conviction, admission of such evidence is not harmless beyond a reasonable doubt; the admission of testimony by a detective as to what defendant's accomplice told him in regard to defendant's participation in the alleged crimes was hearsay testimony, and its admission was prejudicial error where there was a reasonable possibility that it contributed to defendant's conviction.

APPEAL by defendant from *Britt, Judge.* Judgment entered 1 August 1980 in Superior Court, HALIFAX County. Heard in the Court of Appeals 28 April 1981.

Defendant was charged with felonious breaking or entering and felonious larceny. Evidence at the trial tended to show the home of William David Butts was broken into on 30 March 1980 and four guns were taken. The defendant and Howard Williams were questioned by the officers the next day. Charles E. Ward, a detective with the Halifax County Sheriff's Department, testified the defendant signed a written confession as to his participation in the break-in and the larceny of the goods. Mr. Ward testified further that after the defendant had confessed, the defendant and Howard Williams told him they could have the guns returned. He carried them to Hodgestown in order to give them a chance to retrieve the guns; however, they were not able to retrieve them. The defendant denied making the confession.

The following testimony was elicited over objection by the defendant during the redirect examination of Mr. Ward:

> "Q. What did Howard Williams tell his own mother he did up in the detectives' room on March 30, 1980?
>
> * * *
>
> A. He told his mother that he had broken into the house with Ricky Knight and had stolen three guns and carried them to Major Parker's residence."

Howard Williams was not tried with the defendant.

The defendant was convicted and appealed from the imposition of a prison sentence.

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

Chambers, Ferguson, Watt, Wallas, Adkins and Fuller, by James E. Ferguson, II and James C. Fuller, Jr., for defendant appellant.

WEBB, Judge.

The admission of the testimony by Mr. Ward as to what Howard Williams told him in regard to Ricky Knight's participation in the alleged crimes was hearsay testimony. The probative force of this evidence depended upon the credibility of Howard Williams and not Mr. Ward. *See* 1 Stansbury's N.C. Evidence § 138 (Brandis rev. 1973) for the definition of hearsay testimony. It was error to allow this testimony.

The question presented by this appeal is whether the erroneous admission of hearsay testimony was prejudicial error. The question of whether error in the admission of testimony is prejudicial has been passed upon in this state in several cases. *See State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563 (1977); *State v. McCotter*, 288 N.C. 227, 217 S.E. 2d 525 (1975); *State v. Hudson*, 281 N.C. 100, 187 S.E. 2d 756 (1972); *State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289 (1972). If error in admitting evidence is harmless beyond a reasonable doubt, it is not prejudicial error. In determining whether error is harmless beyond a reasonable doubt, we believe the rule is that if there is a reasonable possibility that the evidence complained of might have contributed to the conviction, it is not harmless beyond a reasonable doubt. In this

case the evidence against the defendant consisted principally of a confession which he denied and the testimony of Mr. Ward as to the efforts of the defendant and Howard Williams to retrieve the guns. When the testimony of Mr. Ward as to the statement of Mr. Williams implicating the defendant is considered in conjunction with the other evidence, we cannot say there is not a reasonable possibility this testimony did not contribute to the conviction.

New trial.

Judges HEDRICK and ARNOLD concur.

JEAN P. GLENN v. JOSEPH HENRY GLENN, III

No. 8021DC1103

(Filed 18 August 1981)

Divorce and Alimony § 24— separation agreement—father not entitled to accounting for support

A father is not entitled to an accounting from the mother for sums paid to her for support of the children pursuant to a separation agreement.

APPEAL by defendant from *Alexander, Judge.* Order entered 22 August 1980 in District Court, FORSYTH County. Heard in the Court of Appeals 6 May 1981.

Defendant appeals from an order denying and dismissing his motion to compel plaintiff to render an accounting for sums paid her by defendant as child support pursuant to the provisions of a separation agreement.

House, Blanco and Randolph, P.A., by Clyde C. Randolph, Jr., for plaintiff appellee.

Graham, Glenn, Crumpler and Habegger, by William T. Graham, for defendant appellant.

WHICHARD, Judge.

A father is not entitled to an accounting from the mother for sums paid to her for support of the children pursuant to a consent

judgment. *Tyndall v. Tyndall*, 270 N.C. 106, 153 S.E. 2d 819 (1967); *Zande v. Zande*, 3 N.C. App. 149, 164 S.E. 2d 523 (1968). No reason appears for a different rule when such sums are paid pursuant to a separation agreement rather than a consent judgment. The cases cited indicate that the cause of action for misuse of the money paid pursuant to a consent judgment arises on behalf of the children rather than the father. The children, as third party beneficiaries of the contract between the parents, would likewise be the proper parties in an action for an accounting for money paid pursuant to a separation agreement.

Affirmed.

Chief Judge MORRIS and Judge WEBB concur.

CITY OF WINSTON-SALEM v. KATIE S. ZIGLAR TICKLE (WIDOW), JAMES N. ZIGLAR, JR., AND WIFE, BARBARA C. ZIGLAR

No. 8121SC55

(Filed 1 September 1981)

1. Eminent Domain § 5.1, 6.7— farm broken up into parcels—parcel taken for landfill—unity of lands

In a proceeding to condemn a portion of defendants' land for use as a landfill where defendants contended that the acres taken by plaintiff were merely a portion of the farm of defendants, but plaintiff contended that the tract taken was neither related to nor connected with any of the other land in any meaningful sense, evidence was sufficient for the trial court to find that, with the exception of a parcel of land on which apartments were built, all of the property was being used together as a family farm, and use of the parcels for different activities, including residences, grazing land, and haying, was not incompatible with use of the whole tract as a family cattle farm.

2. Eminent Domain § 5.1— farm broken into parcels—physical unity

In a proceeding to condemn a portion of defendants' land for use as a landfill where defendants contended that the acres taken by plaintiff were merely a portion of their farm while plaintiff contended that the tract taken was neither related to nor connected with any of the other land in a meaningful sense, evidence was sufficient to establish the physical unity of the parcels, with the exception of a parcel used for an apartment building, and the physical unity was not destroyed by the fact that all of the parcels were physically separated from the property taken and from each other by one or two roads, railroad tracks, and natural boundaries, since, if a tract of land, no part of

which is taken, is used in connection with the same farm, part of which is taken, it is not considered a separate and independent parcel even if the two tracts are separated by a highway, railroad, or other boundaries; physical unity requires only that the parcel taken and the parcels sought to be included be contiguous with the whole of the land similarly used; and a single unbroken line could be drawn along the boundary of defendants' farm so that no truly separate parcel need be included.

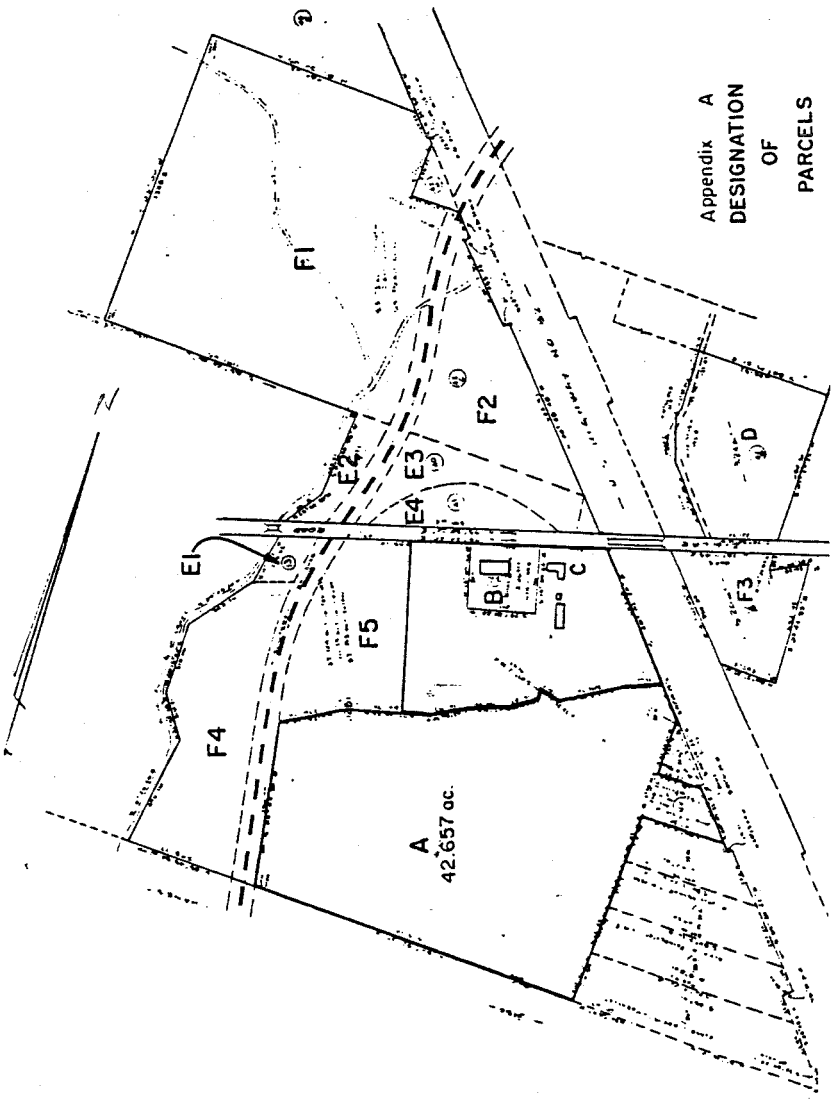
3. Eminent Domain § 5.1— part of property taken for landfill—unity of ownership

There was substantial unity of ownership in the entire 156 acre farm of defendants, a portion of which plaintiff sought to condemn for a landfill, where one defendant held a vested remainder in fee simple in the parcel taken while another defendant was the life tenant of that parcel; all defendants held other parcels in fee simple; and, in determining unity of ownership, the significant factor is that the party who owns an interest and estate in the parcel he seeks to include in the whole for purposes of computing damages must also own an interest and estate in the tract taken, although the two interests and estates need not be of the same quality or quantity.

APPEAL by plaintiff from *Collier, Judge.* Order entered 29 September 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 5 June 1981.

Plaintiff's condemnation of a portion of defendants' land for use as a landfill was initiated under the "quick-take" provision of Article 9 of G.S. Ch. 136, as authorized by 1965 N.C. Sess. Laws, Ch. 895. Upon motion of defendants under G.S. 136-108, a hearing was held to determine whether damages should be determined under G.S. 136-112(1) for a partial taking or under G.S. 136-112(2) for a total taking. Defendants contended that the 42.657 acres taken by plaintiff were merely a portion of the 156.91-acre farm of defendants. Plaintiff contended that the tract taken was neither related to nor connected with any of the other land in any meaningful sense, and argued that damages should be assessed without regard to the remainder of defendants' farm.

The material facts were not in dispute. The parties entered into numerous stipulations of fact which will be incorporated into the description of each individual tract. Dr. James N. Ziglar, Jr. was the only witness to testify at the hearing. To simplify the description of defendants' lands, reference will be made to the map designated in the record as the Court's Exhibit 1 (see p. 518). We will adhere to the labeling of the various parcels employed by plaintiff in its brief.


Appendix A
DESIGNATION OF PARCELS
F1
F2
F3
F4
F5
E1
E2
E3
E4
A
42.657 ac.
B
C
D
N

The land involved in the suit is located north of Winston-Salem along U.S. Highway 52. A single, continuous line can be drawn around the border of the entire 156 acres. Within this border run three rights-of-way. Ziglar Road, a two-lane public road, cuts through the center of the boundary in an east-west direction. The Southern Railroad runs through the property in a north-south direction near the western boundary of all but the northwest corner of the land. U.S. Highway 52 cuts through the boundary in a northwest to southeast swath, carving off a small portion of the northeastern corner of the property. A creek runs along the western boundary south of Ziglar Road and forks a short distance north of the road sending its two branches meandering through the northwest section of the property. A small creek runs east-west through the property and forms the northern boundary of the tract taken by the city.

The entire property, with exceptions noted hereafter, was held in fee by the late James Ziglar, Sr. until his death in 1958. Ziglar, Sr. farmed the land as had his forebears. When Ziglar, Sr. died, he devised his land to his widow, Katie S. Ziglar (later Tickle) for life, remainder in fee to his only son, James N. Ziglar, Jr. Ziglar, Jr. is a dentist who has operated a cattle farm on the property since the early 1960's.

Parcel A is the land taken. Before the taking it was owned by Katie S. Ziglar Tickle, life tenant; James N. Ziglar, Jr., vested remainderman; and Barbara C. Ziglar, who held a statutory interest in her husband's remainder. At the time of the taking the land was about half woodland and the other half was open pastureland used in conjunction with the cattle farming operation run by Ziglar. Some of that open land had been seeded in fescue grass and cultivated to maximize its utility for grazing purposes; some was then in the process of being so improved.

Parcel B is a 2.06-acre tract which includes the residence of James N. Ziglar, Jr., occupied by him and his wife and children. The tract was owned in the same manner as Parcel A until 1976 when it was deeded to James N. Ziglar, Jr., and wife, Barbara C. Ziglar as tenants by the entirety to be used as their home site. A good portion of this two-acre tract is in pasture and is used for grazing purposes along with the surrounding Parcel C. The portion of Parcel B upon which the house sits is fenced off from the cattle and used for residential purposes only.

Parcel C surrounds Parcel B on three sides. It is owned in the same manner as Parcel A. The southern border of Parcel C is the nothern border of Parcel A. The old Ziglar homeplace, in which Mrs. Tickle resides, is located on Parcel C. Also on Parcel C is a barn and several sheds used in conjunction with the farming operation. Much of the Parcel is open pastureland.

Parcel D is a wooded tract containing 9.24 acres. It is owned in the same manner as Parcel A. It contains a four-unit apartment building and appears not to be used in conjunction with the farming operation.

Parcels E1, E2, E3, and E4 will be referred to collectively as Parcel E. This Parcel is the only portion of land in this case which was not part of the holdings of James N. Ziglar, Sr. in 1905. Parcel E was acquired by Ziglar, Sr. and his wife, Mrs. Tickle, as tenants by the entirety in 1945. When Ziglar, Sr. died in 1958, the property passed outside his will to Mrs. Tickle as surviving spouse. Some of this Parcel is still in the process of being cleared of its pulpwood so that it can be cultivated as grassland. Cattle have been allowed to graze in Parcel E, but more recently the cattle have been kept out of Parcels E2, E3, and E4 and hay has been gathered therefrom. Parcel E1 is used part of the time for grazing and part of the time for haying.

Parcels F1 and F2 are held in the same manner as Parcel A. They are in the process of being harvested for their pulpwood, cleared, and then cultivated as grasslands. With the exception of the little triangle of land in Parcel F1 which is east of the creek and west of the railroad track (the extreme southeast corner of F1), Parcel F2 is farther along than is Parcel F1 in this clearing and cultivation process. There was no evidence that cattle had ever actually grazed in either parcel.

Parcel F3 is an open field owned in the same manner as Parcel A. It has been used consistently for the past ten years as a hayfield. The hay is cut from this field twice a year and used to feed the cattle.

Parcel F4 is owned in the same manner as Parcel A. There is a small wooded area in this tract. The tract is used primarily as grassland. It is grazed about two months out of the year, and is used the rest of the time for haying.

Parcel F5 is more pastureland, owned in the same manner and sharing a border with Parcel A.

The trial court went to the farm and viewed the site. He thereupon ordered that the entire 156 acres be considered a unified tract and that damages be determined under G.S. 136-112(1) for a partial taking.

Womble, Carlyle, Sandridge & Rice by Roddey M. Ligon, Jr.; and City Attorneys Ronald G. Seeber and Ralph D. Karpinos for plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready by Dudley Humphrey, F. Joseph Treacy, Jr. and Gray Robinson for defendant appellee.

CLARK, Judge.

The issue in this case is which of the two measures of damages allowed in G.S. 136-112 should be applied in fixing compensation for the taking of Parcel A. The statute provides:

> "The following shall be the measure of damages to be followed by the commissioners, jury or judge who determines the issue of damages:
>
> (1) Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.
>
> (2) Where the entire tract is taken the measure of damages for said taking shall be the fair market value of the property at the time of taking."

Id.

In a case involving a landfill, which would not be expected to benefit surrounding property, it would be to the landowner's advantage to have damages assessed under G.S. 136-112(1) in order to include the diminution in value to surrounding land in the com-

putation of damages in addition to the value of the land actually taken. The issue for the trial court was whether any or all of the previously described parcels constituted a single unified tract for purposes of assessing damages. Plaintiff assigns error to the court's ruling that the 156 acres constituted a single, unified family farm at the time of the taking.

THE TEST FOR UNITY OF LANDS

The principles which must guide our decision in this case are discussed fully in the decision of *Barnes v. Highway Commission*, 250 N.C. 378, 109 S.E. 2d 219 (1959) (Moore, J.):

> "There is no single rule or principle established for determining the unity of lands for the purpose of awarding damages or offsetting benefits in eminent domain cases. The factors most generally emphasized are unity of ownership, physical unity and unity of use. Under certain circumstances the presence of all these unities is not essential. The respective importance of these factors depends upon the factual situations in individual cases. Usually unity of use is given greatest emphasis.
>
> The parcels claimed as a single tract must be owned by the same party or parties. It is not a requisite for unity of ownership that a party have the same quantity or quality of interest or estate in all parts of the tract. But where there are tenants in common, one or more of the tenants must own some interest and estate in the entire tract. *Tyson v. Highway Commission*, 249 N.C. 732, 107 S.E. 2d 630. Under some circumstances the fact that the land is acquired in a single transaction will strengthen the claim of unity. But the fact that the land was acquired in small parcels at different times does not necessarily render the parcels separate and independent. However, there must be a substantial unity of ownership. Different owners of adjoining parcels may not unite them as one tract, nor may an owner of one tract unite with his land adjoining tracts of other owners for the purpose of showing thereby greater damages. *Light Co. v. Moss*, 220 N.C. 200, 207, 17 S.E. 2d 10.
>
> The general rule is that parcels of land must be contiguous in order to constitute them a single tract for

severance damages and benefits. But in exceptional cases, where there is an indivisible unity of use, owners have been permitted to include parcels in condemnation proceedings that are physically separate and to treat them as a unit. It is generally held that parcels of land separated by an established city street, in use by the public, are separate and independent as a matter of law. *Todd v. Railroad Co.*, 78 Ill. 530 (1875); *Wellington v. Railroad Co.* (Mass. 1895), 41 N.E. 652. 'When land is unoccupied and so not devoted to use of any character, and especially when it is held for purposes of sale in building lots, a physical division by wrought roads and streets creates independent parcels as a matter of law . . . (but) If the whole estate is practically one, the intervention of a public highway legally laid out but not visible on the surface of the ground is not conclusive that the estate is separated.' Nichols on Eminent Domain (3rd Edition), sec. 14.31(1), Vol. 4, pp. 437-8. Lots separated by a public alley but in a common enclosure have been held to be a single property. Mere paper division, lot or property lines, and undeveloped streets and alleys are not sufficient alone to destroy the unity of land. 'If the owner's land is merely crossed by the easement of another, the fee remaining in him, and the sections so made are not actually devoted, as so divided, to wholly different uses, they are to be considered actually contiguous and so as a single parcel or tract.' 6 A.L.R. 2d 1200, sec. 2.

As indicated above, the factor most often applied and controlling in determining whether land is a single tract is unity of use. Regardless of contiguity and unity of ownership, ordinarily lands will not be considered a single tract unless there is unity of use. It has been said that 'there must be such a connection or relation of adaptation, convenience, and actual and permanent use, as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used.' *Peck v. Railway Co.* (1887), 36 Minn. 343, 31 N.W. 217. The unifying use must be a *present* use. A mere intended use cannot be given effect. If the uses of two or more sections of land are different and inconsistent, no claim of unity can be main-

tained. But the mere possibility of adaptibility to different uses will not render segments of land separate and independent. If a map of a proposed subdivision is made and the lots shown thereon are actually a compact body of land, used and occupied as an entirety, they are to be treated as one tract notwithstanding the division into imaginary lots. It has been held that where suburban lots acquired under separate titles are divided by an established highway, they will be considered as one tract where the owner uses them together for tillage and cultivation in connection with his residence on one of them. *Welch v. Railway Co.* (1890), 27 Wis. 108. '. . . (I)f a tract of land, no part of which is taken, is used in connection with the same farm, or the same manufacturing establishment, or the same enterprise of any other character as the tract, part of which was taken, it is not considered a separate and independent parcel merely because it was bought at a different time, and separated by an imaginary line, or even if the two tracts are separated by a highway, railroad, or canal.' 18 Am. Jur., Eminent Domain, sec. 270, p. 910.

For a full discussion, exhaustive annotation and citations of authority with respect to the principles of law set out in the four preceding paragraphs, see 6 A.L.R. 2d 1200-1214, and Nichols on Eminent Domain (3rd Edition), sections 14.3, 14.31 and 14.4, Vol. 4, pp. 426-445."

Id. at 384-86, 109 S.E. 2d at 224-26.

UNITY OF USE

[1] Since *Barnes* characterizes use as the most important of the factors to be considered in determining the unity of lands, we first consider the use to which the 156 acres were being put at the time of the taking. The record reveals that all of the property, except for Parcel D, was being used together as a family farm. Plaintiff argues that the parcels were being devoted to at least five separate uses: "A portion was used for raising cattle and hay, a portion was used for the single-family residence of Dr. Ziglar and his wife, a portion was used as the single-family original farm residence of Mrs. Tickle, a portion was used as multi-family rental property and a wood lot, and a portion was not being used for any present purpose." Our examination of the record and exhibits in this case satisfies us that with a single exception the property

was devoted to the single use of cattle farming. The fact that all of the land was not cleared does not indicate to us that it was not farmland. Dr. Ziglar's testimony made it clear that somewhere in every parcel (except Parcel D) some aspect of the farm operation was being carried out. True, not every parcel was presently being used as grazing land. Some was being cultivated to produce hay to eventually feed to the cattle. Some was being cleared of its pulpwood or being seeded so that grass could be produced thereon for grazing or haying. Portions of some of the parcels had not yet been cleared at all, but Dr. Ziglar's testimony made it clear that the work of developing the land was an ongoing process already in progress when Parcel A was taken. The only portions of the property not in grassland (or in the process of being transformed into grassland) were the portions devoted to his residence, his mother's residence, the apartment house lot, the portions of certain tracts which he had not yet had opportunity to clear, and areas that were not "level enough to negotiate." We hold that all these uses (with the exception of the apartment house) are consistent with land devoted to the operation of a family cattle farm, and note in passing that it would be difficult indeed to find a farm in North Carolina which did not encompass at least some wooded area.

The use of part of two of the tracts (Parcels B and C) for residential purposes is not incompatible with the use of the whole tract as a family farm. The evidence was that much of both of these tracts was used for grazing and that only the immediate yard is fenced to keep the cattle out. The residences are both occupied by family members. Ziglar is the farmer. It would be absurd to say that the house in which the farmer lives is not devoted to farm use unless there are cattle in the yard and hay stored in the living room. Mrs. Tickle, as the life tenant, is entitled to the rents and profits from the farm and has immediately behind her house barns and sheds used in the farming operation. Her living on the land cannot be said to deprive it of its essential character as farmland. Rather than belying defendants' claims, as plaintiff suggests, we believe the presence of three generations of the same family on the same land that has been farmed by that family for the past seventy-five years is a strong indication that the property continues to be used as a family farm.

Plaintiff argues at length about the differences in zoning in various portions of the property. We believe this argument is without merit in that it disregards the clear mandate of the *Barnes* court that, "The unifying use must be a *present* use. . . . [T]he mere possibility of adaptability to different uses will not render segments of land separate and independent." *Barnes v. Highway Commission*, 250 N.C. at 385, 109 S.E. 2d at 225. We must follow the *Barnes* court in pointing out that "[t]he contention of appellants with respect to zoning takes into consideration possible future use and ought not to be regarded on this point under pertinent rules of law." *Id.* at 386, 109 S.E. 2d at 226.

Parcel D, containing an apartment house and undeveloped woodland, does not appear to have been used for any farming purpose. Dr. Ziglar testified that for as long as he could remember tenants had lived on that parcel and helped farm the land. Whether a dwelling for tenant farmers would constitute a farm-related use for this property we need not decide. It is the present use with which we are concerned. The parcel is presently being used to support a multi-family dwelling unrelated to the farming operation. No portion of the parcel is cleared or being cleared. We hold that the use to which defendants are putting Parcel D is unrelated to the operation of the family farm.

On the question of use, we hold that with the exception of Parcel D, there was sufficient evidence before the trial court to support a finding of " 'such a connection or relation of adaptation, convenience, and actual and permanent use, as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used.' " *Barnes v. Highway Commission*, 250 N.C. at 385, 109 S.E. 2d at 225.

PHYSICAL UNITY

[2] The unity of use alone, however, does not establish the unity of the parcels sufficiently to support the trial court's order. Another factor to be considered is the physical unity of the parcels. Plaintiff asserts that all of the parcels were physically separated from the property taken and from each other by one or two roads, by railroad tracks, by property in different ownership and use, and by natural boundaries. At least with regard to the farmland of defendants, we must reject this argument as incon-

sistent with the facts of the *Barnes* case, wherein three parcels of land were treated as one unit despite the fact that a creek, a public street, and a private easement ran through the property. As noted in *Barnes*, although the general rule is that "parcels of land separated by an established city street, in use by the public, are separate and independent as a matter of law," *id.* at 385, 109 S.E. 2d at 225, there is an exception to this rule. " '[I]f a tract of land, no part of which is taken, is used in connection with the same farm, . . . part of which was taken, it is not considered a separate and independent parcel . . . even if the two tracts are separated by a highway, railroad, or canal.' " 250 N.C. at 386, 109 S.E. 2d at 226. This is precisely the case before us.

Plaintiff seems to argue that each parcel must be physically contiguous to the parcel taken to support a finding of physical unity. We do not believe this is a reasonable approach to the physical unity requirement. We believe, rather, that physical unity requires only that the parcel taken and the parcel sought to be included be contiguous with the whole of the land similarly used; thus, Parcel F1, although not contiguous with Parcel A, satisfies the contiguity requirement because it is contiguous with other land used in the farming operation and is separated from Parcel A only by portions of the same farm. Moreover, the *Barnes* court noted that contiguity requirements may be relaxed "where there is an indivisible unity of use," 250 N.C. at 385, 109 S.E. 2d at 225, permitting owners "to include parcels in condemnation proceedings that are physically separate and to treat them as a unit." *Id.* In the case *sub judice* we note that a single unbroken line can be drawn along the boundary of the farm so that no truly separate parcel need be included.

Parcel D we must treat differently from the farm parcels. This parcel is separated from the remainder of defendants' lands by Ziglar Road on the south, and by U.S. Highway 52 as well as property not owned by defendants on the west. Since Parcel D is not used for farming, it does not fall under the "same use" exception stated *supra*, and must be held to be "separate and independent as a matter of law" as required by the general rule stated *supra*.

We hold that, with the exception of Parcel D, all the parcels are sufficiently contiguous with the farm as a whole to support a finding of physical unity.

UNITY OF OWNERSHIP

[3] The final factor to be considered is the unity of ownership. There is no issue as to ownership with regard to most of defendants' land. All of defendants' lands are held in the identical manner as was the parcel taken with the exception of Parcel B (Dr. and Mrs. Ziglar's homesite) and Parcel E (consisting of Parcels E1, E2, E3, and E4). Only these two parcels, then, need be scrutinized to determine whether the unity of ownership exists as to them as well. The *Barnes* decision explains the ownership requirement as follows: "It is not a requisite for unity of ownership that a party have the same quantity or quality of interest or estate in all parts of the tract. But where there are tenants in common, one or more of the tenants must own some interest and estate in the entire tract. . . . [T]here must be a substantial unity of ownership." *Id.* at 384, 109 S.E. 2d at 225. The test of substantial unity of ownership appears, then, to be whether some one of the tenants in the land taken owns some quantity and quality of interest and estate in all of the land sought to be treated as a unified tract.

We note first that we view the reference in *Barnes* to tenants-in-common as no more than an example of a situation in which more than one person owns an interest and estate in land. It seems improbable that the court meant to limit its statement to the case of tenancies in common to the exclusion of other forms of ownership where more than one person holds an interest and estate in property. We see no reason to apply a different rule to a joint tenancy, to a tenancy by the entirety, or, as in the instant case, to a life tenancy followed by a vested remainder in fee. In each of these cases, as in the case of a tenancy in common, the significant factor is that the party who owns an interest and estate in the parcel he seeks to include in the whole for purposes of computing damages must also own an interest and estate in the tract taken, although the two interests and estates need not be of the same quality or quantity.

Dr. Ziglar held a vested remainder in fee simple in Parcel A. This is a future interest. It is an estate because it is "an interest in land that is or may become possessory." J. Webster, Real Estate Law in North Carolina § 23 (1971); *see also* Restatement of the Law of Property § 9 (1936). Dr. Ziglar holds Parcel B as a ten-

ant by the entirety in fee simple. The only distinction between the two interests and estates is in quality and quantity, which is not a requisite of unity of ownership. *See Barnes v. Highway Commission, supra.* We hold that there was sufficient evidence upon which to base a finding of substantial unity between the ownership of the tract taken and the ownership of Parcel B upon which Dr. Ziglar resides.

Mrs. Tickle was the life tenant of the parcel taken. As such she held a present possessory freehold estate. She holds Parcel E in fee simple. Again one of the owners of the parcel taken holds an interest and estate in the parcel sought to be included in the whole for purposes of computing damages. The only distinction between her two interests and estates being in quality and quantity, it was not error for the trial court to find Parcel E to be substantially unified in ownership with the parcel taken.

Our holding that there was substantial unity of ownership in the entire 156-acre tract makes it unnecessary for us to seek to reconcile *Barnes v. Highway Commission, supra,* which regards unity of ownership as only one factor to be considered when determining the larger issue of unity of lands, with *Board of Transportation v. Martin,* 296 N.C. 20, 249 S.E. 2d 390 (1978), which treats unity of ownership as an absolute prerequisite without which unity of lands may not be found. We believe it is necessary, however, to comment on one of our own cases which plaintiff cites for the proposition that land owned individually cannot be treated as unified with land owned in common with another. In that case, *Highway Commission v. Cape,* 49 N.C. App. 137, 270 S.E. 2d 555 (1980), we did not so hold. Such a holding would have been contrary to the law of the State as expounded by our Supreme Court. *Tyson v. Highway Commission,* 249 N.C. 732, 107 S.E. 2d 630 (1959). The *Cape* case dealt with a condemnation proceeding brought against two defendants as tenants-in-common. One of the defendants showed that part of the land was owned by him alone and prayed that the action be severed into two separate lawsuits *because of the lack of unity* of ownership. The State did not seek to unite the lands, but *conceded the lack of unity by instituting a second condemnation proceeding* against defendant individually for that portion of the taking which he held individually. The cases were consolidated for trial and were tried as if there had been a single taking. Our holding was that

where two cases concern distinct tracts of land the distinction must be preserved throughout the trial and the judgment must contain a separate award of compensation in each of the two cases. The case is distinguishable in that in that case neither party wished to treat the two tracts as a unit, no one claimed that there was any unity of ownership, and this court did not have before it a contested judicial determination of such unity. Further, our concern in that case was with the differing ownership interests in the property taken, not as in the instant case with the differing ownership interests in the property remaining after the taking. We believe plaintiff's reliance on the *Cape* case to be misplaced.

UNITY OF LANDS

The ultimate determination for the trial court, and for our review, is not any of the three unities discussed above, but the larger question of unity of lands. *See* Barnes, 250 N.C. at 384, 109 S.E. 2d at 224. This determination must be based upon due consideration of all three of the foregoing factors, greatest emphasis being given to the unity of use. *Id.* Our examination of the three unity criteria as they relate to the facts of the case *sub judice* reveal that all three unities exist with regard to 147.67 acres of defendants' 156.91-acre property. Parcel D, being subjected to a use unrelated to operation of the family's cattle farm, and separated physically from the tract taken, may not reasonably be regarded as part of the unified farm. The order of the trial court is affirmed except for the vacation of that part thereof which included the 9.24-acre Parcel D as a portion of the unified tract to be considered in assessing damages under G.S. 136-112(1).

Affirmed in part; vacated in part.

Judges MARTIN (Robert M.) and HILL concur.

MILTON E. DAVIS v. PENELOPE D. DAVIS

No. 8029DC1169

(Filed 1 September 1981)

Divorce and Alimony § 26.1— Uniform Child Custody Jurisdiction Act—findings required by court

Where a child custody action is already pending in another state, the trial court must answer the threshold question of whether the other state was exercising jurisdiction substantially in conformity with the Uniform Child Custody Jurisdiction Act. The record did not show that California obtained jurisdiction over this child custody proceeding substantially in conformity with the Act where the record showed that N.C. rather than California was the home state of the children; there was no evidence that the children had a "significant connection" with California or that there was available in California "substantial evidence" concerning the children's care; and there was significant evidence that defendant had on several occasions taken the children from N.C. to California without plaintiff's consent. G.S. 50A-6(a); G.S. 50A-8(a).

APPEAL by plaintiff from *Gash, Judge.* Order filed 17 July 1980 in District Court, RUTHERFORD County. Heard in the Court of Appeals 26 May 1981.

In this child custody appeal, we determine purusant to North Carolina's Uniform Child Custody Jurisdiction Act, G.S. 50A-1, *et seq.*, whether North Carolina or California obtained jurisdiction in this child custody action.

FACTS AS ALLEGED IN THE COMPLAINT

In 1973, while the plaintiff, Milton E. Davis, and his family were living in North Carolina, the defendant, Penelope D. Davis, abandoned Mr. Davis and took the three children of the marriage to Texas with her. After finding out where his wife had gone, Mr. Davis flew to Texas and regained custody of the children with whom he returned to North Carolina. Mrs. Davis then went to California, but, within thirty days, called Mr. Davis and "begged him to let her come back. . . ." The parties reconciled, and in February 1974, a fourth child was born of the marriage. In December 1976, Mrs. Davis again left Mr. Davis, but she returned after several weeks. At that time she and Mr. Davis entered into a separation agreement by the terms of which Mr. Davis received custody of the four children.

Thereafter Mrs. Davis lived with another man in South Carolina for almost a year and then persuaded Mr. Davis to let her come back. After this third reconciliation, the parties in March 1978 borrowed money against their income tax refunds so that Mrs. Davis might fly to California to visit her mother. When Mrs. Davis returned from California, she took the income tax refund checks and cashed them, thereby causing Mr. Davis not only to lose his refund but also the have to pay back the money they had borrowed against the refund checks. Mrs. Davis then left home again, taking the children with her. In January 1979, she telephoned Mr. Davis and informed him that, if he would send plane tickets, she would send the children back. Mr. Davis sent the tickets and the children came back to North Carolina in January. A little over a month later, Mrs. Davis returned, and Mr. Davis agreed to let her stay. After three days, and while Mr. Davis was at work, Mrs. Davis took the children without Mr. Davis' knowledge and flew to California.

In June 1979, Mrs. Davis again telephoned Mr. Davis from California and informed him that her mother was forcing the children and her to move out of the mother's home and that, if Mr. Davis would send plane tickets for the children, she would send them back home to North Carolina. Mr. Davis again sent tickets, and the children returned to North Carolina.

PROCEDURAL HISTORY

In August 1979, while the four children were living with Mr. Davis, Mr. Davis filed a Complaint in the Rutherford County District Court (trial court), seeking permanent and exclusive custody of the four children born during the parties' twelve-year marriage.

Mrs. Davis, on 5 October 1979, filed an Answer to the Complaint denying allegations concerning abandonment and her treatment of the children. She affirmatively alleged that, purusant to an order entered in a Kings County, California Superior Court case, wherein she was the petitioner, she was granted custody of the four children pending further hearing in the California action; that Mr. Davis had the children in the summer of 1979 only because she granted him visitation privilege; that Mr. Davis refused to return them to California as agreed; that on 5 September 1979, a further Order was entered by the California

court reaffirming that Penelope Davis had custody of the children; that Mr. Davis had notice of, but failed to appear in, the California proceedings; and that Mr. Davis did not file this custody action in the trial court until he was served with notice of a separate action instituted in California, pursuant to the Uniform Reciprocal Enforcement of Support Statute requiring him to reimburse the State of California for public assistance provided by California to the children.

At the July 1980 custody hearing in Rutherford County, the trial court restricted the evidence to that which tended to show whether it had jurisdiction over the case. After hearing the evidence, the trial court telephoned a superior court judge of Kings County, California, who indicated that the California court would not relinquish its jurisdiction over the matter. On the basis of that telephone conversation and the provisions of Chapter 50A of the North Carolina General Statutes, the trial court determined that it did not have jurisdiction to determine the custody of the four children, except to enforce the decree of the California court, and that it did not have jurisdiction to modify the custody order of the California court. Plaintiff appealed.

Jones & Jones, by B. T. Jones, for plaintiff appellant.

J. H. Burwell, Jr., for defendant appellee.

BECTON, Judge.

We do not reach appellant's five assignments of error relating to evidentiary matters since appellant's sixth assignment of error, relating to the entry and signing of the order appealed from, raises, albeit barely, the dispositive jurisdictional question. Appellant's sixth assignment of error presents for review the questions of whether the trial court's conclusions of law—that it did not have jurisdiction to determine the custody issue or to modify the California custody order—are supported by the findings of fact and whether any other alleged error of law appears upon the face of the record. *See Swygert v. Swygert*, 46 N.C. App. 173, 264 S.E. 2d 902 (1980).

In determining the jurisdiction question, we must interpret portions of North Carolina's Uniform Child Custody Jurisdiction Act, G.S. 50A-1, *et seq.* (Uniform Act). Since the Uniform Act

represents an effort to control sensitive and potentially volatile child custody contests, and since the issue raised in this case has not been definitively addressed by our courts, we feel a grave responsibility to interpret thoroughly the Uniform Act so as to accomplish its purposes. On the facts of this case, and for the reasons set forth below, the trial court erred in concluding that the California court had jurisdiction over this child custody matter.[1]

I

The Uniform Child Custody Jurisdiction Act was approved in 1968 by the National Conference of Commissioners on Uniform State Laws. In 1979, North Carolina enacted its Uniform Act, which is substantially similar to that proposed by the Commissioners, and it became effective in July of that year. By its enactment, North Carolina joined the majority of states adopting measures to solve the problems of child custody within an increasingly mobile society, the problems of child-snatching by the noncustodial parent, and the problems of forum shopping.[2] The Com-

1. *Compare Nabors v. Farrell*, 53 N.C. App. --- , --- S.E. 2d --- (filed 4 August 1981).

2. The specific purposes of the Uniform Act are set forth in G.S. 50A-1(a). They are to:

(1) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

(2) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

(3) Assure that litigation concerning the custody of a child takes place ordinarily in the state with which the child and the child's family have the closest connection and where significant evidence concerning the child's care, protection, training and personal relationships is most readily available, and that courts of this State decline the exercise of jurisdiction when the child and the child's family have a closer connection with another state;

(4) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) Deter abductions and other unilateral removals of children undertaken to obtain custody awards;

missioners' Prefatory Note to the Uniform Act contains this description of the effects of shifting custody:

> The harm done to children by these experiences can hardly be overestimated. It does not require an expert in the behavioral sciences to know that a child, especially during his early years and the years of growth, needs security and stability of environment and a continuity of affection. A child who has never been given the chance to develop a sense of belonging and whose personal attachments when beginning to form are cruelly disrupted, may well be crippled for life, to his own lasting detriment and the detriment of society.

9 Uniform Laws Ann. 112 (1979).

Whenever one of our district courts holds a custody proceeding[3] in which one contestant[4] or the children appear to reside in another state, the court must initially determine whether it has jurisdiction over the action. Under the provisions of the Uniform Act, specifically, G.S. 50A-3(a), a North Carolina district court would have jurisdiction to make an initial custody determination or to modify an existing decree if:

> (1) This State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this State

---

(6) Avoid re-litigation of custody decisions of other states in this State insofar as feasible;

(7) Facilitate the enforcement of custody decrees of other states;

(8) Promote and expand the exchange of information and other forms of mutual assistance between the courts of this State and those of other states concerned with the same child; and

(9) Make uniform the law of those states which enact it.

The remainder of the Uniform Act is to be construed so as to promote these general purposes. G.S. 50A-1(b).

3. "Custody proceeding" is defined by G.S. 50A-2(3) to include proceedings in which a custody determination is one of several issues, *e.g.* an action for divorce, and to include neglect and dependency proceedings.

4. "Constestant" is defined as a person, including a parent, who claims custody of, or visitation privileges with, a child. G.S. 50A-2(1).

because of the child's removal or retention by a person claiming the child's custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and the child's parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence relevant to the child's present or future care, protection, training, and personal relationships; or

(3) The child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

Physical presence of the child is not a jurisdictional prerequisite to determine custody. G.S. 50A-3(c). Indeed, paragraphs (1) and (2) of G.S. 50A-3(a) establish the two major bases for jurisdiction. The Commissioners' Note to the Uniform Act states:

> In the first place, a court in the child's home state has jurisdiction, and secondly, if there is no home state or the child and his family have equal or stronger ties with another state, a court in that state has jurisdiction. If this alternative test produces concurrent jurisdiction in more than one state, the mechanisms provided in . . . [G.S. 50A-6 and 7] are used to assure that only one state makes the custody decision.

9 Uniform Laws Ann. at 123.

When there are simultaneous proceedings in another state, the provisions of G.S. 50A-6 must be complied with. G.S. 50A-6 requires a North Carolina court to stay its child custody pro-

ceedings only if it determines (1) that the out-of-state court is "exercising jurisdiction substantially in conformity with" the Uniform Act, G.S. 50A-6(a), and (2) that "the court in which the other proceeding is pending . . . is the more appropriate forum." G.S. 50A-6(c).

A North Carolina court with jurisdiction to make an initial or modification decree may decline its jurisdiction prior to its decree if it determines that it is an inconvenient forum for the custody decision and that the court of another state is a more appropriate forum. G.S. 50A-7(a). In determining whether it is an inconvenient forum, the court shall consider if it is in the best interests of the child that another state assume jurisdiction. G.S. 50A-7(c). Some of the factors necessary for this determination are:

> (1) If another state is or recently was the child's home state;
>
> (2) If another state has a closer connection with the child and the child's family or with the child and one or more of the contestants;
>
> (3) If substantial evidence relevant to the child's present or future care, protection, training, and personal relationships is more readily available in another state;
>
> (4) If the parties have agreed on another forum which is no less appropriate; and
>
> (5) If the exercise of jurisdiction by a court of this State would contravene any of the purposes stated in G.S. 50A-1.

G.S. 50A-7(c). Before determining whether it should decline or retain jurisdiction, the trial court may communicate with a court of another state to "exchange information pertinent to the assumption of jurisdiction by either court with a view toward assuring that jurisdiction will be exercised by the more appropriate court. . . . " G.S. 50A-7(d).

Furthermore, to discourage child-snatching and forum shopping, the provisions of G.S. 50A-8 allow the court to decline jurisdiction

> (a) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar

reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(b) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

G.S. 50A-8(a) and (b). In "appropriate cases" a court dismissing an action under these provisions may charge the petitioner necessary travel and other expenses, including attorneys' fees, incurred by the responding parties and their witnesses. G.S. 50A-8(c).

Finally, in our review of the provisions of the Uniform Act pertinent to this decision, we note that G.S. 50A-14 allows modification of custody decrees handed down in foreign jurisdictions:

(a) If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Chapter or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.

(b) If a court of this State is authorized under subsection (a) and G.S. 50A-8 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with G.S. 50A-22.

There is strong bias toward allowing the state in which a decree has been entered to retain jurisdiction. The Commissioner's Note analyzed the purpose of this section:

> Courts which render a custody decree normally retain continuing jurisdiction to modify the decree under local law. Courts in other states have in the past often assumed jurisdiction to modify the out-of-state decree themselves without regard to the preexisting jurisdiction of the other state. See People ex rel, *Halvey v. Halvey*, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947). In order to achieve greater stability of custody arrangements and avoid forum shopping, subsection (a) declares that other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act. In other words, all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy section 3 [G.S. 50A-3].

9 Uniform Laws Ann. at 154.

III

After this review of jurisdictional considerations, we turn now to the case at bar and set forth the bases upon which we conclude that the trial court erred in concluding that California had jurisdiction over this child custody matter.

Only two of the trial court's findings of fact relate specifically to California's compliance with the Uniform Act. Finding of Fact number 22 concerns a California judge's statement that the California proceedings were "conducted in compliance with the provisions of the 'Uniform Child Custody Jurisdiction Act', which was and is a part of the laws of the State of California." Finding of Fact number 31 simply states, in conclusion-of-law fashion, that "the Courts of the State of California were exercising . . . jurisdiction substantially in conformity with Chapter 50A of the North Carolina General Statutes." These findings are not sufficient to support the trial court's conclusions of law.

In determining the jurisdictional question in a custody hearing, a trial court must go beyond the mere recitation of dates and residences. Under the provisions of the Uniform Act, our courts are compelled to consider such factors as the child's history, the child's best interests, and the conduct of the contestants.

When, as here, there is an action already pending in another state, the trial court must answer the threshold question of

whether the other state was *"exercising jurisdiction substantially in conformity with this Chapter. . . ."* G.S. 50A-6(a); *see also* G.S. 50A-14(a) and *Theresa H. v. Pasquale G.*, 102 Misc. 2d 759, 424 N.Y.S. 2d 652 (1980). The record does not show that California obtained jurisdiction over this case "substantially in conformity with" the Uniform Act. Indeed, the order signed by the trial court contained the following findings of fact:

> 9. That the plaintiff and the defendant and their eldest son came to North Carolina during the year 1968 and that thereafter said children resided in the State of North Carolina until the end of April or early May 1978.
>
> 10. That the plaintiff and the defendant both resided together in the State of North Carolina from 1968 until the last of April or the first of May, 1978, except for a period of separation of approximately one year occurring in 1976 and 1977, during which period of separation said children resided in the State of North Carlina with the plaintiff.
>
> 11. That the defendant removed herself and said four children to the State of California arriving there during the latter part of May, 1978, and that the defendant and said children resided in the State of California from the latter part of May, 1978, until early January, 1979.
>
> 12. That said four children were in the State of North Carolina with the plaintiff from about January 9 or 10, 1979, until the latter part of February, 1979, when they returned to California with the defendant.
>
> 13. That said children were in the State of California with the defendant from the latter part of February, 1979, until about June 8, 1979, when they returned to North Carolina.
>
> 14. That said four children remained in the State of North Carolina with the plaintiff from about June 8, 1979, until the institution of this action and that since the institution of this action, said children have remained in the State of North Carolina with the plaintiff pursuant to the Orders of this Court.

In addition to finding that Mrs. Davis removed herself and the children to California in May of 1978, the trial court further

found that Mrs. Davis in June of 1978, filed a petition seeking, *inter alia*, custody of the four children. We do not believe that, by this brief interlude (one month) in California, California obtained jurisdiction in conformity with G.S. 50A-3. There is plenary evidence in the record that North Carolina has always been the children's home even though the trial court refused to admit Mrs. Davis' testimony that North Carolina had "always been . . . [the children's] home. . . ." The Separation Agreement in which Mrs. Davis, "freely and voluntarily without fear or compulsion," agreed in 1977 that Mr. Davis was to have custody of the children is also in the record. The trial court's reliance upon the California judge's assertion that the California court had jurisdiction which it would not relinquish was error. With all due respect to the courts of other states, the trial courts in this State cannot delegate their responsibility to determine jurisdictional questions to the opinion of a foreign court.

Furthermore, the pleadings suggested that when Mrs. Davis left North Carolina in May 1978, she took the children without Mr. Davis' consent. Mrs. Davis' testimony at the hearing substantiated this:

> In the spring of 1978, I told him I wanted to go back to my mother's. I went back to see my mother. I went to California for a week and then I returned. I would say I stayed approximately a month and then I took the children. I took the children while he was at work and went back to California without his knowledge or consent. . . . I called him from Wyoming in December of '78 or January of '79. . . . Mr. Davis sent tickets for the children to Wyoming and I sent them on a plane here. . . . I learned that Mr. Davis put them in school when they came home. . . . I came back to North Carolina. I didn't tell Mr. Davis that I was coming back home. I came back to get my children. He would have never let them out of his sight if I told him I came to get them. Mr. Davis was trying to keep the children.

We read this testimony to raise the almost certain possibility that Mrs. Davis was engaged in "snatching" the children from Mr. Davis, conduct we believe to be reprehensible under the terms of G.S. 50A-8(a). We, therefore, have an additional and substantial reason to question whether the California court correctly determined that it had jurisdiction.

From the findings of fact concerning Mrs. Davis' mobility, we find the court's conclusions of law that California had jurisdiction to be erroneous. California was not, under the Uniform Act, the "home state" of the children, G.S. 50A-3(a)(1), nor was there any evidence that the children had a "significant connection" with California or that there was available in California "substantial evidence" concerning the children's care, G.S. 50A-3(a)(2). Finally, there was significant evidence provided by Mrs. Davis herself that she had, on several occasions, taken the children from North Carolina without plaintiff's consent. *See* G.S. 50A-8.

On the other hand, the evidence supported the findings of fact made by the trial court, and those findings would support the conclusions that North Carolina had exclusive jurisdiction over the custody matter. By virtue of their lives here, North Carolina was clearly the "home state" of the children.

We are not, therefore, obligated to enforce the California custody order. Under the provisions of G.S. 50A-13, we must enforce decrees only under certain circumstances. When the court of another state has entered an initial or modification decree in a child custody matter, the courts of this State must recognize and enforce that decree when the foreign court has "assumed jurisdiction under statutory provisions substantially in accordance with this Chapter or which was made under factual circumstances meeting the jurisdictional standards of this Chapter. . . ." *Id.* Since the record does not show that the California court assumed jurisdiction under the standards set forth in G.S. 50A-3, its decree is null and void. *See Hopkins v. Hopkins*, 8 N.C. App. 162, 174 S.E. 2d 103 (1970).

In reaching this conclusion, we are not unmindful of the possibility that we are setting up a jurisdictional dispute with the State of California. Pursuant to the provisions of the Uniform Child Custody Jurisdiction Act and with the facts we have before us, however, we feel compelled to reach this result.

Reversed.

Judge VAUGHN and Judge ARNOLD concur.

GRAHAM COURT ASSOCIATES, A PARTNERSHIP, CONSISTING OF BRIAN L. SOUTH, KENNETH G. BROWDER, AND KATHERINE HARKEY v. TOWN COUNCIL OF THE TOWN OF CHAPEL HILL, MARILYN BOULTON, JOSEPH HERZENBERG, JONATHAN H. HOWES, MAYOR PRO TEM, BEVERLY KAWALEC, R. D. SMITH, JOSEPH STRALEY, BILL THORPE, JAMES C. WALLACE, TOWN OF CHAPEL HILL, AND MAYOR JOSEPH L. NASSIF

No. 8015SC1039

(Filed 1 September 1981)

1. **Municipal Corporations § 30— zoning—regulation of use of land**

Zoning is the regulation by a municipality of the use of land within that municipality and of the buildings and structures thereon and is not regulation of the owership of the land or structures.

2. **Municipal Corporations § 30.6— conversion of apartments to condominiums—special use permit not required.**

Where petitioner's apartment complex property did not comply with the zoning ordinance requirements for multi-family housing, but its continued use as multi-family housing was permitted as a prior nonconforming use under the zoning ordinance of respondent town, the contemplated change in ownership to condominiums did not constitute a change in use which respondent town could regulate by a zoning ordinance, and respondent lacked the right or legal authority to require petitioner to apply for or receive a special use permit as a prerequisite to its right to sell the apartments as condominiums.

APPEAL by defendant from *Mills, Judge.* Judgment entered 1 July 1980, Superior Court, ORANGE County. Heard in the Court of Appeals 29 April 1981.

Petitioner is the owner of an apartment complex in Chapel Hill known as Graham Court Apartments which were in existence prior to the enactment of the Chapel Hill Zoning Ordinance. Although the apartments violated the ordinance in several respects, their continued use as multi-family housing was valid as a prior non-conforming use. Petitioner desired to sell the apartments as condominiums and sought the special use permit required by the Town of Chapel Hill for the conversion. Upon the town's denial of petitioner's request, this suit was brought seeking a declaratory judgment that the town lacked "legal authority to require a special use permit as a prerequisite to the exercise by petitioner plaintiff of its legal right to sell the Graham Court property to any legally recognized ownership entity or entities of its choice." The petitioner also asked for injunctive relief and for a writ of certiorari to review the denials of petitioner's applica-

tion for a special use permit. The court issued the writ of certiorari.

The matter was heard upon the record, including the pleadings and documents certified to the court by the respondents. The court entered judgment, finding facts as to which there is no exception, making conclusions of law, to some of which respondents except, decreeing that respondents "do not have the right or legal authority to require petitioner plaintiff to apply for or receive a special use permit as a prerequisite to the exercise by petitioner plaintiff of its right to sell the Graham Court property in any legally recognized format, specifically including the right to sell part or all of said property as condominiums," and granting petitioner the injunctive relief sought. From the entry of this judgment, respondents appeal.

Turner, Enochs, Foster, Sparrow and Burnley, by James H. Burnley, IV, and Wendell H. Ott for petitioner appellee.

Haywood, Denny and Miller, by Emery B. Denny, Jr., and Michael W. Patrick, for respondent appellants.

MORRIS, Chief Judge.

Respondents contend that the issue before this Court is whether municipalities are authorized under the General Statutes to regulate the creation of condominiums and whether the petitioner's property was exempt from the special use provision of the zoning ordinance. Petitioner contends that the only issue before this Court is whether the power to control the *uses* of property through zoning extends to control of the manner in which the property is owned. We agree with petitioner with respect to the issue before us and affirm the trial court.

The trial court, without objection, found as facts the following:

> 5. The petitioner plaintiff at all times relevant to this petition and claim for relief has been and is the owner of the real property to which this cause relates, said property being located within the boundaries of the town of Chapel Hill and being more particularly described by that Deed recorded in Book 312, Page 13, in the Office of the Orange County, North

Carolina, Register of Deeds, said property being hereinafter referred to as "Graham Court".

6. Graham Court consists of a lot of approximately forty-four thousand square feet upon which two separate buildings exist, each of which contains twelve two-bedroom residential apartment units.

7. The Graham Court Apartments were constructed approximately fifty years ago and have been continuously owned and operated since initial construction as a twenty-four unit multi-family residential apartment complex.

8. Subsequent to initial construction of the Graham Court Apartments, the Town of Chapel Hill adopted zoning laws and regulations and provisions for the administration and enforcement of same, restricting and regulating permissible uses of all property within the Town's zoning authority.

9. The Graham Court property is and has been at all times relevant to this cause located within districts designated by Town of Chapel Hill zoning ordinances as "R-4" and "R-10".

10. The Town of Chapel Hill zoning ordinance recognizes multi-family residential property to be a permissible use in the R-4 and R-10 zoning districts in accordance with standards specified therein.

11. The Graham Court property does not fully comply with the Town of Chapel Hill zoning ordinance standards currently applicable to multi-family dwellings within R-4 and R-10 zoning districts in that the side yards of the Graham Court property are six feet wide, whereas currently applicable zoning standards require thirty-six parking spaces; and the number of apartment units on the property exceeds the number of units permissible.

12. Continued use of the Graham Court property as multi-family housing is permitted as a prior non-conforming use under the ordinance providing for the zoning of Chapel Hill.

13. Petitioner plaintiff contemplates selling the Graham Court property to new owners pursuant to and in accordance with the terms of the North Carolina Unit Ownership Act, N.C. G.S. Sec. 47A-1 *et seq.*

14. The Town of Chapel Hill, by its Town Council, asserts authority to regulate the contemplated change of ownership of Graham Court by requiring application for and issuance of a special use permit as a prerequisite of such a change.

15. In the face of the assertion by the Town of Chapel Hill of a special use permit requirement, the petitioner plaintiff applied for such a permit on or about October 5, 1979.

16. On or about December 12, 1979, the application of petitioner plaintiff for a special use permit was considered by the Chapel Hill Town Council at a public hearing.

17. On or about February 11, 1980, the Town Council, by a vote of seven to one, denied issuance of the special use permit applied for by petitioner plaintiff.

[1] This case presents a case of first impression in North Carolina, although other jurisdictions have dealt with the question. Basic to the decisions in other jurisdictions is the premise that zoning is the regulation by a municipality of the *use* of land within that municipality, and of the buildings and structures thereon—not regulation of the *ownership* of the land or structures. *See* 1 Rathkopf, *The Law of Zoning and Planning*, § 1.01 (4th ed. 1981); 82 Am. Jur. 2d, Zoning and Planning, §§ 5 and 13; *Blades v. City of Raleigh*, 280 N.C. 531, 546, 187 S.E. 2d 35, 43 (1972), (wherein Justice Lake said: "The whole concept of zoning implies a restriction upon the owner's right to *use* a specific tract for a *use* profitable to him but detrimental to the value of other properties in the area, thus promoting the most appropriate *use* of land throughout the municipality, considered as a whole." (emphasis added)); *O'Connor v. City of Moscow*, 69 Idaho 37, 43, 202 P. 2d 401, 404 (1949), (where the Court said: "A zoning ordinance deals basically with the use, not ownership, of property."); *Elizabeth City v. Aydlett*, 201 N.C. 602, 161 S.E. 78 (1931); 1 Rathkopf, *The Law of Zoning and Planning*, § 1.04 (4th ed. 1981).

[2] In the case before us, the court found as facts, and no one argues otherwise, that the Graham Court Apartments property does not comply with the zoning ordinance requirements for multi-family housing and that its continued use as multi-family housing is permitted as a prior nonconforming use under the ordinance providing for the zoning of Chapel Hill. We must decide

whether the contemplated change in ownership to condominiums constitutes a change in use which the town can regulate by its zoning ordinance. We answer that it does not. Again, "The test [of nonconforming use] is 'use' and not ownership or tenancy." *Arkam Machine & Tool Co. v. Lyndhurst Tp.*, 73 N.J. Super., 528, 533, 180 A. 2d 348, 350 (App. Div. 1962).

In *O'Connor v. City of Moscow*, 69 Idaho 37, 202 P. 2d 401 (1949), the zoning ordinance adopted in 1947 which prohibited the opening or operation of any new or additional place of business in a prescribed area in which any pool, billiard, card, or dice game is played or in which beer or liquor is sold also provided that any change of ownership of an existing business of that type should be deemed a new or additional business. Prior to the adoption of the ordinance respondents owned land and the building thereon within the prescribed area and in which they conducted a combined pool hall, card room, and retail beer parlor. After the enactment of the ordinance, the respondents wanted to sell their business and lease the premises to a purchaser of the business who would continue to operate the business therein. Because of the ordinance, the prospective purchaser refused to exercise his option. Respondents brought suit for a declaratory judgment to have the provision adjudged void. The ordinance permitted the continuation of non-conforming uses. The Court, in holding for respondents, said:

> The effect of the provision of the ordinance here complained of is to deprive respondents of their property by preventing the sale of their business and restricting their leasing of the real property for use in connection therewith.
>
> A zoning ordinance deals basically with the use, not ownership, of property. The provision in question declaring a change in ownership to be a new business is an arbitrary and unreasonable exercise of the police power and violates the constitutional protection given by the due process clauses.

69 Idaho at 43, 201 P. 2d at 404.

In its judgment, the Court cited several cases from other jurisdictions in accord with the result reached. *Bridge Park Co. v. Borough of Highland Park*, 113 N.J. Super, 219, 273 A. 2d 397 (1971); *Maplewood Vil. Ten. Assn. v. Maplewood Vil.*, 116 N.J.

Super. 372, 282 A. 2d 428 (1971); *Beers v. Bd. of Adjust. of Wayne Tp.*, 75 N.J. Super. 305, 183 A. 2d 130 (1962); *City of Miami Beach v. Arlen King Cole Con. Ass'n., Inc.*, (Fla. App.) 302 So. 2d 777 (1974), *cert. denied*, 308 So. 2d 118 (1975); and *Wentworth Hotel Inc. v. Town of New Castle*, 112 N.H. 21, 287 A. 2d 615 (1972).

In *Beers*, plaintiff had owned a corner tract of land on which five houses were situated since 1955. The bungalow type dwellings were erected prior to 1930, before the zoning ordinance in question was enacted, and had been rented to tenants. Plaintiff sold these dwellings to their tenant-occupants on installment contracts, but when he delivered a deed to one of them, he was told that it was a subdivision and had to be approved by the Planning Board. The Planning Board refused approval on the ground that it did not meet the current zoning requirements. Through various appeals, the matter reached the appellate division, and the court held that plaintiff was legally free to make separate conveyances to vendees of the dwellings without regard for the action of the planning board. It was obvious that the houses were in a pocket surrounded by a river and industrial areas. Without question, as a subdivision, it would not comply with the zoning ordinance. The defendants conceded that the buildings were valid nonconforming uses and entitled to the status accorded such use by the ordinance. The Court noted:

> Defendants do not even suggest, nor do we believe they properly could, that owner-occupation of a dwelling is a different use of the property in a zoning sense from tenant-occupation, the actual occupancy of the residence in either case being by a single family . . . The defendants' attitude towards plaintiff's program is seen actually to come down in essence to dictation of combined as against separate ownership of the dwellings. As indicated, we do not regard a mere change from tenant occupancy to owner occupancy as an extension or alteration of the previous non-conforming use of the dwellings. And there is no question as to the right of alien-ability of property along with its attendant valid non-conforming use.

75 N.J. Super. at 316-17, 183 A. 2d at 136-37.

In *Bridge Park Co.*, supra, plaintiff, a partnership, owned an apartment building containing eleven garden apartments, each

consisting of six rooms and a bath. Plaintiff had owned the apartments since their construction in 1961. In 1969, plaintiff proposed to sell the apartments under a statute contemplating the ownership of apartments outright by the tenants and common ownership of the "general common elements" of the apartment premises. Before any sales were completed, plaintiff was notified that the declaration he had executed would violate the zoning ordinance which defined garden apartments as "a building or series of buildings under single ownership . . ." Plaintiff sought a declaratory judgment. In concluding that the attempted regulation of ownership of property under the guise of the zoning power is beyond the power of the municipality, the Court said:

> Defendant attempts to characterize condominium ownership as a "use" of land—*i.e.*, since the property in question is to be "used" as a condominium, the municipality may regulate or prohibit such "use". It is apparent, however, that after change of ownership as planned, the same buildings will be on the premises in question and the use to which they are put will also remain the same. We conclude that the word "use", as contained in the statute above, does not refer to ownership but to *physical use* of lands and buildings. A building is not "used" as a condominium for purposes of zoning.

113 N.J. Super. at 222, 273 A. 2d at 398-99.

In *Maplewood Village Tenants Association*, plaintiff was an association of tenant prospective purchasers of units in an apartment building being converted into condominium ownership and sought answers to certain questions involved in the conversion. One of the questions raised was whether approval of the municipality was required. The zoning ordinance made no reference to subdivision approval for the conversion of existing apartments into condominiums. The Court noted that N.J. S.A. 46:8B-29 had preempted this area. The statute provided that zoning ordinances should be construed and applied "with reference to the nature and use of the condominium without regard to the form of ownership."[1] In holding that no subdivision approval was required, the Court said:

1. *Beers* was decided in 1962 and the statute was enacted in 1969. *Bridge Park Co.* does not refer to the statute.

> The presently existing apartments conform to the township zoning ordinance, and the proposed conversion represents nothing more than a change in the form of ownership. The use of the land will not be affected.

116 N.J. Super. 377, 282 A. 2d at 431. The Court cited with approval and discussed *Bridge Park Co.*

Another case on which the trial court relied is *City of Miami Beach v. Arlen King Cole Con. Ass'n., Inc.*, supra, a case on "all fours" with the one before us. In 1961, the King Cole Apartments were constructed and were in compliance with the existing zoning ordinance with respect to off-street parking spaces. In 1971, the city amended its zoning ordinance and increased the number of off-street parking spaces that would be required for an apartment building such as the King Cole Apartments, so that the King Cole Apartments became a nonconforming use. In 1974, the owners of the King Cole Apartments filed a "declaration of condominium" for the purpose of converting the apartments into a condominium. The city brought a suit to prevent the conversion because there would not be sufficient off-street parking as required by the 1971 ordinance. The trial judge held that the use had not been changed and the owners were not required to meet the off-street parking requirements of the 1971 ordinance. The city contended that if a new structure were being erected, the 1971 ordinance would have to be met and took the position that the conversion really constituted a new structure. In affirming the trial judge, the Court of Appeals said:

> A nonconforming use relates to the property and not to the type of ownership of the property. *Beers v. Board of Adjustment of Township of Wayne*, 75 N.J. Super. 305, 183 A. 2d 130; *Bridge Park Co. v. Borough of Highland Park*, 113 N.J. Super. 219, 273 A. 2d 397; *Maplewood Village Tenants Ass'n. v. Maplewood Village*, 116 N.J. Super. 372, 282 A. 2d 428. Changing the type of ownership of real estate upon which a nonconforming use is located will not destroy a valid existing nonconforming use. This is the only significant change in the real property and improvements involved in the instant litigation. Such structural changes as the owners determine to make in the hotel-apartment to convert to condominiums were minor in nature and not of a structural quality.

> Therefore, there was no abandonment of the nonconforming use under the zoning ordinances of the City of Miami Beach.

302 So. 2d at 779.

In *Wentworth Hotel, Inc.*, supra, the Supreme Court of New Hampshire held that the owners of a hotel could replace a burned wing of a nonconforming commercial hotel with a 104 unit condominium even though the area was zoned for one and two family residences.

We think the cases from these jurisdictions are well reasoned and answer the question posed. We, therefore, follow their reasoning and hold that the petitioner here is not required to apply for or receive a special use permit in order to convert its tenant occupied apartments to owner occupied apartments.

Without question petitioner has the right to continue the present use of the Graham Court Apartments as they stand, because they constitute nonconforming uses. The only real difference in the contemplated change is ownership. If the town should prevail, the apartments would be relegated, now and for the future, to occupancy by tenants. The conversion which petitioner seeks would permit them to be owned by their occupants. There would be absolutely no change in the *use* of the land. If a use is permitted, as here, it is beyond the power of the municipality to regulate the manner of ownership of the legal estate. *Kaufman & Board v. W. Whiteland Sup.*, 20 Pa. Commonwealth, 116, 340 A. 2d 909 (1975); *Dublin Properties v. Upper Dublin Twp.*, 21 Pa. Commonwealth 54, 342 A. 2d 821 (1975); *see* generally 1 Rathkopf, *The Law of Zoning and Planning*, § 1.04 (4 ed. 1981). *Bridge Park Co. v. Borough of Highland Park*, supra, followed in *Maplewood Tenants Ass'n. v. Maplewood Village*, supra.

Holding, as we do, that the Town of Chapel Hill lacked the right or legal authority to require petitioner to apply for or receive a special use permit as a prerequisite to its right to sell the Graham Court Apartments in any legally recognized format, including the right to sell part or all of the property as condominiums, we do not discuss the question raised by respondents with respect to whether the property, on the special facts of this case, is exempt from the special use provisions of the ordinance.

The judgment of the trial court is

Affirmed.

Judges MARTIN (Harry C.) and HILL concur.

EDWARD I. GREENE, INDIVIDUALLY AND D/B/A GREENE ASSOCIATES v. WILLIAM H. MURDOCK AND WIFE, MARIE D. MURDOCK

No. 8014SC988

(Filed 1 September 1981)

1. Contracts § 27.2— breach of contract—verdict not inconsistent

In an action to recover damages for defendants' failure to pay plaintiff a commission of $10,000 per year for 25 years from the "net profit" from a lease to S. S. Kresge Co. from defendant, there was no merit to defendants' contention that the trial court erred in accepting the verdict as to the third issue, whether defendant had violated a legal duty to plaintiff by obtaining secondary financing of $250,000 payable at ten percent interest over a ten year period, after the jury had answered the second issue, whether there was an agreement between the parties that the $250,000 loan to cover excess expenses was to be financed in such a way as to allow the payment of a commission to the plaintiff, in favor of defendant, since the two issues were not inconsistent, and defendant could have been under a legal duty not to obtain secondary financing in such a way as to prevent him from paying plaintiff a commission without specifically agreeing not to do so.

2. Trial § 45— method of accepting verdict

Where the jury had deliberated for some time, returned to the courtroom and requested further instructions on the fourth issue, the trial court inquired as to whether they had answered the first three issues, the jury replied that they had done so and the court took the verdict as to the first three issues, and the court then allowed the attorneys to argue the fourth issue, which pertained to damages, and gave additional instructions on this issue, the trial court did not abuse its discretion in following this procedure in light of the complicated issues involved in the case, particularly the difference in calculating damages depending upon how the jury had answered the second and third issues.

3. Principal and Agent § 1— lease—husband not agent for wife

In an action to recover damages for defendants' failure to pay plaintiff commissions for a lease to S. S. Kresge Co. from defendants, there was no merit to plaintiff's contention that defendant husband acted as defendant wife's agent in agreeing to pay the commission, since defendant wife did not have a sufficient interest in the lease for her husband to act as her agent in

negotiating it in that she received no income from the lease, and defendant husband testified that the only reason for her name appearing was to satisfy the lessee.

4. Contracts § 21.3— commission for negotiating lease—anticipatory breach—insufficiency of evidence

In an action to recover damages for defendants' failure to pay plaintiff a commission of $10,000 per year for 25 years from the "net profit" from a lease to S. S. Kresge Co. from defendants, the trial court properly directed verdict for defendants on plaintiff's claim for the present worth of commissions payable over the unexpired term of the lease, and there was no merit to plaintiff's contention that defendants made an anticipatory breach of the contract in that, by putting a second deed of trust on the property, they made it impossible to make future payments, since, by making the loan secured by a second deed of trust, defendants did not necessarily make it impossible to carry out their obligation to pay commissions in the future.

5. Accounts § 2— commission for negotiating lease—no account stated

In an action to recover damages for defendants' failure to pay plaintiff a commission for negotiation of a lease between defendants and a third party, evidence was insufficient to require submission to the jury of an issue as to an account stated.

APPEAL by plaintiff and defendant from *Battle, Judge*. Judgment entered 15 February 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 28 April 1981.

The plaintiff brought this action for damages for the defendants' failure to pay what the plaintiff alleged were commissions owing to him for a lease he negotiated for defendants with S. S. Kresge Company in 1971. At the trial it was undisputed that the defendant William H. Murdock agreed to pay the plaintiff a commission of $10,000.00 per year for 25 years from the "net profit" from a lease to Kresge from the defendants. The dispute was as to how "net profit" was to be calculated. Under the terms of the lease, Kresge was to pay an annual rent of $270,000.00 plus one percent of gross sales in excess of $8,000,000.00. Each party agreed that in calculating net profit certain items were to be deducted from the gross annual rental from Kresge including payments on a first mortgage loan, ground rent, insurance and maintenance.

The dispute between the parties is in regard to the payments on a second mortgage loan in the amount of $250,000.00 which was made because of unexpected expenditures which had been incurred in the construction of the project. The plaintiff testified

that the defendant Murdock had agreed to finance the payment of these expenditures in such a way as to have sufficient "net profit" to pay the plaintiff. The plaintiff testified that the defendant Murdock could have borrowed the money to be secured by the second deed of trust for a longer term which would have made money available from the rent to pay the plaintiff his commission.

The defendant William H. Murdock testified he had not agreed with the plaintiff as to any type of secondary loan secured by the property; that unexpected expenditures had occurred in the construction of the project; that he had to place the second deed of trust on the property in order to pay these expenses and they were proper deductions from the gross annual income in order to determine "net profit." The plaintiff has received a total of $2,500.00 in commissions, which was paid in 1974. William H. Murdock contended this was all that plaintiff was entitled to receive as commissions until the time of trial.

At the close of the plaintiff's evidence the court directed a verdict in favor of the defendant Marie D. Murdock. The court also directed a verdict in favor of the defendant William H. Murdock as to commissions that had not accrued. The court submitted an issue as to whether the parties made an agreement for the defendant William H. Murdock to pay a commission to the plaintiff which the jury answered favorably to the plaintiff. The court also submitted an issue as to whether the parties had agreed that the $250,000.00 second deed of trust loan was to be financed in such a way as to allow sufficient income to pay commissions to the plaintiff. The jury answered this issue in favor of the defendant. The court submitted a third issue as to whether the defendant violated any legal duty owed the plaintiff by obtaining the secondary financing of $250,000.00 payable at ten percent interest over a ten-year period which issue was answered favorably to the plaintiff. The jury answered the damage issue in the amount of $45,875.30.

The court entered judgment on the verdict and both sides appealed.

Newsom, Graham, Hedrick, Murray, Bryson and Kennon, by Josiah S. Murray, III and Joel M. Craig, for plaintiff appellant and appellee.

Claude V. Jones for defendant appellant and appellee, William H. Murdock and defendant appellee Marie D. Murdock.

WEBB, Judge.

MURDOCK'S APPEAL

William H. Murdock's first assignment of error is to the court's denial of his motion for a directed verdict at the close of the evidence. He contends the testimony was so vague and contradictory that the jury could not answer the issues. We believe the evidence was sufficient for the jury to answer the issues. Contradictions in the plaintiff's evidence were to be resolved by the jury. *See* 12 Strong's N.C. Index 3d, *Trial* § 21.2 and the cases cited in footnote 78. This assignment of error is overruled.

[1] The defendant William H. Murdock's second assignment of error is to the court's accepting the verdict as to the third issue after the jury had answered the second issue in favor of the defendant. The jury found by its answer to the second issue that there was not an agreement between the parties that the $250,000.00 loan to cover excess expenses was to be financed in such a way as to allow the payment of a commission to the plaintiff. The jury by its answer to the third issue found the defendant had violated a legal duty to the plaintiff by obtaining secondary financing of $250,000.00 payable at ten percent interest over a ten-year period. The defendant William H. Murdock contends the answers to these two issues were inconsistent. He argues that if there were no agreement for the defendant Murdock not to obtain secondary financing it was inconsistent for the jury to hold that he had breached a legal duty by obtaining such financing. We do not believe these issues are inconsistent. The defendant William Murdock could have been under a legal duty not to obtain secondary financing in such a way as to prevent him from paying the plaintiff a commission without specifically agreeing not to do so. If the defendant William H. Murdock, in violation of a duty to pay plaintiff commissions from the rent on the property made a loan secured by a second deed of trust on the property so that there was no net profit from which to pay the plaintiff's commission, he

violated a duty to the plaintiff and is liable for breach of contract. *See* 17 Am. Jur. 2d *Contracts* § 453 (1964). The defendant Murdock's second assignment of error is overruled.

The defendant's third assignment of error is to the charge of the court. He has brought forward under one assignment of error eight different exceptions. We shall discuss some of them. He first takes exception to the charge to the jury that if they answered the second issue "yes", all the evidence shows the amount of the commissions due to be $73,303.86. The jury answered the second issue "no." We find no prejudicial error in this instruction.

The defendant's next exception to the charge is to a statement made by the court while the jury was not in the courtroom. We find no error in this.

The defendant next takes exception to a portion of the charge in which the court recited some of the evidence of the plaintiff. He contends the court should have recited some evidence of the defendant on the same point. No request was made that this additional evidence be given. We find no error. *See Maynard v. Pigford*, 17 N.C. App. 129, 193 S.E. 2d 293 (1972).

The defendant's next exception is to a portion of the charge on the damage issue. The court instructed the jury that the defendant would not be entitled to deduct the payment on the $250,000.00 loan repayable in ten years at ten percent interest but would only be entitled to such deduction as the jury found would be appropriate based on the defendant having used reasonable diligence to obtain a loan at the best interest rate possible and payable over the longest period of time available up to 24 years. The defendant contends this instructed the jury that they could not consider the payments on the loan secured by the second deed of trust. This portion of the charge dealt with damages. When the jury came to a consideration of damages, it meant they had already found the defendant had acted unreasonably in making the second deed of trust and these payments would not be for the jury's consideration. We find no error in this instruction.

The defendant's next exception is to a portion of the charge in which the court instructed the jury that the commissions would not exceed the net income after deduction of the items the agree-

ment provided for which were $16,000.00 in ground rent; insurance premiums; expenses for maintenance of the parking lot, roof and exterior walls; and payments on the first mortgage indebtedness. The defendant appellant contends that this portion of the charge was in error because the court did not instruct as to principal and interest payments on the $250,000.00 indebtedness. Following the portion of the charge to which the defendant takes exception, the court charged the jury they would also deduct from the gross rent in arriving at net profits what would be a proper payment on a second mortgage of $250,000.00 had reasonable diligence been used to obtain the best interest rate possible and the most favorable number of years up to 24 years. We believe this additional instruction cured any error to the charge to which this exception was taken.

The defendant's next exception is to the court's charging the jury that they would deduct from the gross rent in arriving at net profits what would be a proper payment on an indebtedness secured by a second deed of trust of $250,000.00 had reasonable diligence been used to obtain the best interest rate possible and the most favorable number of years up to 24 years. The defendant contends there was no evidence to support this portion of the charge. We find no merit in this exception.

We have examined the defendant's other exceptions to the charge. We hold they are without merit.

[2] The defendant's next assignment of error deals with the way in which the court took the verdict. After the jury had deliberated for some time, they returned to the courtroom and requested further instructions on the fourth issue. The court then inquired as to whether they had answered the first three issues. The jury replied they had done so and the court took the verdict as to the first three issues. The court then allowed the attorneys to argue the damage issue and gave additional instructions on this issue. The defendant excepted to this procedure. In light of the complicated issues involved in this case and particularly the difference in calculating damages depending on how the jury had answered the second and third issue, we do not believe the court abused its discretion in following this procedure. *See Southern National Bank v. Pocock*, 29 N.C. App. 52, 223 S.E. 2d 518 (1976) and *Rupert v. Rupert*, 15 N.C. App. 730, 190 S.E. 2d 693 (1972).

The defendant's last two assignments of error are to the court's overruling his motions to set aside the verdict as to the fourth issue and for judgment notwithstanding the verdict. These two assignments of error are overruled.

We find no error as to the appeal of the defendant William H. Murdock.

GREENE'S APPEAL

[3] The plaintiff's first assignment of error deals with the court's directing a verdict against him on his claim against Marie D. Murdock, the wife of William H. Murdock. The plaintiff offered evidence of circumstances, such as allowing William H. Murdock to negotiate the lease and then signing it when it was presented to her, which he contends is sufficient for a jury to find he acted as her agent in agreeing to pay the commission. He argues further that the jury could also find she clothed her husband with apparent authority to agree to the commissions or ratified his act in doing so.

The difficulty we have with the plaintiff's position is that Marie D. Murdock did not have a sufficient interest in the lease for husband to act as her agent in negotiating it. All the evidence shows that Marie Murdock did not own the land and she does not receive any income from the lease executed with Kresge. The property had been owned by her father-in-law and after his death, it was conveyed by the trustee under his will to her husband's children by a previous marriage. In order to make the lease with Kresge, her husband's children leased the property to her and her husband. Her husband and she then leased the property to Kresge. The income from the lease was to be divided between her husband and his three children with all income going to the children after the death of her husband. William H. Murdock testified the only reason for her name appearing was to satisfy the lessee. We do not believe Marie D. Murdock had a sufficient interest in the project for William H. Murdock to have acted as her agent in agreeing to pay commissions to the plaintiff. The plaintiff's first assignment of error is overruled.

[4] The plaintiff's second assignment of error deals with the directed verdict against him on his claim for the present worth of commissions payable over the unexpired term of the lease. The

plaintiff contends the defendant made an anticipatory breach of the contract in that by putting the second deed of trust on the property he had made it impossible to make future payments. For this reason he contends he is entitled to sue for future commissions. *See* 3 Strong's N.C. Index 3d, *Contracts* § 21.3 (1976) on anticipatory breach. The difficulty with plaintiff's argument is that by making the loan secured by a second deed of trust, Mr. Murdock had not necessarily made it impossible to carry out his obligation to pay commissions in the future. The loan secured by the second deed of trust was to be paid in ten years. At that time, which would still leave fifteen years of payment of commissions to the plaintiff, the "net profit" would be sufficient if the annual income and deductions were the same to pay the plaintiff his full commission in those years. The commissions could vary as the deductions from gross rent varied. There was also a provision in the lease with Kresge that the lessors would receive one percent of gross sales over $8,000,000.00. This could cause the gross income to be enough to pay the commissions if the payments on the second deed of trust were as contended for by William H. Murdock. In that case there would not be an anticipatory breach. We hold the court did not err in directing a verdict for the defendants on the plaintiff's claim for the present worth of future commissions. *See Ross v. Perry*, 281 N.C. 570, 189 S.E. 2d 226 (1972) and *Gouger & Veno, Inc. v. Diamondhead Corp.*, 29 N.C. App. 366, 224 S.E. 2d 278 (1976). The plaintiff's second assignment of error is overruled.

[5] In his third assignment of error the plaintiff contends the court erred in not submitting to the jury an issue as to an account stated. An account stated is a contract based on an agreement between two parties that an account rendered by one of them to the other is correct. Once this agreement is made the account stated constitutes a new and independent cause of action superseding and merging the antecedent cause of action. One method of proving an account stated is the retention without objection by the party receiving the statement of account for such a period of time that the jury could infer that by not objecting, he has agreed to it. *See Mahaffey v. Sodero*, 38 N.C. App. 349, 247 S.E. 2d 772 (1978). The plaintiff contends that he sent several statements of account to the defendant to which the defendant did not object, and the jury could infer from this that he had

agreed to these statements as being correct. We hold that from correspondence and testimony as to the conversations between the parties, there could not be an inference that Mr. Murdock ever agreed the accounts were correct. The plaintiff's third assignment of error is overruled.

In the plaintiff's appeal we find no error.

No error.

Judges HEDRICK and ARNOLD concur.

RHEINBERG-KELLEREI GMBH v. VINEYARD WINE COMPANY, INC.

No. 8026SC1192

(Filed 1 September 1981)

1. **Uniform Commercial Code § 16— purchase of wine—shipment contract**

In an action to recover the purchase price of a shipment of wine sold by plaintiff to defendant, the contract in question was a "shipment" contract, i.e., one not requiring delivery of the wine at any particular destination.

2. **Uniform Commercial Code § 16— shipment from foreign country—notice to buyer—risk of loss**

In an action to recover the purchase price of a shipment of wine sold to defendant and lost at sea en route between Germany and the U.S., the trial court properly concluded that plaintiff's failure to notify defendant of the shipment until after the sailing of the ship and the ensuing loss was not "prompt notice" within the meaning of G.S. 25-2-504, and the risk of loss therefore did not pass to defendant upon delivery of the wine to the carrier pursuant to the provisions of G.S. 25-2-509(1)(a).

APPEALS by plaintiff and defendant from *Owens, Judge.* Judgment entered 7 October 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 May 1981.

Plaintiff, a West German wine producer and exporter, instituted this action to recover the purchase price of a shipment of wine sold to defendant and lost at sea en route between Germany and the United States. Subsequent to a hearing, the court, sitting without a jury, made the following findings of fact.

Plaintiff is a West German corporation engaged in the business of producing, selling, and exporting wine. Defendant, a North Carolina corporation, is a distributor of wine, buying and selling foreign and domestic wines at wholesale. Frank Sutton, d/b/a Frank Sutton & Company and d/b/a The Empress Importing Company, and other names, of Miami Beach, Florida, is a licensed importer and seller of wines. During 1978-1979 Sutton served as an agent for plaintiff and was authorized to sell and solicit orders for plaintiff's wine in the United States. During 1978 and early 1979, Randall F. Switzer, then of Raleigh, North Carolina, was a broker soliciting orders of wine on behalf of several producers and brokers, including Sutton, on a commission basis.

During the summer of 1978, Switzer, on behalf of Frank Sutton, began to solicit orders from prospective customers in North Carolina for wines produced by plaintiff. He contacted Bennett Distributing Company in Salisbury, North Carolina and the defendant in Charlotte, North Carolina, soliciting orders for sale through Sutton of wine produced by plaintiff to be shipped from West Germany consolidated in one container. Switzer, in late August 1978, called the office of Sutton in Miami Beach, Florida, reporting that he had secured orders from Bennett Distributing Company and defendant for 625 cases and 620 cases, respectively, of plaintiff's wines. Switzer then mailed to Sutton a copy of the proposed orders. Switzer also left a copy of the proposed order by defendant with the defendant's sales manager.

On 25 August 1978, the office of Sutton prepared a written confirmation of the orders and mailed them to defendant. Defendant received the written confirmation of orders, but never gave written notice of objection to the contents thereof to plaintiff or plaintiff's agent, Sutton. Written confirmation of the orders together with "Special Instructions" which reflected the instructions to plaintiff regarding the proposed consolidated shipment, were mailed to the plaintiff in West Germany on or about 25 August 1978.

According to the stated prices for the wine, the purchase price of the 620 cases of wine ordered by the defendant was 15.125,00 German marks. On 15 September 1980, the rate of exchange of German marks to United States dollars was such that one German mark equals $.57. Therefore, the purchase price of the 620 cases of wine, 15.125,00 German marks, equals $8,621.25.

Between August and December 1978, defendant's president, Cremilde D. Blank, and Switzer made telephone inquiries to Sutton concerning the status of the wine orders, but were not furnished any information concerning when and how the wine would be shipped or when and where it would arrive. On or about 8 November 1978, Mrs. Blank telephoned Sutton's office and obtained certain details concerning the consolidated order and then wrote to Bennett Distributing Company. Thereafter, in November 1978, Bennett Distributing Company informed Mrs. Blank that it had cancelled its order with the plaintiff, and Switzer thereafter attempted to resell Bennett's share of the order.

On or about 27 November 1978, plaintiff issued notice to Sutton giving the date of the shipment, port of origin, vessel, estimated date of arrival and port of arrival. Sutton did not give any of such information to defendant or to Switzer and did not notify defendant of anything. There was never any communication of any kind between plaintiff and defendant, and defendant was not aware of the details of the shipment.

Plaintiff delivered the wine ordered by defendant, consolidated in a container with the other wine, to a shipping line on 29 November 1978, for shipment from Rotterdam to Wilmington, North Carolina, on board the *MS Munchen.* Defendant did not request the plaintiff to deliver the wine order to any particular destination, and plaintiff and its agent, Sutton, selected the port of Wilmington for the port of entry into the United States. The entire container of wine was consigned by plaintiff to defendant, with freight payable at destination by defendant.

After delivering the wine to the ocean vessel for shipment, plaintiff forwarded the invoice for the entire container, certificate of origin and bill of lading, to its bank in West Germany, which forwarded the documents to Wachovia Bank and Trust Company, N.A., in Charlotte, North Carolina. The documents were received by Wachovia on 27 December 1978. The method of payment for the sale was for plaintiff's bank in West Germany to send the invoice, certificate of origin and bill of lading, to Wachovia whereupon defendant was to pay the purchase price to Wachovia and obtain the shipping documents. Wachovia then would forward payment to plaintiff's bank, and defendant could present the shipping documents to the carrier to obtain possession.

Wachovia mailed to defendant on 29 December 1978, a notice requesting payment for the entire consolidated shipment, by sight draft in exchange for documents. The notice was not returned by the Post Office to the sender.

On or about 24 January 1979, defendant first learned that the container of wine had left Germany in early December 1978 aboard the *MS Munchen*, which was lost in the North Atlantic with all hands and cargo aboard between 12 December and 22 December 1978.

Defendant did not receive any wine from plaintiff and did not pay Wachovia for the lost shipment. Plaintiff released the sight draft documents to Frank Sutton. Defendant was not furnished with any copy of said documents until receiving some in March and April 1979 and the others through discovery after this action was filed.

The order and "Special Instructions", mailed by Sutton to plaintiff, but not to defendant, provided *inter alia:* (1) "Insurance to be covered by purchaser"; (2) "Send a 'Notice of Arrival' to both the customer and to Frank Sutton & Company"; and (3) "Payment may be deferred until the merchandise has arrived at the port of entry."

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

> 2. The defendant agreed to purchase 620 cases of wine from the plaintiff through its agent or broker, Frank Sutton, in late August 1978.
>
> 3. Plaintiff failed to comply with G.S. 25-2-504, which provides:
>
> > "Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must. . .
> >
> > "(c) promptly notify the buyer of the shipment."
>
> 4. The purpose of such notification requirement is so the buyer (as defendant in this instance would have been) may make necessary arrangements for cargo insurance and otherwise to protect itself against any ensuing loss.

5. The plaintiff failed to deliver any such notice to defendant herein prior to the sailing of the ship and the ensuing loss. While plaintiff gave such notice to its agent, Frank Sutton did not pass such information on to defendant, so defendant was unaware of details vital to securing cargo insurance or otherwise protecting itself against loss in transit. The mailing of documents after shipment to Wachovia Bank & Trust Company, N.A. to collect the invoice amount plus freight and charges from defendant by sight draft, of which defendant was unaware until some weeks after the loss of the ship was not prompt notice to the defendant as required by the above statute.

6. Risk of loss of the wine therefore did not pass from the plaintiff to defendant upon delivery of the container of wine to the carrier, as provided in G.S. 25-2-509(1)(a).

7. Plaintiff is not entitled to recover any amount from the defendant due to such lack of notice.

From judgment in favor of the defendant, dismissing plaintiff's action, both plaintiff and defendant have appealed.

Williams, Kratt & Parker, by Neil C. Williams, for plaintiff-appellant.

Caudle, Underwood & Kinsey, P.A., by Lloyd C. Caudle and Donald M. Etheridge, Jr., for defendant-appellee.

WELLS, Judge.

The first question presented by plaintiff's appeal is whether the trial court was correct in its conclusion that the risk of loss for the wine never passed from plaintiff to defendant due to the failure of plaintiff to give prompt notice of the shipment to defendant. Plaintiff made no exceptions to the findings of fact contained in the judgment and does not contend that the facts found were unsupported by the evidence. Our review on appeal is limited to a determination of whether the facts found support the court's conclusions and the judgment entered. Rule 10(a), N.C. Rules of Appellate Procedure; *Swygert v. Swygert*, 46 N.C. App. 173, 180-181, 264 S.E. 2d 902, 907 (1980).

[1] All parties agree that the contract in question was a "shipment" contract, *i.e.*, one not requiring delivery of the wine at any

particular destination. *See* J. White & R. Summers, Uniform Commercial Code § 5-2, at 140-42 (1972). The Uniform Commercial Code, as adopted in North Carolina, dictates when the transfer of risk of loss occurs in this situation. G.S. 25-2-509(1)(a) provides, in pertinent part:

> *Risk of loss in the absence of breach.*—(1) Where the contract requires or authorizes the seller to ship the goods by carrier (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (25-2-505). . . .

Before a seller will be deemed to have "duly delivered" the goods to the carrier, however, he must fulfill certain duties owed to the buyer. In the absence of any agreement to the contrary, these responsibilities, set out in G.S. 25-2-504, are as follows:

> *Shipment by seller.*—Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must
>
> (a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and
>
> (b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and
>
> (c) promptly notify the buyer of the shipment. Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.

[2] The trial court concluded that the plaintiff's failure to notify the defendant of the shipment until after the sailing of the ship and the ensuing loss, was not "prompt notice" within the meaning of G.S. 25-2-504, and therefore, the risk of loss did not pass to defendant upon the delivery of the wine to the carrier pursuant to the provisions of G.S. 25-2-509(1)(a). We hold that the conclu-

sions of the trial court were correct. The seller is burdened with special responsibilities under a shipment contract because of the nature of the risk of loss being transferred. *See* W. Hawkland, 1 A Transactional Guide to the U.C.C. § 1.2104, at 102-107 (1964). Where the buyer, upon shipment by seller, assumes the perils involved in carriage, he must have a reasonable opportunity to guard against these risks by independent arrangements with the carrier. The requirement of prompt notification by the seller, as used in G.S. 25-2-504(c), must be construed as taking into consideration the need of a buyer to be informed of the shipment in sufficient time for him to take action to protect himself from the risk of damage to or loss of the goods while in transit. *But see* J. White & R. Summers, Uniform Commercial Code § 5-2, fn. 12 (1972). It would not be practical or desirable, however, for the courts to attempt to engraft onto G.S. 25-2-504 of the U.C.C. a rigid definition of prompt notice. Given the myriad factual situations which arise in business dealings, and keeping in mind the commercial realities, whether notification has been "prompt" within the meaning of U.C.C. will have to be determined on a case-by-case basis, under all the circumstances. *See* W. Hawkland, 1 A Transactional Guide to the U.C.C. § 1.2104, at 106 (1964).

In the case at hand, the shipment of wine was lost at sea sometime between 12 December and 22 December 1978. Although plaintiff did notify its agent, Frank Sutton, regarding pertinent details of the shipment on or about 27 November 1978, this information was not passed along to defendant. The shipping documents were not received by defendant's bank for forwarding to defendant until 27 December 1978, days after the loss had already been incurred. Since the defendant was never notified directly or by the forwarding of shipping documents within the time in which its interest could have been protected by insurance or otherwise, defendant was entitled to reject the shipment pursuant to the term of G.S. 25-2-504(c).

In its final assignment of error plaintiff asserts that the trial court erred in not imposing a constructive trust upon money received by defendant from a third party in connection with the remarketing of a canceled portion of the wine order. This issue was not presented in the pleadings nor does the record reveal that the issue was raised at trial. Plaintiff cannot now present this theory on appeal. *Baer v. Davis*, 47 N.C. App. 581, 582, 267

S.E. 2d 581, 582, *disc. rev. denied*, 301 N.C. 85, 273 S.E. 2d 296 (1980); *Men's Wear v. Harris*, 28 N.C. App. 153, 156, 220 S.E. 2d 390, 392 (1975), *disc. rev. denied*, 289 N.C. 298, 222 S.E. 2d 703 (1976).

We do not reach the assignments of error presented by defendant. Since by our decision we have left undisturbed the judgment in defendant's favor, it is not a party aggrieved and therefore may not appeal. G.S. 1-271; *Boone v. Boone*, 27 N.C. App. 153, 218 S.E. 2d 221 (1975).

In the plaintiff's appeal, the judgment is

Affirmed.

In the defendant's appeal, the appeal is

Dismissed.

Judges HEDRICK and MARTIN (H.) concur.

STATE OF NORTH CAROLINA v. HERMAN CHARLES

No. 8114SC97

(Filed 1 September 1981)

1. Criminal Law § 91— speedy trial—arrest or indictment—running of 120 day period

G.S. 15A-701(a1)(1) reflects the clear intent of the General Assembly that it is the last occurring of either arrest or indictment which triggers the running of the 120 day period within which trial must begin.

2. Criminal Law § 90— no impeachment of State's own witness

Where a State's witness, prior to recess, was not specific about what she heard defendant and a homicide victim say, but the witness, after recess, testified on direct examination to the exact words of defendant and the homicide victim, there was no merit to defendant's contention that the trial judge erred by permitting the State to impeach its own witness, since the State was not seeking to introduce prior inconsistent statements or to impeach the witness's credibility.

3. Criminal Law § 89.5— corroborating testimony—slight variances

If testimony offered in corroboration is generally consistent with the witness's testimony, slight variations will not render it inadmissible.

4. Criminal Law § 114.2— instructions—omission—no expression of opinion

The trial judge did not improperly express an opinion during instructions to the jury where he declined to repeat profanity to which witnesses had testified and then explained his omission.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 24 April 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 2 June 1981.

Defendant was indicted on 8 January 1980 and charged with the second degree murder of Freddie Robinson. Defendant was initially arrested on 14 August 1979 and was released on bond on 21 August 1979. Defendant's motion to dismiss for failure to grant him a speedy trial, filed on 14 December 1979, was denied after a hearing on 10 April 1980. Defendant was tried on 21 April 1980.

At trial the State's evidence tended to show that on the night of 14 August 1979, defendant, Ben Brooks, and Freddie Robinson were visiting the residence of Willie Vine. Several of Vine's children were at home that night, including Damita Jo Lemon, age seventeen, and Willie Vine, Jr., age fourteen. After shooting pool in the basement of Vine's house for approximately one hour, defendant returned to his car parked in Vine's driveway. Upon discovering that his car keys were no longer in the ignition where he had left them and that his pistol had been removed from the car's glove compartment, defendant asked everybody present at the house about the missing items. No one admitted taking the items and defendant called the police. A police officer arrived soon thereafter and conducted an unsuccessful search of the immediate area for the missing items. After a brief investigation the police officer left and soon thereafter Ben Brooks and Freddie Robinson also left the scene in a friend's car. Defendant remained on the premises.

Willie Vine, Jr. heard defendant say that defendant thought Robinson had taken defendant's gun, that defendant had another gun, and that defendant would be waiting for Robinson when he came back. Defendant obtained a .22 caliber rifle from Willie Vine and soon thereafter defendant went a short distance into the woods near the house and stated that he would wait there all night if he had to in order to get his pistol back. When Willie Vine, Jr. asked defendant to come back in the house, defendant told Vine, Jr. to cut off the outside light and to be quiet because

someone was walking along the train track behind the house. After Vine, Jr. stepped back into the house and turned off the light, he heard one shot, and heard defendant say "[w]hat did you do with my gun?" Then, Vine, Jr. heard another shot. Damita Jo Lemon testified that she was in the house when she heard the first shot, that she then looked out the window and saw Freddie Robinson running from the back of the house toward the street, and that she then ran out of the house, heard Robinson say "Ah, man, you got me," heard defendant say "m----- f-----, die," and then heard a second and final shot. Vine, Jr. testified that after the second shot, defendant returned to the house and told those inside to call an ambulance and that if the police asked them anything about what happened, to say that Robinson shot at defendant first.

Robinson's body was discovered on the road in front of the Vine residence approximately two hundred feet from the house. A search of the immediate area around the body revealed no weapon of any sort. An autopsy revealed two entrance wounds on Robinson's body and tests on Robinson's hands revealed residues indicating that Robinson could have fired a gun that night. Defendant's pistol was discovered hidden underneath pine straw in the wooded area in the rear of the Vine residence. No fingerprints were found on the pistol but the pistol contained one spent cartridge.

Defendant presented no evidence.

Defendant appeals from a conviction of voluntary manslaughter.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Grayson G. Kelley, for the State.

B. Frank Bullock, for the defendant-appellant.

WELLS, Judge.

In his first assignment of error, defendant contends that the trial court erred in denying his motion to dismiss the charges against him by reason of the failure of the State to begin his trial within 120 days of his arrest. In his speedy trial motion, filed and served on the State on 14 December 1979, defendant alleged that he was charged with murder and arrested on or about 14 August

1979, that he had not been indicted, that he had not been tried, that no part of the delay of his trial was attributable to defendant, and that the State, without a valid reason, had failed to accord defendant a speedy trial. Defendant's motion did not come on for hearing until 10 April 1980. In the meantime, defendant was indicted for second degree murder on 8 January 1980. At the hearing before the Honorable James H. Pou Bailey on 10 April 1980, the trial court took judicial notice of the foregoing sequence of events and that defendant's file indicated no reason for the delay between the arrest and the indictment. The State argued to the trial court that because there had been no showing by defendant that his trial was not "granted" within 120 days of the indictment, defendant's motion should be denied. The State made no effort to explain or justify the delay of trial beyond 120 days of defendant's arrest. Judge Bailey denied defendant's motion. We find no error in Judge Bailey's ruling.

G.S. 15A-701(a1) provides as follows:

> 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-703, *in pertinent part, provides:*

> If a defendant is not brought to trial within the time limits required by G.S. 15A-701 . . . , the charge shall be dismissed on motion of the defendant.

In felony cases, there are a number of events which may start the running of the 120 day period provided for in G.S. 15A-701(a1)(1). *See* Chapter 15A, Article 17, Criminal Process. The General Assembly revised the Speedy Trial Act in the 1977 Session. *See* Chapter 787 of the 1977 Session Laws. The original version of the Bill which contained the revisal, H.B. 718, filed 4 April 1977, contained a provision that the *first* of the events enumerated in G.S. 15A-701(a1)(1) would start the running of the 120 day period. The original draft was the one recommended by the Legislative Re-

search Commission in its Report to the 1977 General Assembly on Speedy Trials. The Bill was amended in Committee to provide that it would be the *last*, not the *first*, occurring of the events enumerated in G.S. 15A-701(a1)(1) which would measure the 120 days, and it was the Committee revisal which was enacted.

[1] Recognizing that under the provisions of Chapter 15A, Article 17, Criminal Process, arrest may precede indictment or indictment may precede arrest, we believe that G.S. 15A-701(a1)(1), as finally enacted, reflects the clear intent of the General Assembly that it is the *last* occurring of these events which will trigger the running of the 120 day waiting period.[1] In the case now before us, the last occurring event in the criminal process chain was the return of the Bill of Indictment by the Grand Jury on 8 January 1980. Defendant's trial began on 10 April 1980, well within 120 days of the return of the indictment against him. *Compare State v. Young*, 302 N.C. 385, 388, 275 S.E. 2d 429, 432 (1981). This assignment is overruled.

[2] Defendant's next assignment of error concerns the testimony of Damita Jo Lemon. Prior to recess, Lemon had testified that after hearing the first shot, she heard the voices of Robinson and defendant. Although she was not specific about what was said, Lemon did remember that defendant's voice used profanity. After the recess, Lemon testified on direct examination that after the first shot she heard Robinson say, "man, you got me," and then heard defendant say "m----- f-----, die." Defendant contends that the trial judge erred by permitting the State to impeach its own witness. The State, however, was clearly not seeking to introduce prior inconsistent statements or to impeach Lemon's credibility and therefore his assignment of error is without merit. *Compare State v. Berry*, 295 N.C. 534, 537-38, 246 S.E. 2d 758, 760-61 (1978).

Defendant also assigns error to the admission, over objection, of Lemon's statement on re-direct that when defendant returned to the house after the shooting, defendant told the occupants that if the police asked who shot first, they should say Freddie Robinson. Lemon did not testify to this on direct ex-

1. Our holding recognizes, of course, that there are other events in the chain of criminal process in felony cases which may control.

amination, and defendant contends that the State was improperly allowed to produce new evidence on re-direct examination. During cross-examination, while Lemon was in the process of relating the statements defendant made when he entered Lemon's house after the shooting, counsel for defendant interrupted her in the middle of a sentence and requested that she confine her answer to what defendant said about calling an ambulance. On re-direct, counsel for the State asked her to complete her recollection of what defendant said when he entered the house. She then stated that after asking those present to call an ambulance, defendant said that if the police asked who shot first, "say that Freddie shot at him." It was within the discretion of the trial judge to allow the witness on re-direct to clarify testimony elicited on cross-examination. *See* 1 Stansbury's N.C. Evidence § 36, at 109 (Brandis rev. 1973). This assignment of error is overruled.

[3] Defendant next assigns error to the admission of the corroborative testimony of Detective Clarence Gooch. Gooch's testimony concerned conversations he had with Willie Vine, Jr., held shortly after 14 August 1979 pursuant to Gooch's investigation of the shooting. Although for the most part consistent, what Vine told Gooch differed in some respects from Vine's testimony on direct examination, *e.g.* Vine told Gooch he heard four rather than two shots, and Vine told Gooch that after the shots he heard defendant say "I got you," and heard Robinson say, "Oh, you got me." "[I]f the testimony offered in corroboration is generally consistent with the witness's testimony, slight variations will not render it inadmissible. Such variations affect only the credibility of the evidence which is always for the jury." *State v. Warren*, 289 N.C. 551, 557, 223 S.E. 2d 317, 321 (1976). The variations were slight in this case and defendant has failed to demonstrate any prejudicial error and this assignment of error is overruled.

[4] Defendant next asserts that the trial judge improperly expressed an opinion during the instructions to the jury. G.S. 15A-1232. In summarizing the testimony of Lemon, the trial judge stated: "She also reported that she heard some vulgarity that I see no need to repeat for you. I didn't enjoy hearing the vulgarity under any circumstances, but these witnesses were telling you what they say they heard." Considered in the context in which they were made, these statements by the trial judge could not reasonably be considered as an expression of opinion on the

evidence in the trial. The trial judge merely declined to repeat the profanity and then explained his omission. This assignment is overruled.

Defendant's final assignment of error concerns the trial judge's denials of defendant's motions to set aside the verdict as being contrary to the evidence, for a new trial, and for a mistrial. A motion to set aside the verdict as being against the weight of the evidence is addressed to the discretion of the trial court, and is not reviewable on appeal in the absence of abuse of discretion. There was more than sufficient evidence to take the case against defendant to the jury; hence, no abuse of discretion has been shown. *State v. Hamm*, 299 N.C. 519, 523, 263 S.E. 2d 556, 559 (1980). Defendant's motions for a new trial and for a mistrial are not supported by any showing of prejudicial error in the trial. These assignments of error are overruled.

Defendant received a trial free from prejudicial error.

No error.

Judges HEDRICK and MARTIN (H. C.) concur.

DANNY RAY COLEMAN AND SANDRA J. COLEMAN v. NORMAN F. SHIRLEN, JR. AND WIFE, JESSIE SHIRLEN, NORMAN SHIRLEN, SR., AND WIFE, REBA SHIRLEN AND RONALD ALBERT SHIRLEN

No. 8026SC1074

(Filed 1 September 1981)

Conspiracy § 2.1; Contracts § 20— conspiracy to abduct child—breach of separation agreement—sufficiency of evidence

In an action to recover damages arising from an alleged civil conspiracy to abduct and the subsequent abduction of the minor child of one plaintiff and one defendant where plaintiff alleged that the parents' separation agreement provided that plaintiff was to have custody of the child, the trial court erred in entering summary judgment for defendants where they did not meet their burden of establishing that no genuine issue existed as to any material fact, and there was no merit to defendants' contention that a breach of the separation agreement by plaintiff mother would excuse performance by defendant father, since the language of the agreement implied that the promises contained therein were intended to be mutually independent, and failure to per-

form an independent promise does not excuse nonperformance on the part of the other party.

APPEAL by plaintiffs from *Burroughs, Judge.* Order entered 26 June 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 May 1981.

Plaintiffs brought this action seeking damages arising from an alleged civil conspiracy to abduct and the subsequent abduction of the minor child of plaintiff Sandra J. Coleman and defendant Norman F. Shirlen, Jr. In their verified complaint, plaintiffs alleged that Sandra Coleman and Norman Shirlen, Jr. were married in 1965 and that Martyn Ryan Shirlen was born to the marriage on 14 October 1971. Sandra Coleman and Norman Shirlen, Jr. separated in 1974 and entered into a separation agreement providing that Coleman was to have custody of the child, Martyn. Coleman and Shirlen, Jr. obtained a divorce in 1975 and by order of a judge of the South Carolina family court, Coleman was granted the exclusive care and custody of the child. Plaintiffs further alleged the following:

> 8. That on or about October 4, 1977, without the knowledge, consent or permission of the Plaintiffs, and in violation of existing Court Orders and Contractual Agreements between the parties, the Defendant Norman F. Shirlen, Jr., conspired with and was assisted by the active participation of the Defendant Jessie Shirlen, the Defendant Ronald Albert Shirlen, the Defendant Norman Franklin Shirlen, Sr., and the Defendant Reba Shirlen, and together the named Defendants abducted Martyn Ryan Shirlen from White Hall Elementary School, Anderson, South Carolina, and thereafter removed him from the jurisdiction of the State of South Carolina to a place unknown to these Plaintiffs.
>
> 9. That the abduction of Martyn Ryan Shirlen and his removal from the State of South Carolina was an unlawful act perpetrated by the Defendant Norman F. Shirlen, Jr., his wife, Jessie Shirlen, and the Defendant Ronald Albert Shirlen, the Defendant's brother.

10. That the Defendant Norman F. Shirlen, Sr. and wife, Reba Shirlen, actively participated in said abduction and thereafter assisted and aided Norman Shirlen, Jr. and wife, Jessie Shirlen in removing said child from the custody of these Plaintiffs in violation of contractual agreements and Orders of the Courts of the State of South Carolina.

11. That demand has been made by the Plaintiffs upon the Defendants named herein for the return of Martyn Ryan Shirlen but that all Defendants have willfully refused to return said minor child.

The whereabouts of Martyn, Shirlen, Jr. and Jessie Shirlen have been unknown to plaintiffs since 4 October 1977.

Defendants Norman Shirlen, Jr. and Jessie Shirlen did not answer or otherwise plead to the complaint. In their answer, defendants Norman Shirlen, Sr., Reba Shirlen, and Ronald Albert Shirlen denied the existence of the South Carolina court order as it related to the custody of the child, denied the allegations concerning the conspiracy and alleged abduction, alleged a breach of the separation agreement by plaintiffs prior to October, 1977, and moved to dismiss the complaint for failure to state a claim upon which relief could be granted.

After the pleadings were joined, defendants, Norman Shirlen, Sr., Reba Shirlen, and Ronald Albert Shirlen, moved to dismiss for failure to state a claim upon which relief might be granted and for summary judgment. In addition to the pleadings, the trial judge considered the following in ruling on the motion: (1) the separation agreement entered into in August 1974 providing *inter alia* that "the Wife shall have the sole and exclusive custody" of Martyn; (2) the order of the South Carolina family court setting out Shirlen, Jr.'s visitation rights with regard to Martyn; (3) defendants' affidavit stating *inter alia* that Shirlen, Sr. and Reba Shirlen are the parents of Shirlen, Jr.; and (4) interrogatories and depositions of defendants indicating that on 30 June 1977, Shirlen, Jr. and Jessie Shirlen executed and delivered powers of attorney to Shirlen, Sr. and that Shirlen, Sr. has utilized the powers of attorney since October 1977 to manage his son's and daughter-in-law's affairs in their absence, that subsequent to the alleged abduction, the only contact between Shirlen, Jr., Jessie Shirlen and the other three defendants has been two telephone calls to

Shirlen, Sr. from his son from locations unknown, and that when asked about his participation in the alleged abduction, Ronald Albert Shirlen has refused to answer on the grounds that such answers might subject him to criminal liability. Subsequent to his ruling, the trial judge allowed plaintiffs' motion to amend the record to include a document, an application for renewal of an electrical contractor's license, signed by both Shirlen, Sr. and Shirlen, Jr., which was received by the State Board of Examiners of Electrical Contractors in June 1980.

In its ruling, the trial court granted Shirlen, Sr.'s, Reba Shirlen's, and Ronald Albert Shirlen's motions to dismiss for failure to state a claim for relief pursuant to G.S. 1A-1, Rule 12(b)(6), and their motions for summary judgment pursuant to G.S. 1A-1, Rule 56. Plaintiffs have appealed.

W. J. Chandler for plaintiff-appellant.

Michael P. Carr for defendants-appellees.

WELLS, Judge.

Plaintiffs first assign error to the granting by the trial judge of the defendants' motion to dismiss for failure to state a claim upon which relief can be granted. G.S. 1A-1, Rule 12(b) provides, however, that if "matters outside the pleading are presented to and not excluded by the court, the [Rule 12(b)(6)] motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . ." *See Smith v. Smith*, 17 N.C. App. 416, 420-21, 194 S.E. 2d 568, 570 (1973). The trial court's order indicates that it was "[b]ased on the matters presented to the Court, which consisted of the documentary evidence in the Court's file and the statements of counsel . . . ." As the record before us indicates that matters outside the pleadings were presented and not excluded by the trial judge, we must view defendants' motion to dismiss for failure to state a claim for relief as a motion for summary judgment. Thus we consider only plaintiffs' second assignment of error which was to the trial judge's order allowing defendants' motion for summary judgment.

Plaintiffs' cause of action was based on an alleged civil conspiracy to abduct the child, Martyn Ryan Shirlen, whose custody was vested in plaintiff Sandra Coleman under a separation agree-

ment between Sandra Coleman and Norman Shirlen, Jr. A conspiracy is an agreement between two or more individuals to commit an unlawful act or to do a lawful act in an unlawful manner. *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E. 2d 325, 337 (1981); *Evans v. GMC Sales*, 268 N.C. 544, 546, 151 S.E. 2d 69, 71 (1966). To recover under this cause of action, plaintiffs must prove the existence of the agreement between the defendants, that one or more of the conspirators committed an overt, tortious act in furtherance of the conspiracy, and that plaintiffs suffered damages caused by acts committed pursuant to the conspiracy. *Dickens v. Puryear, supra; Reid v. Holden*, 242 N.C. 408, 414-415, 88 S.E. 2d 125, 130 (1955).

On a motion for summary judgment, however, the burden on the moving party is to establish that there is no genuine issue as to any material fact remaining to be determined. *Blue Jeans Corp. v. Pinkerton, Inc.*, 51 N.C. App. 137, 138, 275 S.E. 2d 209, 211 (1981). The burden shifts to the non-moving party to either show that a genuine issue of material fact exists or provide an excuse for not so doing, only if the movant carries its burden by showing that an essential element of the opposing party's claim is non-existent. *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 656, 267 S.E. 2d 584, 586 (1980).

The evidence presented to the trial court by defendants on the issues of the alleged conspiracy, abduction and resulting damage to plaintiffs, consists of an answer and affidavit verified by defendants Norman Shirlen, Sr., Reba Shirlen, and Ronald Albert Shirlen. These defendants have clearly not met their burden of establishing that no genuine issue exists as to any material facts. Lacking an adequately supported motion for summary judgment by defendants on these issues, we need not determine whether plaintiffs produced facts, as distinguished from allegations, sufficient to indicate that at trial they could prove, circumstantially or otherwise, the existence of an agreement between defendants to commit the unlawful act of abduction. *See Dickens v. Puryear, supra; Edwards v. Ashcraft*, 201 N.C. 246, 159 S.E. 355 (1931).

Defendants' answer and affidavit allege and describe a material breach by plaintiffs of the separation agreement. The general rule governing bilateral contracts requires that if either

party to the contract commits a material breach of the contract, the other party should be excused from the obligation to perform further. 6 Williston, Contracts § 864, at 290 (3d ed. 1962). Thus, if no valid contract grants custody of the minor child to the mother, then the father's common law right to control his minor child might render the father's abduction of that child legal. *See La Grenade v. Gordon*, 46 N.C. App. 329, 264 S.E. 2d 757, *app. dismissed*, 300 N.C. 557, 270 S.E. 2d 109 (1980); 3 Lee, N.C. Family Law § 243, at 129-32 (1963). Although defendants' allegations are not contradicted by plaintiffs' papers filed in response to defendants' motion, paragraph 12. of the separation agreement between the parties provides as follows:

> 12. It is mutually agreed and understood that either party hereto shall have the right to compel the performance of this Agreement, or sue for breach thereof, in the Courts where jurisdiction of the parties hereto may be obtained.

This contractual language implies that the promises contained in the separation agreement were intended to be mutually independent. Failure to perform an independent promise does not excuse nonperformance on the part of the other party. 6 Williston, Contracts § 817, at 32 (3d ed. 1962). Thus the language of the contract itself controverts defendants' assertion that plaintiffs' breach was material. Whether or not plaintiffs' breach was material is a genuine issue of material fact remaining to be determined. *See* Calamari and Perillo, Contracts § 11-22, at 409 (1977). In their papers offered in support of their motion for summary judgment, defendants Norman Shirlen, Sr., Reba Shirlen, and Ronald Albert Shirlen have not succeeded in demonstrating that plaintiffs' claim is unfounded as to them or that it has a fatal weakness. *Gregory v. Perdue, Inc., supra.* All of the elements of plaintiffs' claim set forth in their complaint and put at issue by these defendants' answer remain as genuine issues of material fact in the action, to be determined by the triers of fact. We hold that it was error to grant defendants' motion for summary judgment.

Reversed.

Judges HEDRICK and MARTIN (H.) concur.

TAROKH TAEFI v. VERNON R. STEVENS AND JOANNE B. STEVENS

No. 8026SC967

(Filed 1 September 1981)

1. **Vendor and Purchaser § 8— breach of contract to purchase—measure of damages**

In an action for breach of a contract to purchase real property where there is evidence of damages other than the difference between the contract price and the market value of the property, the damaged party may recover for them; therefore, in plaintiff's action to recover from defendants for their failure to complete the purchase of a house and lot, evidence was sufficient for the jury to find that plaintiff incurred expenses including mortgage payments, closing costs, newspaper advertisements for the sale of the house, a "for sale" sign, and maintenance of the house and lawn, and the jury could find that such items could have been within the contemplation of the parties at the time of the breach of the contract.

2. **Damages § 9; Vendor and Purchaser § 8— breach of contract to purchase property—duty to minimize damages**

In an action to recover for defendants' breach of contract to purchase a house and lot from plaintiff, the trial court did not err in admitting testimony as to the mortgage payments by plaintiff from the time defendants breached the contract until plaintiff ultimately sold the property, and evidence of plaintiff's renting an apartment rather than living in the house was for the jury's consideration as to whether plaintiff took reasonable action to minimize his damages.

3. **Vendor and Purchaser § 3.1— contract to purchase land—sufficiency of description**

In an action to recover for defendants' breach of a contract to purchase a house and lot, there was no merit to defendants' contention that the contract did not comply with the Statute of Frauds because the description of the property as "5532 Providence Road" was too ambiguous for the contract to be enforced, since the description was latently ambiguous and could be made definite by extrinsic evidence.

APPEAL by plaintiff from *Griffin, Judge.* Judgment entered 14 July 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 April 1981.

This is an action for breach of contract. The plaintiff alleged that he entered into a contract with the defendants to sell a house and lot he owned in Charlotte to the defendants on or before 31 August 1975 for the sum of $46,000.00, which contract the defendants breached by refusing to consummate the sale. The plaintiff prayed for $8,271.63 in damages. The defendants denied

the material allegations of the complaint and pled the statute of frauds as a defense. The defendants also counterclaimed for a judgment in the amount of $500.00 which amount they alleged they had delivered to the plaintiff with the understanding that it be returned if the contract did not become effective.

The plaintiff's evidence tended to show that the parties entered into a contract to sell the defendants a certain parcel of real estate known as 5532 Providence Road on or before 31 August 1975 for a price of $46,000.00; that on or about 14 August 1975, the defendants notified the plaintiff they would not purchase the property; that the plaintiff then listed the property again and sold it on 28 October 1977 for a price of $46,000.00. The plaintiff testified that in his opinion the fair market value of the house and lot was $46,000.00 at the time the defendants refused to consummate the sale. The plaintiff testified over the objection of the defendants that he incurred the following expenses from 31 August 1975 until 28 October 1977 in connection with the sale of the house: mortgage payments of $305.00 per month; $315.00 as a part of the closing costs when he sold the house; $206.64 in newspaper advertisements for the sale of the house; $41.64 for a "for sale" sign posted in front of the house; $264.76 for house maintenance and $1,091.25 for lawn maintenance.

The defendant Vernon Stevens testified that he and his wife negotiated for the purchase of the house and lot through a real estate agent; that they signed the contract but told the agent it was not to be effective until they had sold a house and lot which they owned. He testified he had delivered $500.00 to the real estate agent which was to be applied to the purchase price of the house if the contract became effective.

The jury answered the issues favorably to the plaintiff and awarded the plaintiff $1,500.00. The court granted the defendants' motion for judgment notwithstanding the verdict, and the plaintiff appealed.

Perry, Patrick, Farmer and Michaux, by Roy H. Michaux, Jr., for plaintiff appellant.

William H. Booe (now deceased) and Richard A. Cohan for defendant appellee.

WEBB, Judge.

[1] The resolution of the question as to whether the court committed error in granting the judgment notwithstanding the verdict depends on the measure of damages to which the plaintiff is entitled. The only evidence of damage, which was admitted over the objection of the defendant, was testimony as to mortgage payments, expenses of selling the property, and house and yard maintenance. The defendant contends that the proper measure of damages is the difference between the contract price and the market value at the time of the breach, and evidence as to other items of damage could not support the verdict. The defendant relies on *Lane v. Coe,* 262 N.C. 8, 136 S.E. 2d 269 (1964); *LeRoy v. Jacobosky,* 136 N.C. 443, 48 S.E. 796 (1904); *Rodman v. Robinson,* 134 N.C. 503, 47 S.E. 19 (1904). These cases state the rule as the defendants contend but in none of these cases was there evidence of other damages flowing from the breach.

The rule is stated in 77 Am. Jur. 2d *Vendor and Purchaser* § 489 (1975) as follows:

> "In general, the basis upon which damages will be assessed against a vendee for breach of his executory contract to purchase real estate is compensation to the vendor for the loss or injury sustained by him by reason of the vendee's breach, the amount, however, to be limited to such damages as may reasonably be supposed to have been within the contemplation of the parties when they made the contract as the probable result of the breach. Generally, the measure is the difference between the contract price and the market value of the land at the time of the breach, giving the vendee credit for any sums paid by him on the purchase price, or in other words, the difference between the unpaid balance of the principal and the market value of the property at such time." (Footnotes omitted)

Johnson v. Sidbury, 226 N.C. 345, 38 S.E. 2d 82 (1946) is a case which was tried on the theory of a breach of contract to sell real estate. The plaintiff was allowed to recover "the difference between the purchase price of the land as fixed in the bond for title and its reasonable market value at the time of the breach, less the sum 'due and owing upon the contract,' plus 'such sum as you (jury) find necessary to fully compensate the plaintiff for any in-

jury sustained by him, directly flowing from, and proximately caused by, the wrongful act of the defendant.' "

We believe that when there is evidence of damages other than the difference between the contract price and market value of the property, the damaged party may recover for them. *See Aiken v. Andrews*, 233 N.C. 303, 63 S.E. 2d 645 (1951). We see no reason why the measure of damages for breach of contract in real estate transactions should be different from other contract actions. *See Troitino v. Goodman*, 225 N.C. 406, 35 S.E. 2d 277 (1945).

We believe the jury could find the items of damage to which the plaintiff testified could have been within the contemplation of the parties at the time of the breach of the contract. We hold there was evidence to support the verdict for the plaintiff, and it was error to grant the defendants' motion for judgment notwithstanding the verdict.

[2] The defendants also assign error to the admissions of the testimony as to the mortgage payments by the plaintiff from 31 August 1975 until 28 October 1977. The defendants contend the plaintiff was under a duty to minimize his damages during this period and the evidence showed he rented an apartment rather than live in the house. The defendants argue that for this reason, evidence of the mortgage payments was inadmissible. We agree with the defendants that the plaintiff was under a duty to minimize his damages. *See Halsey Co. v. Knitting Mills*, 38 N.C. App. 569, 248 S.E. 2d 342 (1978). This does not make this evidence inadmissible, however. Testimony of mortgage payments was admissible as to damages, and the evidence of the plaintiff's renting an apartment rather than living in the house was for the jury's consideration as to whether the plainiff took reasonable action to minimize his damages. The defendants did not assign error to the jury charge on this feature of the case and apparently the jury took into account the plaintiff's failure to minimize his damages. The verdict was substantially less than it could have been on the evidence.

[3] The defendants in their last assignment of error contend that the contract does not comply with the statute of frauds, G.S. 22-2. The defendants contend that the description of the property as "5532 Providence Road" is too ambiguous for the contract to be

enforced. *Lane v. Coe, supra,* deals with a contract to convey real estate in which the description was "house and lots on 601 highway where [Charlie Coe's] residence is . . . ." Our Supreme Court held this was a sufficient description to comply with the statute of frauds. The Supreme Court said a description is patently ambiguous if it leaves the subject of the contract in a state of absolute uncertainty and refers to nothing extrinsic by which it might be possibly identified with certainty. A patently ambiguous description does not comply with the statute of frauds. The Supreme Court said when a description is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made, it contains a latent ambiguity. A description which is latently ambiguous complies with the statute of frauds. By the test of *Lane v. Coe, supra,* we believe the description in the case sub judice is latently ambiguous. The contract has "Charlotte, N.C." and "Mecklenburg County" in its heading. It describes the parcel of real estate as "5532 Providence Road." It says Tarokh Taefi has sold the lot to the defendants. We believe that from this description a lot at 5532 Providence Road in Charlotte, North Carolina, owned by the plaintiff at the time the contract was signed, could be made definite by extrinsic evidence. We hold this description complies with the statute of frauds.

The plaintiff assigned error to the court's failure to direct a verdict in his favor on the defendants' counterclaim and to give him a peremptory instruction on the counterclaim. The jury answered the issue favorably to the plaintiff on the counterclaim. We hold any error the court may have made on this issue was not prejudicial to the plaintiff.

For reasons stated in this opinion, we reverse the judgment of the superior court and order that the court enter judgment on the verdict for the plaintiff.

Reversed and remanded.

Judges HEDRICK and ARNOLD concur.

JAMES O. PENNINGTON, EMPLOYEE, PLAINTIFF APPELLANT v. FLAME REFRACTORIES, INC., EMPLOYER, AND GENERAL ACCIDENT GROUP, CARRIER, DEFENDANT APPELLEES

No. 8010IC745

(Filed 1 September 1981)

Master and Servant § 77.2— workers' compensation—review of award for change of condition—timeliness of application

Claimant's application for review of his workers' compensation award on the ground of a change of condition was made within the two-year limitation of G.S. 97-47 where the evidence tended to show that claimant last received compensation for an employment-related injury on 13 April 1976; he required further surgery on 1 November 1977; his wife immediately advised defendant carrier that this surgery was related to the injury; on 30 January 1978 claimant's wife telephoned the Industrial Commission and talked with a Commission employee who advised her to write the Commission about her husband's claim; claimant's wife typed and mailed a letter to the Commission, sufficiently addressed, dated 31 January 1978 but such letter was not received by the Commission; evidence supported a reasonable inference of nondelay in mailing the letter; and there is a presumption that mail, with postage prepaid and correctly addressed, will be received.

APPEAL by plaintiff (claimant) from opinion and award of the North Carolina Industrial Commission, by Commissioner William H. Stephenson (adopting the opinion and award of the Hearing Commissioner, Deputy Commissioner Ben E. Roney, Jr.) filed 25 April 1980. Heard in the Court of Appeals 2 March 1981.

Claimant appeals from a denial of review of his worker's compensation award.

Hutchins, Tyndall, Bell, Davis & Pitt, by Richard Tyndall, for plaintiff appellant.

Young, Moore, Henderson & Alvis, by John E. Aldridge, Jr., and William F. Lipscomb, for defendant-employer and defendant-carrier, appellees.

WHICHARD, Judge.

G.S. 97-47 provides that "upon the application of any party in interest on the grounds of a change in condition," the Industrial Commission may review any award of workers' compensation and, *inter alia*, increase the award. This review must occur, however, within two years from the last payment under the original award. The issue here is whether claimant made timely "application" for review of his award. We hold that he did.

Claimant received compensation for an employment-related back injury from 14 January 1976 through 13 April 1976. On 1 November 1977 he had surgery for removal of portions of two discs. His wife immediately advised defendant-carrier that this surgery was related to the injury. Telephone conversations and correspondence with defendant-carrier ensued, but did not lead to further compensation or to "any satisfaction . . . as to what was going to happen."

On 30 January 1978 claimant's wife telephoned the Industrial Commission. She advised an employee that claimant was not getting compensation and asked the employee for help. She told the employee she "wanted her to do whatever had to be done to get [defendant-carrier] to take back up the compensation." The employee told her to write a letter regarding their conversation and promised that she "would help [her]." Claimant's wife prepared the requested letter for claimant's signature "sometime around the time when the phone call was made." Her file copy was dated 31 January 1978. She "put [the letter] in the envelope and put it in the mail box for the postman to pick . . . up." The letter was not returned to her. The record does not establish its receipt by the commission.

On 13 February 1978 counsel retained by claimant advised defendant-carrier of his representation. Defendant-carrier advised counsel on 17 February 1978 of receipt of his letter. On or about 13 April 1978 the two year period from receipt of claimant's last compensation payment expired. Claimant's counsel was advised by letter from defendant-carrier dated 9 June 1978 that "the statute of limitations ha[d] expired" on review of the claim.

The commission, by adoption of the opinion and award of the hearing commissioner, made the following finding of fact:

> [Claimant's wife] called the Industrial Commission at 919, 733-5020 and talked to [a Commission employee] about the circumstances of claimant's most recent hospitalization. [The employee] advised [claimant's wife] to correspond with the Commission in writing about the circumstances of her husband's claim. This conversation took place on 30 January 1978. [Claimant's wife] typed a one-page letter dated 31 January 1978 directed to the Industrial Commission for her husband's signature. The address on the letter, while not cor-

rect in all respects, contained more than sufficient information for it to be delivered to the Industrial Commission. The letter was on a date uncertain placed in the custody of the United States Postal Service in a properly addressed envelope.

This finding is supported by competent evidence and is conclusive on appeal. *Hollman v. City of Raleigh*, 273 N.C. 240, 159 S.E. 2d 874 (1968). The commission also found as a fact the following: "Claimant did not on this record timely file with the Commission application to review the 12 March 1976 Award." While denominated a finding of fact, this is in reality a conclusion of law. "A conclusion of law is made no less reviewable by virtue of the fact that it is denominated a finding of fact." *Walston v. Burlington Industries*, 49 N.C. App. 301, 307, 271 S.E. 2d 516, 520 (1980). "[C]onclusions 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." *Id.*

The conclusive finding quoted establishes that on 30 January 1978 claimant's wife talked to a commission employee; that the employee advised her to write the commission about her husband's claim; and that claimant's wife typed and mailed a letter to the commission, sufficiently addressed, dated 31 January 1978. "There is a presumption that mail, with postage prepaid and correctly addressed, will be received." *State v. Teasley*, 9 N.C. App. 477, 486, 176 S.E. 2d 838, 844 *cert. denied*, 277 N.C. 459, 177 S.E. 2d 900 (1970) (citing *Petroleum Corp. v. Oil Co.*, 255 N.C. 167, 120 S.E. 2d 594 (1961)). Evidence that a letter was mailed permits an inference that it "was in a mailable condition, properly addressed . . . , and stamped." *Mill Co. v. Webb*, 164 N.C. 87, 90, 80 S.E. 232, 234 (1913). While the commission correctly found the letter was mailed "on a date uncertain," there being no evidence of the precise mailing date, the evidence permits the inference that it was mailed in close proximity to 31 January 1978, the date it was prepared.

Testimony by claimant's attorney indicates that he first discussed the claim with claimant's wife in February 1978; that she sent him copies of "what she deemed to be pertinent" from her file; that a copy of the 31 January 1978 letter was in these

materials; and that this copy was in his "file dated February 1978." It is unreasonable to infer that claimant's wife mailed the copy to claimant's attorney without having mailed the original to the commission. Because all the evidence indicates claimant and his wife were striving to secure benefits as soon as possible, it is unreasonable to infer that claimant's wife delayed at all in mailing the letter; and it is especially unreasonable to infer that she delayed mailing it until it would not have been received in due course of the mail by 13 April 1978, the date the two year limitation expired. The reasonable inference of nondelay in mailing the letter, together with the presumption of delivery in due course of the mail, supports a conclusion that claimant timely did all G.S. 97-47 required to secure review of his claim.

Defendants rely on the following from *Supply Co. v. Motor Lodge:*

> The stipulation [that a notice was mailed] established *prima facie* that the notice was received . . . in regular course of mail. *Trust Co. v. Bank*, 166 N.C. 122, 81 S.E. 1074; *Bragaw v. Supreme Lodge*, 124 N.C. 154, 32 S.E. 544. However, no presumption as to *time* of receipt of the notice arose absent proof of (1) where and when it was mailed, and (2) frequency or usual course and time of the mails between the mailing place and place of purported receipt of letter.

277 N.C. 312, 321, 177 S.E. 2d 392, 397 (1970) (emphasis in original). The portion of that opinion containing this statement commences "[a]ssuming, without deciding"; thus, the statement is clearly *dictum. Id.*, at 320, 177 S.E. 2d at 397. Further, we believe the requirements are satisfied. As to the first, the reasonable inference from the evidence is that the letter was mailed from claimant's residence in Maryland in close proximity to its preparation on 31 January 1978. As to the second, courts take judicial notice of subjects and facts of common and general knowledge. *Smith v. Kinston*, 249 N.C. 160, 105 S.E. 2d 648 (1958). It is common and general knowledge that in due course of the mail a letter mailed in Maryland, on or about 31 January 1978, would reach Raleigh, North Carolina, prior to 13 April 1978, the date on which the limitation expired.

This two year limitation is not jurisdictional. It merely provides a defense (formerly a plea in bar) which the employer may

assert. *Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971); *Ammons v. Sneeden's Sons, Inc.*, 257 N.C. 785, 127 S.E. 2d 575 (1962). Its purpose is "to protect the employer against claims too old to be successfully investigated and defended." 3 Larson, Workmen's Compensation Law § 78.20 at 15-28 (1976). Here, claimant notified the carrier immediately regarding his surgery. Claimant testified that the carrier was notified "at that time." Hence, the carrier had immediate notice of the claim, and the purpose of the limitation is not circumvented by the conclusion that claimant timely filed his application.

The worker's compensation act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents; and its benefits should not be denied by a technical, narrow, and strict construction. *Hinson v. Creech*, 286 N.C. 156, 209 S.E. 2d 471 (1974); *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972); *Britt v. Construction Co.*, 35 N.C. App. 23, 240 S.E. 2d 479 (1978). "The primary consideration is compensation for injured employees." *Barbour v. State Hospital*, 213 N.C. 515, 518, 196 S.E. 812, 814 (1938). To eschew those reasonable inferences prerequisite to the conclusion that claimant made timely application for review of his award would result in the miserly construction of the act proscribed by this principle.

The opinion and award of the Industrial Commission is reversed. The cause is remanded for findings of fact and determination whether claimant, having timely filed application for review, is entitled to modification, on grounds of a change in condition, of his prior award.

Reversed and remanded.

Chief Judge MORRIS and Judge MARTIN (Robert M.) concur.

Carnahan v. Reed

MARCENE CARNAHAN, NEXT OF KIN OF DONALD E. CARNAHAN v. AMOS E. REED, SECRETARY OF NORTH CAROLINA DEPARTMENT OF CORRECTION

No. 8010SC622

(Filed 1 September 1981)

Convicts and Prisoners § 2; Rules of Civil Procedure § 23— prisoner's widow—no standing to sue

Plaintiff, as widow and next of kin of a prisoner who took his own life while incarcerated, did not have standing to seek injunctive relief against defendant Secretary of Correction which would invalidate defendant's regulation limiting access to inmates' psychiatric and psychological evaluations, since plaintiff was not a member of the class of all prisoners or former prisoners which she claimed to represent and she therefore could not bring an action on behalf of that class of persons; nor was there any evidence in the record to indicate that plaintiff ever qualified as the personal representative of the deceased's estate so that she could bring suit upon any causes of action which survived her husband's death. G.S. 1A-1, Rule 23(a).

APPEAL by plaintiff from *Herring, Judge.* Order entered 25 April 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 29 January 1981.

Plaintiff is the widow and next of kin of Donald E. Carnahan. Donald Carnahan, while a prisoner incarcerated under the authority of the North Carolina Department of Correction, took his own life by the ingestion of lye.

Plaintiff brought this suit in her own behalf as the next of kin of the deceased, Donald Carnahan, on the behalf of all next of kin of deceased prisoners, and on the behalf of all prisoners or former prisoners, of the North Carolina Department of Correction. In her complaint, plaintiff sought injunctive relief against defendant which would invalidate defendant's regulation, 5 N.C. A.C. 2d .0601(b). That regulation provides:

> Section .0600—*Access to Information/Inmate Records .0601 General . . .*
>
> (b) Medical records, except for psychiatric and psychological evaluations of an inmate or former inmate, may be released to a physician, the legal representative of an inmate, or the personal representative of a deceased former inmate with the written consent of the person to whom such records pertain or the personal representative of such person if the inmate is

deceased. The content of psychiatric and psychological evaluations may be released to an attending psychologist, an attending psychiatrist, or a state or federal agency directly involved in mental health treatment upon written consent of the inmate involved.

Plaintiff alleged in her complaint that the proximate cause of her husband's death was the failure of defendant's employees in the North Carolina Department of Correction to provide the deceased with the minimally necessary psychiatric treatment for an individual suffering from psychosis. Plaintiff contended that because defendant's employees would not release the psychiatric records of her deceased husband to her, due to the restraints of 5 N.C. A.C. 2D .0601(b), neither she nor her counsel could ascertain whether she had a substantial claim for wrongful death against defendant's employees. Plaintiff alleged that defendant's regulation and the refusal of his employees to make available to her the psychiatric and psychological records of the deceased constituted violation of plaintiff's rights under G.S. 132-1 and 9, and denied her constitutional right of access to the courts.

In her prayer for relief, plaintiff asked for a preliminary injunction requiring defendant to provide to plaintiff the psychiatric and psychological records of deceased. She also asked for permanent injunctive relief in favor of the classes represented which would require defendant to provide psychiatric and psychological records on request, except where to do so would likely cause harm.

Defendant answered, asserting several defenses, and made a motion to dismiss plaintiff's complaint pursuant to G.S. 1A-1, Rule 12(b)(6). The trial court filed its order on 25 April 1980 allowing defendant's motion to dismiss. Plaintiff duly appealed from that order.

Attorney General Edmisten, by Assistant Attorney General James Peeler Smith (and summer intern Lex Allen Watson II), for the State.

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

MORRIS, Chief Judge.

Initially, we must concern ourselves with the question of plaintiff's standing to bring this action. Plaintiff prosecutes her action in several different capacities. Plaintiff is not a member of the class of all prisoners or former prisoners which she claims to represent. Therefore, her complaint does fail to state a cause of action insofar as it pertains to that class. G.S. 1A-1, Rule 23, provides in part:

> Class Actions.
>
> (a) *Representation.*—If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued. . . .

The purpose of this requirement is to assure the adequacy of the representation afforded the class. As is obvious from the wording of the statute, one who is not a member of the represented class may not bring a class action representing that class. The record does not indicate that plaintiff is a prisoner nor does it indicate that she is a former prisoner. Therefore, she does not have the proper standing to bring this action on behalf of that class of persons. *See English v. Realty Corp.*, 41 N.C. App. 1, 7, 254 S.E. 2d 223, 230, *cert. denied*, 297 N.C. 609, 257 S.E. 2d 217 (1979), *citing* 7 Wright and Miller, Federal Practice and Procedure: Civil § 1765, p. 626.

There is nothing in the record to indicate that plaintiff ever qualified as the personal representative of the deceased's estate. G.S. 28A-18-1 provides:

> *Survival of actions to and against personal representative.*—(a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of his estate.
>
> (b) The following rights of action in favor of a decedent do not survive:

(1) Causes of action for libel and for slander, except slander of title;

(2) Causes of action for false imprisonment;

(3) Causes of action where the relief sought could not be enjoyed, or granting it would be nugatory after death.

Under this section, all causes of action which had accrued in favor of Donald Carnahan survive his death, except the causes of action specified in subsection (b). The statute also designates the personal representative of the deceased as the person who may sue upon the surviving cause of action. *McIntyre v. Josey*, 239 N.C. 109, 79 S.E. 2d 202 (1953). *See also* G.S. 1A-1, Rule 17(a). Therefore, plaintiff simply as next of kin and as representative of the class of next of kin of deceased prisoners does not have standing to sue to enforce the constitutional rights of her husband or the class of deceased inmates which she claims were violated by the restrictions of 5 N.C. A.C. § 2D .0601(b).

Plaintiff maintains that as next of kin of her deceased husband she has property rights in his psychological and psychiatric records. This claim is not authoritatively supported, and we fail to see its validity. Assuming *arguendo* that her deceased husband did have property rights in his own psychological and psychiatric records, the authority to enforce these rights would have passed to the legal representative of his estate rather than to plaintiff.

Accordingly, we find that plaintiff did not have the necessary standing to maintain this cause of action. This renders moot her argument that she is entitled to a preliminary injunction. The trial court's order dismissing plaintiff's cause of action is

Affirmed.

Judges VAUGHN and BECTON concur.

WHIT MORGAN v. B. H. OATES, JR. AND WIFE, DONNA K. OATES

No. 803SC1137

(Filed 1 September 1981)

1. **Brokers and Factors § 5.1; Evidence § 33— real estate commission—evidence not hearsay**

In an action by plaintiff to recover a real estate commission allegedly owed him by defendants, the trial court did not err in admitting testimony by a witness that he and his wife were ready, willing, and able to purchase the property in question, since all the evidence showed that the witness had negotiated for the property and intended to put it in his wife's name, and such evidence was competent to show that plaintiff had produced a buyer ready, willing, and able to purchase the property; moreover, by letting the witness testify that he and his wife were ready, willing, and able to purchase the property, the court did not allow the witness to express an opinion on the question which was for the jury to decide, nor did the court allow improper hearsay testimony by allowing the witness to testify as to his wife's willingness and readiness to purchase.

2. **Brokers and Factors § 5.1— real estate commission—sufficiency of evidence**

In plaintiff's action to recover a real estate commission allegedly owed him by defendants, evidence was sufficient to be submitted to the jury where the testimony of plaintiff was specific that defendant agreed to pay him a ten percent commission if he could sell the property in question on certain terms, and if plaintiff produced a buyer before the termination of the agency contract who agreed to buy on the terms specified by defendant.

APPEAL by defendant B. H. Oates, Jr. from *Rouse, Judge.* Judgment entered 22 July 1980 in Superior Court, CRAVEN County. Heard in the Court of Appeals 25 May 1981.

Plaintiff instituted this action to recover a commission he alleges was owed to him by the defendants. At the trial, the plaintiff testified he contacted Mr. Oates on 14 July 1978 in regard to a tract of land owned by Mr. Oates. He testified as to his conversation as follows:

> "In general I said, B. H. I understand that the tax office shows that you own a piece of property in Havelock on the corner of Shephard Street and U.S. 70 East. I have a client that is looking for something in that area. Would you be interested in selling? And he says, yes, if the price is right. And I asked him, well, what price did he have in mind? And he said, $250.00 a front foot and I expressed to Mr. Oates

that the real estate fee on raw land and commercial is normally 10% and would he be willing to pay 10%, and Mr. Oates' words were, he said, you get me $250 a front foot and I will pay you 10%. Mr. Oates at that time offered terms. The price of the property is $128,750.00 and this was arrived at by 515 road front feet times $250.00. Mr. Oates advised me get me $28,750.00 down prior to closing sometime between now and the 31st of this year, which would be 1978, and I will take the remaining two annual payments, $50,000 per year plus 9% interest on the unpaid balance, with a purchase money deed of trust and note to secure it and we have got a deal."

It was not to be an exclusive listing. The plaintiff testified that pursuant to his conversation with B. H. Oates, Jr., he got Mr. W. T. Williams to sign a contract to purchase the property according to the terms specified by Mr. Oates. He called Mr. Oates on 21 July 1978 and read the contract to him at which time Mr. Oates said: "[T]hat's exactly what I wanted." The contract which Mr. Williams signed showed the property would be put in the name of his wife Virginia Williams. On 24 July 1978, Mr. Oates told the plaintiff he had sold the property to someone other than Mr. or Mrs. Williams. Mr. Williams testified over objection that he was ready, willing, and able to buy the property at the time he signed the contract and remained so through 24 July 1978. He also testified over objection that he and his wife were ready, willing, and able to buy the property at that time.

The court directed a verdict in favor of the defendant Donna K. Oates. The jury answered the issues favorably to the plaintiff and awarded damages in the amount of $12,875.00. The defendant B. H. Oates, Jr. appealed from a judgment on the jury verdict.

Sumrell, Sugg, Carmichael and Martin, by James R. Sugg, Fred M. Carmichael and Rudolph A. Ashton, III, for plaintiff appellee.

Beaman, Kellum, Mills, Kafer and Stallings, by James C. Mills and George M. Jennings, for defendant appellant.

WEBB, Judge.

[1] The defendant assigns as error the testimony of W. T. Williams that he was ready, willing, and able to purchase the

property and Mr. Williams' testimony that he and his wife were ready, willing, and able to purchase the property. He argues as to the testimony that W. T. Williams was ready, willing, and able to purchase the property that the evidence showed that the contract the plaintiff read over the telephone to B. H. Oates showed Virginia Williams as the purchaser. For this reason, the plaintiff had not produced W. T. Williams as a purchaser of the property at the time the agency was revoked, and his testimony as to being ready, willing, and able to purchase was not competent. He argues that Mr. Williams' testimony that Mrs. Williams was ready, willing, and able to purchase the property had to be based on hearsay testimony because the only way he would know she was ready and willing to buy the property would be based on what she told him. We believe this testimony of Mr. Williams was properly admitted. The plaintiff's action is based on the breach of an agency contract in which he contended that he was given the non-exclusive right to sell property for the defendants for a commission and that he produced a purchaser ready, willing, and able to purchase the property before the defendant revoked the contract. *See White v. Pleasants*, 225 N.C. 760, 36 S.E. 2d 227 (1945). All the evidence showed that Mr. Williams had negotiated for the property and intended to put it in his wife's name. The gravamen of the plaintiff's claim is that the defendant refused to pay the commission after he had produced a buyer. This is not an action for breach of contract to sell the property. We believe the testimony as to Mr. Williams' agreement to buy the property and put it in his wife's name was competent to show the plaintiff had produced a buyer ready, willing, and able to purchase the property. The form of the contract should not control the admission of this evidence.

We do not believe Mr. Williams' testimony as to his wife's willingness and readiness to purchase should have been excluded as hearsay. In the context of this case we believe Mr. Williams meant that he was confident he could get his wife to put the property in her name and if she did not, he would put it in his own name.

The defendant also argues that by letting Mr. Williams testify that he and his wife were ready, willing, and able to purchase the property, the court allowed the witness to express an opinion on the very question that was for the jury to decide. *See*

1 Stansbury's N.C. Evidence § 126 (Brandis rev. 1973) for opinion testimony that invades the province of the jury. We do not discuss the question of whether this testimony allowed the witness to express an opinion on the question the jury was to decide because we do not believe it was opinion testimony. Mr. Williams was stating a fact when he said he and his wife were ready, willing, and able to purchase the property. It may have been his conclusion based on other facts which he did not state, but we do not believe it was such a conclusion as to cross the line to become opinion. *See* 1 Stansbury's N.C. Evidence § 122 (Brandis rev. 1973).

[2] The defendant by his second assignment of error challenges the denial of his motions for a directed verdict, judgment notwithstanding the verdict, and a new trial. He contends the court was in error because there was not sufficient evidence that a brokerage contract existed between the plaintiff and the appellant. We believe the testimony of the plaintiff was specific that the defendant B. H. Oates, Jr. agreed to pay him a ten percent commission if he could sell the property on certain terms, and the plaintiff produced a buyer before the termination of the agency contract who agreed to buy on the terms specified by Mr. Oates. This assignment of error is overruled.

Defendant, by his last assignment of error, contends it was error for the court to charge the jury that if they were satisfied by the greater weight of the evidence that plaintiff had produced W. T. Williams before the brokerage contract was revoked as a buyer ready, willing, and able to buy the property in accordance with the terms imposed by the defendant, they would answer an issue favorably to the plaintiff. This assignment of error is overruled.

No error.

Chief Judge MORRIS and Judge WHICHARD concur.

THOMAS FERREL HARRIS v. JIM STACY RACING, INC.

HARRY HYDE v. JIM STACY RACING, INC., A CORPORATION

No. 8119SC37

(Filed 1 September 1981)

1. **Appeal and Error § 64— judgment reversed—no parties to the record—restitution not required**

Where defendant's property was sold pursuant to a judgment, the sales proceeds were disbursed in partial payment of the judgment and costs, and the judgment was subsequently reversed on appeal, defendant was not entitled to compel restitution from parties and entities, other than plaintiff, who were not parties to the record.

2. **Appeal and Error § 6.2— judgment not final—no appeal**

Where defendant's property was sold pursuant to a judgment for plaintiff, the sales proceeds were disbursed in partial payment of the judgment and costs, the judgment was subsequently reversed, defendant sought to compel restitution of the sums disbursed by motion in the cause, and the motion was denied "pending ultimate determination of plaintiff's claims and defendant's counterclaims," defendant's appeal from denial of the motion was improper, since the trial court's judgment and order contained no provision that it was a "final judgment" and that there was no just reason for delay, nor was it in fact a final judgment disposing of all the claims of plaintiff and defendant.

APPEAL by defendant from *Wood, Judge.* Judgment and order entered 1 October 1980 in Superior Court, CABARRUS County. Heard in the Court of Appeals 3 June 1981.

Defendant appeals from denial of its motion to compel restitution and an accounting.

Tucker, Hicks, Sentelle, Moon and Hodge, P.A., by John E. Hodge, Jr., for plaintiff appellee, Thomas Ferrel Harris.

Grant & Hastings, P.A., by Randell F. Hastings, for defendant appellant.

WHICHARD, Judge.

[1] Plaintiff, Thomas Ferrel Harris, was granted summary judgment for the balance due on defendant's note. Defendant appealed, but did not obtain a stay of execution. During pendency of the appeal, plaintiff executed on the judgment. Defendant's property was sold; and the sales proceeds, together with a cash bond

posted to secure costs, were disbursed in partial payment of the judgment and costs. A portion of the proceeds was disbursed to John E. Hodge, Jr., plaintiff's attorney, in payment of counsel fees. A further portion was disbursed to John Boger, Jr., attorney for Cabarrus County, in payment of costs. The remainder was disbursed to plaintiff.

This Court thereafter reversed the summary judgment.[1] Defendant, by motion in the cause, now seeks to compel restitution of the sums disbursed, together with an accounting, from the following: plaintiff; plaintiff's attorney, John E. Hodge, Jr.; the Sheriff of Cabarrus County, J. B. Roberts; and the attorney for Cabarrus County, John Boger, Jr. The trial court denied the motion. The judgment and order provides—as to plaintiff's attorney, John E. Hodge, Jr.; his law firm, Tucker, Hicks, Sentelle, Moon, and Hodge, P.A.; the Sheriff of Cabarrus County, J. B. Roberts; the county attorney, John Boger, Jr.; and Cabarrus County—that it "is a final judgment as to the claims of defendant against these parties for the entry of which there is no just reason for delay." As to plaintiff, the judgment and order provides that the motion is denied "pending ultimate determination of plaintiff's claims and defendant's counterclaims."

It was stipulated that the above-named persons and entities, other than plaintiff, were not parties to the action and had not been served with process. The judgment and order recites, however, that at the hearing on the motion John E. Hodge, Jr., appeared for himself and his firm, and John Boger, Jr., appeared for the sheriff and county. Nothing in the record indicates that they appeared to seek dismissal for lack of *in personam* jurisdiction. Such jurisdiction can derive from voluntary appearance. *See In re Peoples*, 296 N.C. 109, 144, 250 S.E. 2d 890, 910 (1978), *cert. denied* 442 U.S. 929 (1979); *In re Blalock*, 233 N.C. 493, 64 S.E. 2d 848 (1951). The court thus had jurisdiction, by virtue of voluntary appearances, to make the entries relating to these persons and entities. Further, these entries are immediately appealable by virtue of the provision that, as to them, the judgment is final and "there is no just reason for delay." G.S. 1A-1, Rule 54(b).

A party to the record must, upon reversal of a judgment, restore any benefits received thereunder. This rule is limited,

1. Unpublished opinion dated 15 July 1980.

however, to parties to the record, and ordinarily does not extend to third persons to whom portions of the benefits have been distributed. "[A]ll proceedings taken under the judgment are dependent for their validity on the judgment being sustained—when it is reversed or set aside, *the party to the record* who has received the benefit thereof must make restitution to the other party of money or property received under it." 5 Am. Jur. 2d, *Appeal and Error* § 997 (1962) (footnotes omitted) (emphasis supplied). However,

> [t]he right to or liability for restitution *is ordinarily restricted to the parties to the record.* If plaintiff pays over to a third person the proceeds of a sale made under the judgment or decree reversed, the money cannot ordinarily be recovered from that person; the defendant is restricted to recovery against the judgment creditor or his privies.

Id. § 999 (footnotes omitted) (emphasis supplied).

In *Bank of United States v. Bank of Washington*, 31 U.S. (6 Pet.) 8, 8 L.Ed. 299 (1832), a firm obtained a judgment against the Bank of Washington, executed thereon, and collected. The proceeds were deposited in the United States Bank to reduce certain indebtedness of the firm. The United States Supreme Court subsequently reversed the judgment, and the Bank of Washington sued the United States Bank for restitution of the sums it had received. The Court denied recovery. It noted that the law raises an obligation in *the party to the record* who has received the benefit of the erroneous judgment to make restitution to the other party for what he has lost, but that as to third persons whatever was done under the judgment while it remained in full force and effect is binding. *Id.* at 16-17, 8 L.Ed. at 303-304; *see also Great American Indemnity Company v. Dauzat*, 157 So. 2d 308 (La. App. 1963) (restitution from plaintiff's husband and attorney not required because they were not parties to the original suit); *Little v. Bunce*, 7 N.H. 485, 494 (1835) ("the general rule [is] that there is no remedy for restitution against any one who is not a party to the record.")

Here, the persons and entities named in the judgment and order, other than plaintiff, are not parties to the record. Hence, that portion of the judgment and order denying the motion to compel restitution and an accounting from them is proper.

[2] As to plaintiff: The motion was denied "pending ultimate determination of plaintiff's claims and defendant's counterclaims." The judgment and order contains no provision that it is a "final judgment" for the appeal of which "there is no just reason for delay." G.S. 1A-1, Rule 54(b). Nor is it, in fact, a final judgment disposing of all the claims of plaintiff and defendant. *Id.* It does not affect a substantial right of defendant or in effect determine the action. G.S. 1-277, G.S. 7A-27. The appeal, then, as to this portion of the judgment and order, is properly dismissed as interlocutory. *See Investments v. Housing Inc.*, 292 N.C. 93, 232 S.E. 2d 667 (1977).

The result is:

As to the portion of the judgment and order denying the motion to compel restitution and an accounting from John E. Hodge, Jr.; Tucker, Hicks, Sentelle, Moon and Hodge, P.A.; John Boger, Jr.; the Sheriff of Cabarrus County; and Cabarrus County, affirmed.

As to the portion of the judgment and order denying the motion to compel restitution and an accounting from plaintiff, Thomas Ferrel Harris, appeal dismissed.

Chief Judge MORRIS and Judge WEBB concur.

ADA PEARL STONE AND CECIL GLYNN JERNIGAN, INDIVIDUALLY, AND AS SHAREHOLDERS OF CREEKSIDE ENTERPRISES, INC. v. R. L. MARTIN, JR. AND LARRY G. SANDERFORD AND CREEKSIDE ENTERPRISES, INC.

No. 8010SC1061

(Filed 1 September 1981)

Constitutional Law § 76; Rules of Civil Procedure § 37— self-incrimination— failure to make discovery—sanctions

Defendant had the right to refuse to answer interrogatories and requests for admission on the ground that to answer might tend to incriminate him; however, the trial court could nevertheless impose sanctions provided by G.S. 1A-1, Rule 37(b), for defendant's failure to obey an order to permit discovery.

Stone v. Martin

APPEAL by defendant R. L. Martin, Jr., from *Preston* and *Lee, Judges.* Order filed 31 March 1980 by *Judge Preston* and order and judgment filed 12 September 1980 by *Judge Lee* in Superior Court, WAKE County. Heard in the Court of Appeals 1 May 1981.

Plaintiffs, shareholders in defendant corporation, bring this action against the corporation and the individual defendants, officers and directors thereof, alleging numerous improper and unlawful acts and omissions relating to the affairs of the corporation. They seek, *inter alia*, compensatory damages, punitive damages, and, as to the individual defendants, arrest and bail, and execution against the person.

Plaintiffs served on the individual defendants fifty-eight interrogatories and fifteen requests for admission. Defendant R. L. Martin, Jr., objected to all the interrogatories and requests for admission on grounds that, because the action seeks punitive damages which are in the nature of a penalty, answering would violate his privilege against self-incrimination under the United States Constitution, amendments V and XIV and the North Carolina Constitution, article I, section 23. Judge Preston found that three of the interrogatories and three of the requests for admission called for potentially incriminating answers. He ordered that the individual defendants were not required to answer those so found, but were required to answer all others.

The individual defendants did not comply with this order; and plaintiffs moved for sanctions pursuant to G.S. 1A-1, Rule 37(b). Judge Lee ordered the individual defendants' answers stricken and that the individual defendants not oppose any claim or allegation set out in plaintiffs' complaint. He adjudged them to be in default and ordered a judgment of default against them, the jury to determine the amount of the judgment.

Defendant R. L. Martin, Jr. (hereinafter defendant) appeals.

Brenton D. Adams for plaintiff appellees.

Hunter, Wharton & Howell, by John V. Hunter, III, for defendant R. L. Martin, Jr., appellant.

WHICHARD, Judge.

Assuming the orders are interlocutory and non-appealable, we treat the appeal as a petition for a writ of certiorari and allow the writ in order to dispose of the issue presented on its merits. *See Plumbing Co. v. Associates*, 37 N.C. App. 149, 245 S.E. 2d 555, *disc. rev. denied* 295 N.C. 648, 248 S.E. 2d 250 (1978).

G.S. 1A-1, Rule 37(b), permits the following sanctions for failure to obey an order to permit discovery:

> b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses . . . .
>
> c. An order striking out pleadings or parts thereof, . . . or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Judge Lee's order and judgment which (1) struck defendant's answer, (2) ordered that defendant not oppose any claim or allegation set out in plaintiffs' complaint, and (3) adjudged defendant to be in default and ordered judgment of default against him, clearly fell within these provisions. "The choice of sanctions to be imposed having been left by the rule in the court's discretion, we may not overturn the court's decision unless an abuse of that discretion is shown." *Silverthorne v. Land Co.*, 42 N.C. App. 134, 137, 256 S.E. 2d 397, 399, *disc. rev. denied* 298 N.C. 300, 259 S.E. 2d 302 (1979). *See also Laing v. Loan Co.*, 46 N.C. App. 67, 264 S.E. 2d 381, *disc. rev. denied* 300 N.C. 557, 270 S.E. 2d 109 (1980); *Plumbing Co. v. Associates*, 37 N.C. App. 149, 245 S.E. 2d 555, *disc. rev. denied* 295 N.C. 648, 248 S.E. 2d 250 (1978); Shuford, North Carolina Civil Practice and Procedure § 37-3 (1975). The issue presented is whether an abuse of discretion has been shown by virtue of defendant's claim that to compel response to the matters propounded would violate his constitutional privilege against self-incrimination. We answer in the negative.

In *Franklin v. Franklin*, 365 Mo. 442, 283 S.W. 2d 483 (1955), a divorce action, plaintiff-wife refused, on the ground that the answers might tend to incriminate her, to answer interrogatories, as well as questions asked at the temporary alimony hearing, regarding the status of her previous marriage to another. The

court held that this justified the sanction of striking her pleadings. It stated:

> Of course, plaintiff had the right to refuse to answer . . . if to answer would tend to incriminate her. But, may she, by virtue of that privilege, obtain . . . relief . . . which otherwise would be denied to her on refusal to answer pertinent written or oral interrogatories? We have not been cited to nor have we found any case authorizing her to do so.
>
> . . . .
>
> . . . Although plaintiff may refuse to answer self-incriminating interrogatories, yet, when she does, her action must be judged in the same manner and by the same rules as though she had refused to answer any other pertinent written or oral interrogatories.

365 Mo. at 445-447, 283 S.W. 2d at 485-486.

We concur in that reasoning. Defendant has the right to refuse to answer the interrogatories and requests for admission on the ground that to answer may tend to incriminate him. Invocation of this constitutional privilege may legitimately serve as a shield, with potential to protect defendant from criminal responsibility which may ensue from the acts and omissions alleged. It is not an abuse of discretion, however, to refuse to allow that privilege to serve also as a sword, with potential to defeat civil actions which may likewise ensue from those acts and omissions.

Defendant cites and relies on *Allred v. Graves*, 261 N.C. 31, 134 S.E. 2d 186 (1964). We do not find that decision dispositive. It held that a defendant subject to punitive damages and execution against the person could claim the constitutional privilege against self-incrimination and decline to give testimony in an adverse examination pursuant to former G.S. 1-568.11 (repealed 1970). It did not hold, however, that the trial judge abuses his discretion by imposition of clearly authorized sanctions therefor. Defendant also cites the decision of this court in *Lowder v. Mills, Inc.*, 45 N.C. App. 348, 263 S.E. 2d 624 (1980). The North Carolina Supreme Court has reversed that decision, holding that refusal by defendant there to produce tax returns pursuant to court order was not protected by the privilege against self-incrimination. *Lowder v. Mills, Inc.*, 301 N.C. 561, 273 S.E. 2d 247 (1981).

We find no abuse of discretion in the imposition of the sanctions invoked, and we thus affirm the entries below.

Affirmed.

Judges MARTIN (Robert M.) and BECTON concur.

SHARON B. CHINAULT, WIDOW; SHARON B. CHINAULT, GUARDIAN FOR AMY R. CHINAULT, STEP-DAUGHTER, AND HEATHER D. CHINAULT, DAUGHTER; SANDRA W. CHINAULT, GUARDIAN FOR LORI LEIGH CHINAULT, DAUGHTER; JERRY S. CHINAULT, DECEASED EMPLOYEE, PLAINTIFFS v. FLOYD S. PIKE ELECTRICAL CONTRACTORS, EMPLOYER; UNITED STATES FIDELITY AND GUARANTY CO., CARRIER; DEFENDANTS

No. 8010IC754

(Filed 1 September 1981)

Master and Servant § 79— workers' compensation—determination of death benefits

The effect of G.S. 97-38 is to fix each recipient's share of death benefits under the Workers' Compensation Act at the date of decedent's death; therefore, the Industrial Commission properly held that the entire compensation to which the survivors, a widow and three minor children, were entitled should be divided into four equal parts with the widow to receive weekly payments for 400 weeks and each of the three minor children to receive only its share of weekly compensation beyond the 400 week period and until such child reached 18 years of age.

APPEAL by plaintiffs from order of North Carolina Industrial Commission entered 5 June 1980. Heard in the Court of Appeals 3 March 1981.

In this proceeding Deputy Commissioner Ben E. Roney made findings of fact based on stipulations that Jerry S. Chinault died on 25 August 1978 as a result of an injury received in an accident arising out of and in the course of employment with Floyd S. Pike Electrical Contractors; that he had an average weekly wage of $460.00; and that he was survived by a widow, two daughters, and one stepdaughter, all of whom were wholly dependent on him. His two daughters and his stepdaughter were under 18 years of age. The parties stipulated the defendant Pike had more than four employees on 25 August 1978 and that they are bound by and

subject to the provisions of the Workers' Compensation Act. Deputy Commissioner Roney made an award of $42.00 per week for 400 weeks to the widow and each of the three minor children, with each of the minor children's award of $42.00 per week to continue until the minor reached 18 years of age.

The plaintiffs appealed to the Full Commission which affirmed the award of Deputy Commissioner Roney. The plaintiffs appealed to this Court.

Faw, Folger, Sharpe and White, by Cama C. Merritt and P. M. Sharpe, for plaintiff appellants.

Hutchins, Tyndall, Bell, Davis and Pitt, by Richard Tyndall, for defendant appellees.

WEBB, Judge.

This appeal presents a case of first impression in this state. It involves a question of how death benefits under the Workers' Compensation Act are to be determined. The deceased left a widow and three children wholly dependent on him at the time of his death. The Industrial Commission has held that the entire compensation to which the survivors are entitled should be divided into four equal parts with the widow to receive weekly payments for 400 weeks and each of the three minor children to receive her weekly compensation beyond the 400 week period and until she reaches 18 years of age.

The appellants contend the Industrial Commission is in error. They argue that the survivors are entitled to a payment of $168.00 per week and this should not be reduced until the youngest child reaches 18 years of age. They contend that after 400 weeks the share the decedent's widow had been receiving should be divided equally between the three minor children and as each minor child reaches 18 years of age, her share should be divided between those minors not yet 18 years of age.

This case is governed by G.S. 97-38 which says in part:

> "If death results proximately from the accident . . . the employer shall pay . . . to the person or persons entitled thereto as follows:

(1) Persons wholly dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. If there be only one person wholly dependent, then that person shall receive the entire compensation payable.

* * *

Compensation payments due on account of death shall be paid for a period of 400 weeks from the date of the death of the employee; provided, . . . compensation payments due a dependent child shall be continued until such child reaches the age of 18."

We affirm the order of the Industrial Commission. We base this decision on the plain words of the statute. We believe a fair reading of the statute shows the General Assembly intended to fix each recipient's share at the date of the decedent's death. Section (1) of G.S. 97-38 fixes the share each survivor is to receive, in this case one-fourth of the total benefits or $42.00 per week. Sections (2) and (3) which we do not quote in this opinion fix the shares beneficiaries are to receive if there are no persons wholly dependent on the decedent at the date of his death. The next paragraph quoted above then fixes the period of time for which the benefits are to be paid, in this case 400 weeks for the widow and for each minor child until she becomes 18 years of age. We do not believe this paragraph is intended to fix the percentage of the survivors' benefits, that having been done by G.S. 97-38(1).

We believe *Caldwell v. Marsh Realty Co.*, 32 N.C. App. 676, 233 S.E. 2d 594 (1977) reinforces our holding. In that case this Court affirmed an award by the Industrial Commission that had interpreted G.S. 97-38(1) in a similar manner as was done in the case sub judice. The issue raised in this case was not presented in *Marsh Realty* but that case demonstrated the interpretation the Industrial Commission gives to the statute and the legislature has not seen fit to amend the statute since that time.

The appellants argue that the interpretation we make has the anomalous result of different total benefits depending on the number and ages of wholly dependent survivors. Any anomaly in

the statute is for the General Assembly and not us to resolve. The appellants also argue that when the statute says the "entire compensation" shall be paid for the full period, this means the original total award of $168.00 per week cannot be reduced until the youngest child reaches 18 years of age. We agree that the "entire compensation" cannot be reduced. The question we face is how to define "entire compensation." We believe "entire compensation" is defined by the statute as we interpret it in this case.

Affirmed.

Judges HEDRICK and HILL concur.

BRENDA H. DEESE, WIDOW; BRACY DEESE, GUARDIAN OF KATIE LYNN DEESE, STEPHEN HAYWOOD DEESE, AND CHRISTOPHER WAYNE DEESE, MINOR CHILDREN; BRACY DEESE, ADMINISTRATOR OF THE ESTATE OF CHARLES W. DEESE, DECEASED, EMPLOYEE, PLAINTIFFS v. SOUTHEASTERN LAWN AND TREE EXPERT COMPANY, EMPLOYER; FIDELITY AND CASUALTY COMPANY OF NEW YORK, CARRIER, DEFENDANTS

No. 8010IC1042

(Filed 1 September 1981)

APPEAL by plaintiff Bracy Deese, Guardian of Katie Lynn Deese, Stephen Haywood Deese and Christopher Wayne Deese, Minors, from order of North Carolina Industrial Commission entered 15 August 1980. Heard in the Court of Appeals 30 April 1981.

This is a proceeding to determine death benefits under the Workers' Compensation Act. After a hearing, Commissioner Robert S. Brown found that on 28 October 1978, Charles W. Deese died as a result of an injury from an accident arising out of and in the course of his employment; that he had a wife and three minor children at the time of his death; that his weekly wages at the time of his death were $265.44; that the parties were subject to the Workers' Compensation Act; and that his widow and three minor children were entitled to total compensation of $176.97 per week. Commissioner Brown awarded compensation of $44.25 per week for 400 weeks to the decedent's widow and $44.25 per week

to each of his minor children until he or she reaches 18 years of age. Bracy Deese, guardian for the three minor children, appealed to the Full Commission which affirmed Commissioner Brown's award. The guardian has appealed to this Court.

Roberts, Cogburn and Williams, by James W. Williams, for plaintiff appellant.

Van Winkle, Buck, Wall, Starnes and Davis, by Philip J. Smith, for defendant appellees.

WEBB, Judge.

The question presented by this appeal is identical with the question presented in *Chinault v. Pike*, filed today by this Court. For the reasons stated in *Chinault v. Pike*, we affirm the opinion and award of the Industrial Commission.

Affirmed.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. DON C. ROSE

No. 8010SC1014

(Filed 1 September 1981)

1. Criminal Law § 91— interstate agreement on detainers inapplicable—trial within 120 days not required

Where the record contained no evidence establishing compliance by the State of Oregon with the requirements of G.S. 15A-761, Art. IV(b), there was no showing that the trial court erred in concluding that defendant's return to N.C. was not procured pursuant to the Interstate Agreement on Detainers and that the provision of that act requiring trial within 120 days of defendant's return to N.C. was thus inapplicable.

2. Escape § 9— willfullness—instruction not required

In a prosecution of defendant for felonious escape, the trial court was not required to instruct the jury pursuant to G.S. 148-4 that one of the essential elements of felonious escape is that the failure to remain in or return to confinement must be willful, since defendant was not charged with escape while outside the place of his confinement pursuant to authorization by the Secretary of Correction under G.S. 148-4, but was charged under G.S. 148-45,

which establishes the general escape offense, and that statute does not contain the word willful.

APPEAL by defendant from *Herring, Judge.* Judgment entered 29 May 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 4 March 1981.

The record, including findings of the trial court to which no exception has been taken, indicates that defendant was an inmate in the North Carolina correctional system, serving a sentence for murder and other charges, when he allegedly escaped on or about 11 August 1977. He thereafter was incarcerated in the State of Oregon upon conviction of the crime of burglary in the second degree. On or about 1 March 1978 defendant was "paroled" to this State by the State of Oregon. On 10 March 1980 defendant was indicted for felonious escape, third offense, as a result of the alleged escape of 11 August 1977.

The jury found defendant guilty of felonious escape; and from a judgment of imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Sandra M. King, for the State.

Jerry W. Leonard for defendant appellant.

WHICHARD, Judge.

[1] Defendant first contends that his trial was not commenced within 120 days of his arrival in North Carolina from Oregon, and that the Interstate Agreement on Detainers (G.S. 15A-761 *et seq.*) thus required dismissal of the charge. He relies on the following provision: "In respect of any proceeding made possible by this Article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state . . . ." G.S. 15A-761, Article IV(c).

The trial court found this provision inapplicable, concluding that defendant's presence in North Carolina was not procured pursuant to the Interstate Agreement on Detainers. Upon the record before us, we are unable to find that the court erred in reaching this conclusion.

G.S. 15A-761, provides, in part:

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: Provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request . . . .

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

While the record does not contain any "indictment, information or complaint" which was "pending" against defendant in North Carolina at the time his return to this State was procured, it does contain testimony from a Department of Correction records supervisor that the detainer forwarded to the State of Oregon was based on a warrant for escape. Thus, there is evidence from which the trial court could have found compliance with the requirements of G.S. 15A-761, Article IV(a). The record contains no evidence, however, establishing compliance by the State of Oregon with the requirements of G.S. 15A-761, Article IV(b). Absent such evidence, we have no basis for determining that the trial court erred in concluding that defendant's return to North Carolina was not procured pursuant to the Interstate Agreement on Detainers and that the 120 day trial provision of that act was thus inapplicable. *See State v. Vaughn*, 296 N.C. 167, 250 S.E. 2d 210 (1978), *cert. denied* 441 U.S. 935 (1979) [non-compliance with G.S. 15A-761, Article III(a)].

[2] Defendant's second and final contention is that the trial court erred by failing to instruct the jury that one of the essential elements of felonious escape is that the failure to remain in or return to confinement must be "willful." He cites the following provision:

> The *willful* failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to the place of confinement designated by the Secretary of Correction, shall be deemed an escape from the custody of the Secretary of Correction punishable as provided in G.S. 148-45.

G.S. 148-4 (emphasis supplied). We note that G.S. 148-4 authorizes the Secretary of Correction, under prescribed conditions, to extend the limits of the place of confinement for some prisoners by permitting them to leave the place of confinement for specified reasons. The portion of G.S. 148-4 quoted above proscribes the willful failure of a prisoner to comply with the prescribed conditions or to return within the time limits of the permission to leave the place of confinement. Defendant does not appear to have been charged with escape while outside the place of his confinement pursuant to authorization by the Secretary of Correction under G.S. 148-4. The statute which establishes the general escape offense, G.S. 148-45, pursuant to which defendant appears to have been charged, does not contain the word "willful."

We further note that nothing in the record in any way indicates that defendant's escape was anything other than "willful." Under these circumstances we see no "reasonable possibility that . . . a different result would have been reached" had the trial court instructed as defendant contends it should have, and we thus find that defendant has failed to carry his burden of showing prejudice. G.S. 15A-1443.

No error.

Chief Judge MORRIS and Judge MARTIN (Robert M.) concur.

MAE GOODMAN v. LINN-CORRIHER CORPORATION, SELF-INSURED

No. 8010IC883

(Filed 1 September 1981)

1. **Master and Servant § 68— workers' compensation—byssinosis**

Evidence was sufficient to support the finding of the Industrial Commission that plaintiff was totally disabled from the occupational disease byssinosis.

2. **Master and Servant § 93— workers' compensation—independent physical examination—denial proper**

Denial of defendant's request to have plaintiff examined by a physician of its choice was not an abuse of discretion, since defendant received a report from the physician elected by the Industrial Commission on 2 October 1978; one week before the matter was set for hearing, some five months later, defendant moved that the hearing be continued and that plaintiff be examined by a physician of its choice; and under these circumstances, there was no abuse of discretion in the determination that the motion was not timely made.

3. **Master and Servant § 94.2— workers' compensation—statement in opinion and award surplusage**

There was no merit to defendant's contention that the opinion and award of the Industrial Commission was contrary to the purpose of the Workers' Compensation Act because it contained the statement that the hearing commissioner's decision was "another example in which the Workers' Compensation Act is being used, not for compensating a working man or woman while they are disabled . . . but to provide a supplemental source of income to a retired person who is receiving social security and possibly other benefits," though the statement was clearly improper and should not have been included in the opinion and award, since the statement was mere surplusage and was neither essential to the award nor grounds for reversal.

4. **Master and Servant § 93— workers' compensation—deposition—cost borne by defendant**

The Industrial Commission did not err in requiring defendant to pay for the deposition of a physician selected by the Industrial Commission, since the Commission-selected physician was paid by defendant, and the deposition was necessitated by defendant's refusal to stipulate the physician's report into evidence.

APPEAL by defendant from opinion and award of the North Carolina Industrial Commission, by Chief Deputy Commissioner Forrest H. Shuford, II (adopting the opinion and award of the Hearing Commissioner, Coy M. Vance), filed 19 December 1979. Heard in the Court of Appeals 1 April 1981.

Defendant appeals from an award of workers' compensation to plaintiff on the basis of plaintiff's incurrence of the occupational disease byssinosis.

Hassell & Hudson, by Charles R. Hassell, Jr., for plaintiff appellee.

Alexander and Brown, by B. S. Brown, Jr., and Constangy, Brooks and Smith, Atlanta, Georgia, by Daniel P. Murphy, for defendant appellant.

WHICHARD, Judge.

[1] Defendant's first contention is that the record contains no competent evidence to support the finding that plaintiff was totally disabled from the occupational disease byssinosis. We disagree. The record contains testimony by plaintiff as to the dusty conditions of her work place over a period of years; as to her resultant respiratory difficulties; and as to her having "stopped working . . . because it was getting harder and harder breathing." It contains corroborating testimony by a fellow employee as to the dusty work conditions and plaintiff's resultant breathing problems. It contains competent testimony from the physician who examined plaintiff upon referral by the commission. He testified that plaintiff "in all probability, had byssinosis, and because she had residual airways abnormalities, chronic obstruction, that was Grade III." He further testified that in his opinion plaintiff's "chronic obstructive pulmonary disease, and byssinosis Grade III . . . could or might have been caused by . . . approximately 25 to 30 years exposure to cotton dust in her employment" and that "the probability is certainly greater than 50 percent." This, together with other evidence in the record, supports the disability finding; and it is thus conclusive on appeal. *Hollman v. City of Raleigh*, 273 N.C. 240, 159 S.E. 2d 874 (1968).

[2] Defendant's second contention is that it had an absolute right to have plaintiff examined by a physician of its choice, and that the denial of its request in this regard was an abuse of discretion. Counsel for defendant, by letter dated 1 March 1979, requested that the hearing scheduled for 8 March 1979 be continued and that defendant be permitted to have plaintiff examined by a physician of its choice. At the hearing on 8 March 1979 plaintiff opposed the motion on grounds "that it was not timely [and]

would delay the proceeding." The grant or denial of an employer's request that the employee submit to an independent physical examination is in the discretion of the commission. *Taylor v. Delivery Service*, 45 N.C. App. 682, 263 S.E. 2d 788, *disc. rev. denied* 300 N.C. 379, 267 S.E. 2d 684 (1980). Defendant here received the report from the commission-selected physician on 2 October 1978. One week before the matter was set for hearing, some five months later, defendant moved that the hearing be continued and that plaintiff be examined by a physician of its choice. Under these circumstances we find no abuse of discretion in the determination that the motion was not timely made.

Defendant's third contention is that it was denied due process and prejudiced by (1) the denial of an independent medical examination and (2) the denial of access to other medical records. As to (1), defendant failed to make its request in timely fashion. As to (2), defendant's motion for a subpoena duces tecum to produce the records of physicians who had treated plaintiff at an earlier period was denied. The record indicates this motion was filed on 15 March 1979, one week after the hearing. Defendant could have subpoenaed these physicians and their records to the hearing. It also could have moved to examine them and their records at any time during the five month period between receipt of the commission-selected physician's report and the hearing. Under these circumstances we find no abuse of discretion in denial of the motion.

[3] Defendant's fourth contention is that the opinion and award is contrary to the purpose of the workers' compensation act. The contention is based on the following statement in the opinion and award:

> The holding . . . simply points out another example in which the Workers' Compensation Act is being used, not for compensating a working man or woman while they are disabled on account of an industrial injury or disease, but to provide a supplemental source of income to a retired person who is receiving social security and possibly other benefits.

The statement apparently was intended as criticism of the hearing commissioner's decision, not as an expression of the purpose of the workers' compensation act. It was nevertheless clearly improper and should not have been included in the opinion and

award. The statment is mere surplusage, however, and is neither essential to the award nor grounds for reversal. The purpose of the act is "to provide compensation for injured [and diseased] employees or their dependents." *Hollman*, 273 N.C. at 252, 159 S.E. 2d at 882. Plaintiff has produced competent evidence from which the commission has found that she incurred a disease "due to causes and conditions which are characteristic of and peculiar to [her] particular trade, occupation or employment." G.S. 97-53(13). The improper statement does not render her any less entitled to an award resultant upon this finding.

[4] Defendant's fifth and final contention is that the commission should not have required it to pay for the deposition of the commission-selected physician. Commission Rule XX-A provides that when additional medical testimony is necessary to the disposition of a case, the hearing officer may order the deposition of medical witnesses taken; and the costs shall be borne by the defendants for those medical witnesses whom defendants paid for the initial examination of the plaintiff, and those cases where defendants are requesting the depositions. The record indicates that the commission-selected physician was paid by defendant. Further, the deposition was necessitated by defendant's refusal to stipulate the physician's report into evidence. Under these circumstances, the deposition constituted "additional medical testimony" within Rule XX-A, and it was proper to order payment by defendant.

Affirmed.

Judges MARTIN (Robert M.) and BECTON concur.

MICHAEL H. HARRELL v. R. DUKE WHISENANT, INDIVIDUALLY AND IN HIS CAPACITY AS CITY MANAGER OF THE CITY OF NEWTON; AND THE CITY OF NEWTON

No. 8025SC958

(Filed 1 September 1981)

1. Rules of Civil Procedure § 12.1— motion for judgment on pleadings—treatment as failure to state a claim for relief

Where defendants' motion was in fact a motion to dismiss for failure to state a claim upon which relief could be granted pursuant to G.S. 1A-1, Rule

12(b)(6), and the effect of the trial court's judgment was to treat it as such, the label "judgment on the pleadings" which was inadvertently entered in the notice of hearing to plaintiff and the trial court's judgment could not have prejudiced plaintiff, the motion being properly treated according to its substance rather than its label.

2. Municipal Corporations § 11— police chief—city manager's authority to dismiss

Plaintiff's complaint for wrongful discharge from employment as a city police chief was properly dismissed for failure to state a claim for which relief could be granted, since the applicable section of the city code provided that the city manager should appoint "to serve at the pleasure of the city manager" the chief of police.

APPEAL by plaintiff from *Grist, Judge.* Judgment entered 3 July 1980 in Superior Court, CATAWBA County. Heard in the Court of Appeals 8 April 1981.

Plaintiff appeals from a judgment dismissing with prejudice his complaint for wrongful discharge from employment as Chief of Police of the City of Newton.

Isenhower, Long, Gaither & Wood, by Samuel H. Long, III, for plaintiff appellant.

Jesse C. Sigmon, Jr., for the City of Newton, defendant appellee.

Charles D. Dixon, Lewis E. Waddell, Jr., and Stephen M. Thomas for R. Duke Whisenant, defendant appellee.

WHICHARD, Judge.

The essence of the claim alleged is that defendant Whisenant, as manager of defendant-city, purported to terminate plaintiff's employment as Chief of Police of defendant-city; that plaintiff is a "permanent employee" of defendant-city under the Newton City Code; and that consequently his employment cannot be terminated without affording him certain procedural and substantive rights granted to permanent employees by that Code. The trial court based its dismissal of the claim on Newton City Code section 2-22, which provides: "*Officers to be appointed by manager.* The city manager shall appoint *to serve at the pleasure of the city manager* the following officers and employees: . . . (c) Chief of police." (Emphasis supplied.) We agree that this provision is

dispositive, and that the complaint thus fails to state a claim upon which relief can be granted. G.S. 1A-1, Rule 12(b)(6).

[1] Plaintiff contends the court erred by treating defendants' motion as a motion for judgment on the pleadings, in that defendants had not filed answer, and a motion for judgment on the pleadings is approprate only "[a]fter the pleadings are closed." G.S. 1A-1, Rule 12(c). The motion clearly stated it was made pursuant to G.S. 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted. The notice of hearing to plaintiff also correctly stated that the motion was made pursuant to Rule 12(b)(6) on that ground, but it incorrectly stated that defendants would move "to enter Judgment on the Pleadings." The judgment correctly states that the motion was made pursuant to Rule 12(b)(6), but it is incorrectly labeled a judgment on the pleadings.

The motion was, in fact, a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). The effect of the judgment is to treat it as such, and the label "judgment on the pleadings" which was inadvertently entered in the notice and the judgment could not have prejudiced plaintiff. A motion is properly treated according to its substance rather than its label. *See Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); *Green v. Best*, 9 N.C. App. 599, 176 S.E. 2d 853 (1970). There is no merit to this contention.

[2] Plaintiff further contends that he is a "permanent employee" of defendant-city under Chapter 19 of its Code,[1] and that as such observance of certain substantive and procedural Code provisions is prerequisite to his dismissal. He asserts, *inter alia*, that the trial court's "absolutist" interpretation of Code section 2-22 renders Chapter 19 a nullity. We believe, on the contrary, that to give section 2-22 the interpretation for which plaintiff contends would render that provision a nullity. The words "to serve at the pleasure of the city manager" would be meaningless if exercise of the manager's "pleasure" were subjected to Chapter 19 requirements.

1. Chapter 19 is entitled "Personnel." It establishes the personnel policies of the city, including policies regarding dismissal from employment of "permanent employees," *i.e.*, those employees in service beyond a six month probationary period. See Newton City Code §§ 19-5 and 19-8.

The fact that Chapter 19 was enacted subsequent to section 2-22 is not controlling.

> While an ordinance may be repealed by a subsequent enactment in conflict therewith, repeals by implication are not favored and will not be extended beyond the reason therefor. Hence, a later ordinance will not repeal an earlier one relating to the same subject matter unless there is irreconcilable conflict between the two, or the later ordinance is clearly intended as a substitute for the earlier.

56 Am. Jur. 2d, *Municipal Corporations* § 411 at 453-454 (1971). Nor does the fact that plaintiff in some respects had been treated like other employees with regard to Chapter 19 provisions control.

The controlling factor is legislative will. *Underwood v. Howland, Comr. of Motor Vehicles*, 274 N.C. 473, 164 S.E. 2d 2 (1968). We perceive no legislative will, in the enactment of Chapter 19, to repeal by implication section 2-22. The apparent legislative intent was to establish personnel policies, including dismissal procedures, for subordinate employees of defendant-city. While the language of the chapter is broad, we do not believe it was intended to cover those policy level employees designated in section 2-22 so as to preclude their dismissal at the city manager's pleasure as therein provided.

Plaintiff finally contends the court erred in dismissing his complaint with prejudice, thereby precluding curative amendments or repleading. "The motion to dismiss under Rule 12(b)(6) may be successfully interposed to a complaint which states a defective claim or cause of action . . . ." Shuford, N.C. Civil Practice and Procedure § 12-10 at 108 (1975). Because on the record here section 2-22 gave defendant Whisenant unbridled discretion to discharge plaintiff, no course of remedial treatment would salvage plaintiff's cause. Dismissal with prejudice was therefore proper.

Affirmed.

Judges MARTIN (Robert M.) and BECTON concur.

FREDERICK KENNETH RIDGE v. WILLIAM P. GRIMES

No. 8122SC30

(Filed 1 September 1981)

Highways and Cartways § 7.3— construction of highway—sufficiency of evidence of negligence

Evidence was sufficient to be submitted to the jury in plaintiff's negligence action where it tended to show that defendant, by construction of a street incident to development of his subdivision, with knowledge that it was used as a public road, open to members of the public, incurred thereby a duty to plaintiff, a member of the general public travelling permissively thereon, to maintain it in a safe condition and to give adequate warning of any contrary condition; that the abrupt termination of the pavement just over the crest of a hill, without warning, constituted an unsafe condition; and that defendant's failure to correct this condition, or to give adequate warning thereof, constituted a breach of his duty to plaintiff which proximately caused plaintiff's injuries and damages.

APPEAL by plaintiff from *Davis, James C., Judge.* Judgment entered 12 August 1980 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 3 June 1981.

Plaintiff appeals from a judgment directing a verdict at the close of his evidence and dismissing his negligence action against defendant.

W. Warren Sparrow for plaintiff appellant.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker, for defendant appellee.

WHICHARD, Judge.

If plaintiff's evidence, viewed in the light most favorable to him, giving him the benefit of all permissible inferences, tended to support all essential elements of actionable negligence, it was sufficient to survive the motion for directed verdict. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 638, 272 S.E. 2d 357 (1980), and authorities cited. His evidence, judged by this standard, was sufficient; and directed verdict thus was granted improperly.

The evidence here, viewed in the light most favorable to plaintiff, established the following facts: Defendant, in or about

1969, developed a subdivision. He continued to own some land and lots therein at the time of plaintiff's accident. Jefferson Drive, a paved street in the subdivision, connects with North Carolina Highway 150. It was constructed at defendant's request incident to development of the subdivision. It had been open to the public since its construction, and defendant knew it was used as "a public road, open to members of the public."

Defendant thought Jefferson Drive was a part of the state highway system. An employee of the North Carolina Department of Transportation had inspected it, however, and had determined that it was not. There were no signs which would have indicated that it was a state road.

On the afternoon of 1 April 1978 plaintiff, while driving his motorcycle, turned from Highway 150 onto Jefferson Drive. He continued thereon until he drove slightly beyond the crest of a hill where, without warning, the pavement abruptly terminated. There he "ran into the dirt, ruts and gravel part at the end of the road, where they looked like they were continuing the road." The motorcycle "flipped," resulting in personal injuries and property damage to plaintiff.

One who constructs means of conveyance, open permissively to the general traveling public, impliedly "invite[s] the public to use them" and incurs thereby a duty "to keep [them] in a safe condition so that no detriment may come to travelers." *Campbell v. Boyd,* 88 N.C. 129, 132 (1833). "[A]s long as the way is left open and the [means of conveyance] remain for the public to use, it is incumbent on those who constructed and maintain them to see that they are safe for all." *Id.*

> A possessor of land who so maintains a part thereof that he knows or should know that others will reasonably believe it to be a public highway is subject to liability for physical harm caused to them, while using such part of a highway, by his failure to exercise reasonable care to maintain it in a reasonably safe condition for travel.

Restatement (Second) of Torts § 367 (1965). The duty owed is "not only [to] use care not to injure the visitor by negligent activities, and warn him of [known] latent dangers . . . , but . . . also [to] inspect the premises to discover possible [unknown] dangerous con-

ditions . . . , and take reasonable precautions to protect the invitee from dangers which are foreseeable." W. Prosser, Law of Torts § 61 at 393 (4th ed. 1971). *See also Hughes v. Lassiter*, 193 N.C. 651, 137 S.E. 806 (1927); *Batts v. Telephone Co.*, 186 N.C. 120, 118 S.E. 893 (1923).

A trier of fact could find that defendant here, by construction of Jefferson Drive incident to development of his subdivision, with knowledge that it was used as "a public road, open to members of the public," incurred thereby a duty to plaintiff, a member of the general traveling public permissively thereon, to maintain it in a safe condition and to give adequate warning of any contrary condition. It could find, further, that the abrupt termination of the pavement just over the crest of a hill, without warning, constituted an unsafe condition; and that defendant's failure to correct this condition, or to give adequate warning thereof, constituted a breach of his duty to plaintiff which proximately caused plaintiff's injuries and damages. On the issue of defendant's negligence, then, the evidence, viewed in the light most favorable to plaintiff, presented a question for the trier of fact. Defendant may, by his evidence, establish to the satisfaction of the trier of fact that his duty to plaintiff had been transferred to the State or to some other person or entity. That has not been established as a matter of law by plaintiff's evidence, however.

Defendant contends that the motion for directed verdict nevertheless was properly granted, because the evidence established contributory negligence by plaintiff as a matter of law. A directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence, in the light most favorable to plaintiff, establishes plaintiff's negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 279 S.E. 2d 559 (1981); *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979); *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 638, 272 S.E. 2d 357 (1980). Plaintiff testified: "I was paying attention to where I was going. I was keeping my eyes and attention directly toward my line of travel up ahead. That didn't mean anything." This evidence was sufficient to permit a finding that plaintiff was exercising due care for his own safety. It thus precluded a conclusion of contributory negligence

as a matter of law and rendered directed verdict on the issue of contributory negligence improper.

Reversed.

Chief Judge MORRIS and Judge WEBB concur.

RUDY V. DORSEY v. ISABELLE A. DORSEY

No. 8026DC1109

(Filed 1 September 1981)

1. Reformation of Instruments § 7— defendant's name on deed—no fraud

In plaintiff's action to have a deed reformed on the basis of fraud by defendant, evidence was sufficient for the jury to find that defendant made a false representation to plaintiff as to marital status at the time she married plaintiff which she knew was false. However, evidence was insufficient to show that the misrepresentation by defendant was intended to induce plaintiff to have her name put on the deed where it tended to show that the parties went through a marriage ceremony in 1960; prior to the purported marriage to plaintiff, defendant had married another man from whom she was divorced in 1963; the parties lived as husband and wife until 1980, at which time the marriage was annuled in an action brought by plaintiff; plaintiff testified that he had defendant's name put on the deed because he thought he was legally married to her; and plaintiff testified that, had he known defendant was still married to another man, he would have waited until she got her divorce, married her, and then probably put her name on the deed.

2. Attorneys at Law § 7— reformation of deed—award of counsel fees for appeal improper

In an action for reformation of a deed where the court ordered the action dismissed, and plaintiff gave notice of appeal, the trial court erred in ordering plaintiff to pay $500 to defendant's attorney to help defray the expenses of the appeal.

APPEAL by plaintiff from *Black, Judge.* Judgment entered 17 September 1980 in District Court, MECKLENBURG County. Heard in the Court of Appeals 6 May 1981.

The plaintiff brought this action to have a deed reformed on the basis of fraud by the defendant. The case was tried by the court without a jury. The plaintiff's evidence showed that he and the defendant went through a marriage ceremony on 11 August

1960 in Lancaster, South Carolina. At that time, she was pregnant with the plaintiff's second child. Prior to the purported marriage to the plaintiff, defendant had married another man from whom she was divorced in 1963. The parties lived as husband and wife until 1980, at which time the marriage was annulled in an action brought by the plaintiff.

The plaintiff testified that at the time of the marriage ceremony, he had been told by the defendant that she was divorced. In 1969 a house and lot was conveyed to the parties. The plaintiff paid the entire consideration for the property. He testified: "I tell the Court the reason I had her name put on the [deed] is because I thought that I was legally married." He testified further: "[I]f I had known she was still married to Raymond Rudisill I would have waited until she got her divorce, then I would have married her, then her name probably would have been on the deed, 'cause the house wasn't purchased until '69."

At the conclusion of the plaintiff's evidence the court entered an order in which it found that the plaintiff had not made a prima facie case that he was induced by the fraud of the defendant to have both their names on the deed. The court ordered the action dismissed. The plaintiff gave notice of appeal and the court ordered the plaintiff to pay $500.00 to the defendant's attorney to help defray the expenses of the appeal.

Charles V. Bell for plaintiff appellant.

Marnite Shuford for defendant appellee.

WEBB, Judge.

The first question on this appeal is whether the plaintiff presented evidence from which it could be concluded that the plaintiff was induced by the fraud of the defendant to put her name on the deed. We note that the court did not make a finding of fact that the defendant's fraud did not induce the plaintiff to have her name put on the deed. We do not have the question of whether the evidence supports the findings of fact. In order to reform a deed on the ground of fraud, the plaintiff must prove (1) a false representation; (2) the person making the representation knew it was false or had a reckless disregard of its truth or falsity; (3) the statement was intended to mislead the plaintiff and in-

duce him to act upon it; and (4) the plaintiff did rely on the statement and was damaged by doing so. *See Kemp v. Funderburk*, 224 N.C. 353, 30 S.E. 2d 155 (1944).

[1] We believe the evidence in this case is sufficient from which to find the defendant made a false representation to the plaintiff as to her marital status which she knew was false. The question crucial to this appeal is whether it could be found that this misrepresentation was intended to mislead the defendant and induce him to have the house and lot conveyed to both parties. We hold that on the evidence in the case sub judice such finding of fact could not be made. The parties went through a marriage ceremony nine years before the property was conveyed to them. There is no evidence that the defendant had the conveyance in mind when she misled the plaintiff as to her marital status. We do not believe there was sufficient evidence to find the misrepresentation by the defendant was intended to induce the plaintiff to have her name put on the deed. We hold the district court was correct in dismissing the plaintiff's action to reform the deed.

[2] The plaintiff also assigns error to the court's order requiring him to pay the counsel fees for the appeal. We believe this assignment of error has merit. Defendant contends the award of counsel fees is supported by G.S. 6-18(1) and G.S. 6-21(7). G.S. 6-18(1) deals with the taxing of costs without mentioning attorney fees. G.S. 6-21(7) deals with special proceedings for the partition of real property. The claim in the case sub judice is for the reformation of a deed. We hold the district court erred in allowing counsel fees.

Modified and affirmed.

Chief Judge MORRIS and Judge WHICHARD concur.

HARRINGTON MANUFACTURING CO., INC. v. LOGAN TONTZ COMPANY AND TRIAD METAL PRODUCTS COMPANY

No. 806SC1140

(Filed 1 September 1981)

Damages § 17; Uniform Commercial Code § 24— revocation of acceptance of goods —cover—instruction on damages

In a breach of contract action in which plaintiff contended that it justifiably revoked its acceptance of latches ordered from defendant after it had paid part of the purchase price and that it properly "covered" by procuring substitute latches for those ordered by defendant, the trial court erred in charging the jury that they would have to find that there had been a justifiable revocation and "cover" to award damages to plaintiff, since damages for "cover" are damages to which plaintiff would be entitled in addition to so much of the purchase price as it had paid if the jury should find that plaintiff "covered" after properly revoking its acceptance. G.S. 25-2-712.

APPEAL by plaintiff from *Hobgood (Hamilton H.), Judge.* Judgment entered 2 June 1980 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 25 May 1981.

This is an action for breach of contract which is now in this Court for the second time. *See Manufacturing Co. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E. 2d 282 (1979) in which this Court remanded for a new trial on all issues. The defendant Logan Tontz Company was voluntarily dismissed prior to trial.

The plaintiff alleged, and its evidence tended to prove, that it had purchased from Triad Metal Products latches to be used in the construction of bulk tobacco curing barns and that these latches did not conform to the sample by which plaintiff had ordered. It offered further evidence that it paid a part of the purchase price, revoked its order, and replaced the latches at additional cost by making its own latches. The jury found that the plaintiff had justifiably revoked its acceptance of the latches, that the plaintiff did not properly "cover", and awarded the plaintiff $1.00 in damages.

Plaintiff appealed.

Pritchett, Cooke and Burch, by Stephen R. Burch and W. W. Pritchett, Jr., for plaintiff appellant.

Turner, Enochs, Foster, Sparrow and Burnley, by B. J. Pearce and James R. Turner, and Allsbrook, Benton, Knott, Cranford and Whitaker, by Thomas I. Benton, for defendant appellee.

WEBB, Judge.

We note at the outset that the appellant has violated Rule 28(b)(3) of the Rules of Appellate Procedure in that in its brief it did not, immediately following each question, refer to the assignment of error and exception pertinent to the question identified by their numbers and pages in the printed record on appeal. Pursuant to Rule 2 of the Rules of Appellate Procedure, we consider the appellant's assignments of error.

The appellant assigns error to the charge of the court as to damages. We believe this assignment of error has merit. The court correctly charged the jury under the previous decision of this Court as to what the plaintiff had to prove to show justifiable revocation under G.S. 25-2-608, and "cover" under G.S. 25-2-712. In charging on damages, the court instructed the jury it would have to answer the revocation issue and the "cover" issue favorably to the plaintiff in order to award damages to plaintiff. In this there was error. As we stated in *Manufacturing Co. v. Logan Tontz, supra*, at page 504:

> "If a jury did find such a revocation of acceptance, then, under G.S. 25-2-711(1) plaintiff would be entitled to recover the amount of the contract price it has paid for the goods involved. In addition to allowing the recovery of so much of the purchase price as has been paid, G.S. 25-2-711 provides additional remedies for the buyer upon a justifiable revocation of acceptance. Under G.S. 25-2-711(1)(a) the buyer is entitled to 'cover' by procuring substitute goods for those found to be nonconforming."

As our decision on the previous appeal points out, damages for "cover" are damages to which the plaintiff would be entitled in addition to so much of the price as had been paid if the jury should find the plaintiff has "covered" after properly revoking its acceptance. G.S. 25-2-712(3) specifically provides that the failure of

a buyer to effect "cover" does not bar him from any other remedy. When the jury found the plaintiff had justifiably revoked its acceptance, the plaintiff was entitled to damages in the amount it had paid for the goods involved although the jury found the plaintiff did not "cover." For this reason we hold it was error to charge the jury they would have to find there had been a revocation and "cover" to award damages.

The plaintiff also assigns error to the exclusion of testimony which it contends showed loss of profit and damage to the goodwill of its business. We do not believe the evidence in this record, including that which was excluded, is sufficient to show a loss of profit or damage to goodwill. For that reason we do not consider these elements of damage in this case.

We do not discuss the plaintiff's other assignments of error, as the questions they pose may not arise at a new trial. For the reasons given in this opinion, we hold there must be a new trial on all issues.

New trial.

Chief Judge MORRIS and Judge BECTON concur.

BEATRICE JOHNSON INGLE v. CARNELL INGLE ALLEN, INDIVIDUALLY, CARNELL INGLE ALLEN, CO-EXECUTRIX OF THE ESTATE OF B. H. INGLE, SR., RUTH INGLE JOHNSON, INDIVIDUALLY, CARNELL INGLE ALLEN AND RUTH INGLE JOHNSON, TRUSTEES UNDER THE WILL OF B. H. INGLE, SR., W. A. JOHNSON AND MARTHA INGLE CURRIN

No. 8010SC805

(Filed 1 September 1981)

Courts § 3— improprieties arising from administration of estate—jurisdiction of court

In plaintiff's action to recover for breach of fiduciary duties, negligence, and fraud, all arising from administration of her husband's estate and a trust created under his will, dismissal for want of subject matter jurisdiction on the ground that the claims alleged should be brought initially before the clerk was improper, since the claims were "justiciable matters of a civil nature," original general jurisdiction over which was vested in the trial division, and though the claims arose from the administration of an estate, their resolution was not a

part of the administration, settlement or distribution of an estate so as to make jurisdiction properly exercisable initially by the clerk; moreover, inclusion by plaintiff in her complaint of matters which should have been brought initially before the clerk did not require dismissal for want of subject matter jurisdiction of the entire action. G.S. 7A-240; G.S. 28A-2-1.

APPEAL by plaintiff from *Farmer, Judge.* Judgment entered 19 August 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 11 March 1981.

Plaintiff appeals from a judgment dismissing her action for want of subject matter jurisdiction.

Tharrington, Smith & Hargrove, by J. Harold Tharrington and Carlyn G. Poole, for plaintiff appellant.

Boyce, Mitchell, Burns & Smith, by Eugene Boyce and James M. Day, for defendant appellees.

WHICHARD, Judge.

Plaintiff alleges improprieties by defendants arising from administration of her husband's estate and a trust created under his will. Dismissal for want of subject matter jurisdiction apparently was granted on the ground that the claims alleged should be brought initially before the clerk. We find this ground erroneous and the dismissal improvidently granted.

Plaintiff's husband died testate in 1971. Plaintiff and defendant Carnell Ingle Allen are co-executrices of his estate. Defendants Carnell Ingle Allen and Ruth Ingle Johnson are co-trustees of a trust established by the will. Defendant W. A. Johnson is attorney for the estate.[1] Defendant Martha Ingle Currin purchased land owned by decedent which was allegedly sold by the other defendants pursuant to a fraudulent scheme.

In summary, the claims dismissed are for (1) breach of fiduciary duties, (2) negligence, and (3) fraud, all arising from administration of the estate and trust. The remedy sought is monetary damages, actual and punitive. These claims are "justiciable matters of a civil nature," original general jurisdiction

1. The action was not dismissed as to defendant W. A. Johnson. One of the claims alleged against him was for professional malpractice, a claim clearly proper for consideration by the trial division.

over which is vested in the trial division. G.S. 7A-240.[2] While the claims *arise from* administration of an estate, their resolution is not *a part of* "the administration, settlement and distribution of estates of decedents" so as to make jurisdiction properly exercisable initially by the clerk. G.S. 28A-2-1; *see also* G.S. 7A-241. Thus, it was improper to dismiss them from the trial division for want of subject matter jurisdiction.

The prayer for relief also seeks the following: (1) an accounting and distribution from defendant Carnell Ingle Allen, as co-executrix, and her removal as co-executrix; (2) an accounting from defendants Carnell Ingle Allen and Ruth Ingle Johnson, as co-trustees, and their removal as co-trustees; (3) appointment of a new trustee; (4) return of compensation received by defendants from the estate, and denial of compensation to defendants; (5) reimbursement by defendants for any benefit they received which rightfully belongs to the estate; and (6) award of counsel fees to plaintiff's attorney from the estate and from defendants. These matters *are* a part of "the administration, settlement and distribution of estates of decedents," original jurisdiction over which should properly be initially exercised by the clerk. G.S. 28A-2-1; *see also* G.S. 7A-241. Their inclusion in the prayer for relief was not, however, grounds for dismissal, for want of subject matter jurisdiction, of the entire action. Upon remand, leave should be granted to amend the complaint to delete these portions. G.S. 1A-1, Rule 15(a). Plaintiff may then petition the clerk for the redress sought.

The claims properly alleged in the trial division may be indeterminate until the matters properly presented initially to the clerk are resolved. Whether they are cannot be determined on the record in this appeal. The record in this appeal contains a complaint which adequately alleges claims for "justiciable matters of a civil nature" properly brought in the trial division under G.S. 7A-240. It was thus error to dismiss for want of subject matter jurisdiction. This is the only question presented for determination at this time.

Reversed and remanded.

Chief Judge MORRIS and Judge MARTIN (Robert M.) concur.

2. The amount in controversy exceeds $5,000. Thus, the superior court is the proper division within the trial division. G.S. 7A-243.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 AUGUST 1981

ALLSTATE v. DUNCAN No. 805SC1106	New Hanover (79CVS2367)	Affirmed
ANDERSON v. GOODING No. 803SC1185	Pitt (77CVS1086)	No Error
BATTLE v. BATTLE No. 807DC1144	Nash (77CVD583)	Affirmed
COMBS v. PETERS No. 802SC1067	Beaufort (79SP104)	Affirmed
CROUCH v. CROUCH No. 8018DC1187	Guilford (75CVD7158)	Affirmed
MOFFATT SHERARD v. NESBIT No. 8026DC1165	Mecklenburg (79CVD12112)	Affirmed
NEWMAN v. NEWMAN No. 8023DC1017	Yadkin (80CVD13)	Affirmed
SKINNER v. TURNER No. 8018DC1213	Guilford (80CVD438)	New Trial
STATE v. BUNCH No. 8127SC129	Cleveland (80CRS6691)	No Error
STATE v. CHAPMAN No. 8118SC135	Guilford (80CRS19469)	No Error
STATE v. ROBINSON No. 8116SC157	Robeson (79CRS23656)	No Error
STATE v. THORNTON No. 8111SC98	Harnett (80CRS2)	No Error
WADDELL v. LANE No. 8112DC42	Cumberland (78CVD3799)	Affirmed

FILED 1 SEPTEMBER 1981

BROWN v. BROWN No. 8018DC891	Guilford (79CVD460)	Affirmed
EAST v. KENT No. 8115SC2	Chatham (78CVS271)	Affirmed
HANNON v. HANNON No. 8010DC1200	Wake (80CVD2892)	Affirmed in Part & Vacated & Remanded in Part
IN RE BREMER No. 8126DC10	Mecklenburg (80J140)	Affirmed

IN RE FORECLOSURE No. 805SC998	New Hanover (79SP163) (79SP309)	Affirmed
STATE v. BARROW No. 812SC29	Beaufort (80CR4239) (80CR4240)	No Error
STATE v. EPPS No. 8016SC1184	Robeson (80CRS3747)	Dismissed
STATE v. JOHNSON No. 817SC81	Wilson (80CRS2845)	New Trial
STATE v. WARD No. 8115SC92	Alamance (79CRS1031-01)	No Error
WADDELL v. LANE No. 8112DC43	Cumberland (78CVD3875)	Affirmed
YORK v. SOUTHERN SCREW No. 8110IC26	Industrial Comm. (G9023)	Affirmed

STATE OF NORTH CAROLINA v. JAMES W. SHELTON

No. 8121SC6

(Filed 15 September 1981)

1. **Criminal Law § 161.2— form of exceptions and assignments of error**

Under Appellate Rule 28(b)(3) failure to refer to the assignments of error or exceptions following the statement of the questions presented could result in abandonment of all of appellant's questions on appeal and consequently result in dismissal of the appeal.

2. **Criminal Law § 91— speedy trial—codefendant's request for continuance—tolls time limit for defendant's trial**

Where defendant was indicted for armed robbery and assault and tried on those charges 140 days after the date of the indictment, he was not denied his statutory right to a speedy trial as the period of delay caused by a codefendant's request for continuance to receive a psychiatric examination is excluded when computing defendant's, as well as the codefendant's, statutorily prescribed time limit for trial. G.S. 15A-701(b)(1)(a); G.S. 15A-701(b)(6).

3. **Criminal Law § 158— evidence omitted—presumption as to finding**

When evidence upon which the trial court based its findings is not in the record there is a presumption that there was sufficient evidence to support the findings and they are conclusive on appeal.

4. **Constitutional Law §§ 50, 53— speedy trial—failure to assert right**

Where defendant failed to object to a consolidation of his case with that of his codefendant and further failed to object to codefendant's request for a continuance, more was needed to show a valid effort to assert his right to a speedy trial than a motion to dismiss made seven days prior to trial.

5. **Constitutional Law § 52— speedy trial—death of potential witness—failure to show prejudice**

Where defendant alleges that, due to the delay in his trial, he was prejudiced by the death of a potential witness, but he failed to include in the record an indication of what the witness's testimony would have been, it is impossible for the Court to say what prejudice, if any, was caused by the unavailability of the witness.

6. **Criminal Law § 111.1— court's instructions to prospective jurors—no improper reference to indictments**

The trial court can, as directed by G.S. 15A-1213, refer to and summarize an indictment when explaining to the jury the circumstances under which the defendant is being tried.

7. **Constitutional Law § 29; Jury § 7.1— exclusion of blacks from jury—no prima facie case of systematic exclusion**

Defendants failed to make out a prima facie case of arbitrary or systematic exclusion of blacks from the jury where they showed eight of the State's eleven challenges were of black jurors and the petit jury was all white.

8. Criminal Law § 66.14— illegal pretiral confrontation—in-court identification not tainted

A robbery victim's in-court identification of defendant was of independent origin and, thus, was not tainted by possible unduly suggestive pretrial identification procedures where the witness testified the defendant stayed in his store approximately five minutes, was not wearing anything over his face or head, the lighting was good, he had no trouble seeing his face, he "gave them a good look," and he had "no doubt" in his mind that the defendant was the one who had robbed and assaulted him.

9. Criminal Law § 93— testimony concerning exhibit—chain of custody not established

The trial court did not err in allowing an SBI employee to testify about blood samples found on a lamp before the chain of custody for the lamp, identified as the dangerous weapon, had been established. The trial court may permit introduction of evidence that depends for its admissibility upon some preliminary showing which has not yet been made upon counsel's assurance that such showing will be made later.

10. Assault and Battery § 5.2— sufficiency of evidence to show deadly weapon utilized—circumstantial evidence

Circumstantial evidence that the victim received a "terrific blow to the head" which knocked him out; that when he regained consciousness he saw a bloodied lamp lying at his feet; that the lamp had been directly beside defendant when defendant was standing next to the victim; and that evidence of blood comparisons made by the SBI showed that the blood on the lamp was consistent with that of the victim and inconsistent with that of defendant is sufficient evidence to create a reasonable inference that defendant struck the victim on the head with the lamp.

11. Criminal Law § 42.4— introduction of physical object into evidence—relevancy

The court did not err in allowing a ball peen hammer into evidence where testimony was unclear as to what sort of weapon, if any, was used to knock out the victim, and the jury could possibly have inferred from the evidence that the victim was struck with the hammer.

12. Constitutional Law § 68; Criminal Law § 97.2— no constitutional right to have case reopened—judge's discretion

There is no constitutional right on behalf of defendant to have his case reopened. The decision to reopen a case and hear further evidence is within the trial court's discretion. G.S. 15A-1226(b).

APPEAL by defendant from *Wood, Judge.* Judgment entered 14 August 1980. Heard in the Court of Appeals 29 April 1981.

Defendant was charged by indictments returned on 24 March 1980 with the crimes of armed robbery and assault with a deadly weapon inflicting serious bodily injury. He pled not guilty to these charges, was tried, and convicted of the crimes charged.

The state presented evidence which tended to show the following: At the time these crimes were committed Mr. Wade Swaim owned and operated Flynt's Television Shop in Kernersville, North Carolina. At approximately 3:55 p.m. on 11 December 1979 Mr. Swaim was alone at his place of business. Defendant and one Jerry Gaither entered the store. Defendant approached Mr. Swaim and asked him to change a dollar bill. All the while, Gaither remained close by the entrance to the store. Mr. Swaim handed defendant change for the dollar, and suddenly defendant hit Mr. Swaim on the side of his head with his fist, stunning him. Then both defendant and Gaither hit Mr. Swaim, knocking him to the floor. They continued to beat Mr. Swaim while he lay on the floor, and they took his billfold which contained $150. While he was lying on the floor semiconscious he heard one of the robbers repeatedly saying "open the cash register." Suddenly, Mr. Swaim felt a "terrific blow" to his head which knocked him out. When he came to he saw that his cash register had been tampered with and that his workbench lamp was lying on the floor at his feet with blood on it. Defendant allegedly ran from the store, was apprehended and brought back to the store within a short while. Before being taken from his store to the hospital, Mr. Swaim identified defendant as the man who had just assaulted and robbed him.

Defendant testified in his own behalf. His statements tended to show that on 11 December 1979 he, Gaither and Rodgers Jackson met in Winston-Salem. Defendant and Gaither rode around with Jackson to "get high." They drove over to Kernersville. Defendant and Gaither entered Swaim's store, and defendant testified that Gaither, rather than he, got a dollar's change from Mr. Swaim. Defendant testified that he saw Gaither knock Mr. Swaim to the floor and then Gaither hit and kicked Mr. Swaim. Defendant rushed over, grabbed Gaither, and pulled him off Mr. Swaim. Mr. Swaim then grabbed defendant by the leg. Defendant pushed Mr. Swaim away, and he and Gaither ran from the store. Defendant declared that he did not strike Mr. Swaim, and that he did not see Gaither hit Mr. Swaim with the lamp or any weapon.

The jury rendered its verdicts finding defendant guilty of both crimes as charged in the indictments. The trial court entered separate judgments sentencing defendant to concurrent terms of

imprisonment of 16 to 20 years on the armed robbery charge and 10 years on the assault charge. Defendant (hereinafter appellant) appealed from from the entry of the judgments.

Attorney General Edmisten, by Assistant Attorney General George W. Lennon, for the state.

Nancy S. Mundorf for defendant appellant.

MORRIS, Chief Judge.

[1] Appellant has disregarded the mandatory requirements of Rule 28(b)(3), N. C. Rules of Appellate Procedure. That rule specifies:

> Immediately following each question [contained in appellant's brief] shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages of the printed record on appeal at which they appear. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

Appellant's brief contains no reference to the assignments of error or exceptions following the statement of the question to which they pertain. Under Rule 28(b)(3) we could deem all of appellant's questions to have been abandoned and consequently dismiss his appeal. However, to prevent any injustice to this appellant, especially, considering his terms of imprisonment, we will suspend the requirements of Rule 28(b)(3) as authorized by Rule 2, N. C. Rules of Appellate Procedure, and consider appellant's arguments.

[2] Appellant submits that his statutorily and constitutionally guaranteed right to a speedy trial was disregarded. The record reveals that appellant was arrested on 13 December 1979 for the commission of the crimes of which he was convicted. He was charged by indictment with these crimes on 24 March 1980. The case came to trial on 11 August 1980. On 4 August 1980 appellant made a motion to dismiss based on the ground that he had not received a speedy trial. Subsequently, the trial court denied this motion.

G.S. 15A-701(a1) requires that an individual charged with a crime be brought to trial on those charges within 120 days from

the date he is arrested or indicted, whichever occurs last. Appellant's trial did not begin until 140 days after his indictment. However, G.S. 15A-701(b) provides that certain time periods be excluded from the time within which the trial of the criminal offense must begin. G.S. 15A-701(b)(6) provides for the exclusion of "[a] period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." G.S. 15A-701(b)(1)(a) provides for the exclusion from the computation of the time period of delays resulting from "[a] mental or physical examination of the defendant, or a hearing on his mental or physical incapacity." In his order concerning appellant's motion to dismiss for failure to receive a speedy trial entered 11 August 1980, Judge Wood found that the cases of appellant and his two codefendants came on for trial on 9 June 1980, at which time Judge Rousseau allowed the state's motion to consolidate their cases for trial. On 9 June 1980, following Judge Rousseau's order of consolidation, defendant Gaither made a motion for a psychiatric examination to determine his competency to stand trial and a motion for continuance until 21 July 1980 to afford time for the examination. Judge Rousseau allowed Gaither's motion. The state's subsequent motion that appellant and the third defendant's cases also be continued until 21 July 1980 so that all three could be tried simultaneously was likewise granted.

In his order, Judge Wood excluded from the computation of the length of time from indictment to trial, the time period from 9 June 1980 until 21 July 1980 during which the case was continued so that defendant Gaither could be examined. This left a total of 98 days from the date of indictment until the date of trial which was well within the statutorily prescribed limit. Appellant contends that this exclusion under G.S. 15A-701(b)(1)(a) should not have been made applicable to him, but rather should have been applied solely to defendant Gaither.

Appellant's analysis overlooks G.S. 15A-701(b)(6). The continuance resulting from the mental exam did pertain only to defendant Gaither. Even overlooking the fact that appellant's case was also continued for the same period, under G.S. 15A-701(b)(6) appellant's statutory right was not violated because the time for trial of codefendant Gaither had not run due to the continuance

for his mental exam. Appellant's case was consolidated with Gaither's so appellant's statutory rights were not violated.

[3] Appellant contends that error resulted from the fact that Judge Rousseau's order consolidating and joining appellant and his codefendants' cases for trial did not appear in the record. In fact, defendant contends that the record shows that no written motion for consolidation was ever filed by the prosecutor's office as required. Therefore, appellant asserts that there was insufficient basis for Judge Wood's findings in his order of 11 August 1980 in which he determined that the speedy trial act had not been violated with regard to appellant. Specifically, he argues that G.S. 15A-701(b)(6) could not be used as a basis for Judge Wood's order, because no order of consolidation of the cases appears in the record.

The better practice would have been to place in the record the motions and orders upon which the trial court based its order denying appellant's motion to dismiss. This Court must rely exclusively upon the record on appeal. When the evidence upon which the trial court based its findings is not in the record this Court will presume that there was sufficient evidence to support the findings of fact necessary to support the trial court's order, and those findings are conclusive on appeal. *Town of Mount Olive v. Price*, 20 N.C. App. 302, 201 S.E. 2d 362 (1973). The only evidence appearing in the record of the case *sub judice* with regard to the motion and order to consolidate appellant and defendant's cases were the findings of Judge Rousseau's order. We are bound by those findings, and we accept their veracity. Hence, we find that there was no violation of appellant's statutory right to a speedy trial.

Nor do we think that appellant's constitutional right to a speedy trial was violated. The factors to be considered in determining whether an accused has been denied his constitutional right to a speedy trial are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from delay. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972); *State v. Hill*, 287 N.C. 207, 214 S.E. 2d 67 (1975).

> The burden is on an accused who asserts denial of his constitutional right to a speedy trial to show that the delay was

due to the neglect or willfulness of the prosecution (citations omitted).

State v. Tann, 302 N.C. 89, 94, 273 S.E. 2d 720, 724 (1981). Appellant has not carried this burden.

Approximately 140 days elapsed from the date of appellant's indictment on 24 March 1980 until the date of his trial on 11 August 1980. In the recent case of *State v. Hartman*, 49 N.C. App. 83, 270 S.E. 2d 609 (1980), this Court held that 319 days, standing alone, was insufficient time to constitute unreasonable and prejudicial delay. Similarly, we think under the facts of this case 140 days was insufficient time to show prejudicial delay.

[4] Portions of the delay occurred by reason of codefendant Gaither's continuance of the case so that he might have a mental exam. Although this delay was not directly attributable to appellant, the record does not indicate that he objected to the continuance or moved for a severance of his case from that of Gaither. The consolidated cases were continued as a result of defendant Gaither's and the state's motions to continue until 21 July 1980. Judge Wood in his order of 11 August 1980 stated that there was no criminal session of court in Forsyth County for the week of 21 July 1980, and the cases subsequently came to trial on 11 August 1980. Appellant has shown no cause for the delay directly attributable to the actions of the prosecution.

The record does not reveal that appellant effectively asserted his right to a speedy trial during this lapse of time. "[F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker v. Wingo*, supra, 407 U.S. at 532, 92 S.Ct. at 2193, 33 L.Ed. 2d at 118. On 4 August 1980, just prior to his trial on 11 August appellant made his motion to dismiss for lack of speedy trial. Something more is needed to show a valid effort to assert this right.

[5] Appellant alleges that he was prejudiced by the delay due to the death during the interim of a potential witness. It is impossible for us to say what prejudice, if any, was caused by the unavailability of this witness. We do not know what his testimony would have been.

Balancing all of these factors, we think it clear that appellant has failed to show that the delay was undue, prejudicial, or due to

the willfulness or neglect of the state. Therefore, we hold that appellant was not denied his constitutional right to a speedy trial and the trial court's denial of his motion to dismiss on that basis was not in error.

[6] Before the jurors were called from the *venire* the appellant made a motion for mistrial on the grounds that the trial court incorrectly read the indictments to the prospective jurors. He now claims that the trial court's denial of this motion was error. G.S. 15A-1221(b) provides:

> At no time during the selection of the jury or during the trial may any person read the indictment to the prospective jurors or to the jury.

Defendant's objection is apparently addressed to the following portion of the trial court's opening remarks:

> Mr. Shelton is charged in 79CRS52439 with on or about the 11th day of December, 1979, with robbery of John Wade Swaim of $150.00 in good and lawful money of the United States with a dangerous weapon, to-wit, a metal-based gooseneck desk lamp with a metal shade.
>
> . . .
>
> In 79CRS52443, the defendant, James W. Shelton, is charged with assault with a deadly weapon inflicting serious bodily injury on John Wade Swaim, on Wade Swaim, with a metal-based gooseneck type lamp with a metal shade on the 11th day of December, 1979, in violation of General Statutes 14-32(b) . . . .

G.S. 15A-1213 provides:

> Prior to selection of jurors, the judge must identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense . . . The judge may not read the pleadings to the jury.

The purpose of this section is to avoid giving jurors a distorted view of the case through a reading of the stilted language contain-

ed in the indictments. *State v. Laughinghouse*, 39 N.C. App. 655, 251 S.E. 2d 667, *cert. denied*, 297 N.C. 615, 257 S.E. 2d 438 (1979). In *State v. McNeil*, 47 N.C. App. 30, 266 S.E. 2d 824, *cert. denied*, 301 N.C. 102, 273 S.E. 2d 306-07 (1980), we held that the trial court could, as directed by the statute set out above, refer to and summarize the indictments when explaining to the jury the circumstances under which the defendant was being tried. Similarly, in preparation for the trial of appellant's case the trial court summarized the charges from the indictments as required by G.S. 15A-1213, but did not repeat the indictment verbatim. We find no error.

[7] Appellant next contends that the trial court committed prejudicial error by denying his motion to quash the petit jury on the basis of the prosecution's alleged discrimination against the selection of blacks. Appellant alleged in his motion to quash that eight of the state's eleven challenges were of black jurors and the petit jury was all white.

"If the motion to quash alleges racial discrimination in the composition of the jury, the burden is upon the defendant to establish it. (Citations omitted.)" *State v. Spencer*, 276 N.C. 535, 539, 173 S.E. 2d 765, 768 (1970). "A person has no right to be indicted or tried by a jury of his own race or even to have a representative of his own race on the jury. He does have the constitutional right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded. (Citations omitted.)" *State v. Cornell*, 281 N.C. 20, 32, 187 S.E. 2d 768, 775 (1972).

Appellant has failed to make out a case of arbitrary or systematic exclusion of blacks from the jury. To do this appellant must show that the prosecutor systematically used peremptory challenges to exclude blacks over a period of time, not only in this one instance. *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759 (1965); *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *vacated in part*, 429 U.S. 809, 97 S.Ct. 46, 50 L.Ed. 2d 69 (1976). The record discloses no evidence that this prosecutor had previously followed a practice of excluding blacks from juries.

Appellant, however, contends that the burden of proof of jury discrimination as set out in *Alford*, supra, is unduly burdensome and impossible adequately to rebut. It is not within our pur-

view to discard the rule set out by our Supreme Court in *Alford*, supra. A similar method of review was approved by the Supreme Court of the United States in *Swain*, supra, which our Supreme Court followed in *Alford*, supra, and with which we are in total agreement. This assignment of error is overruled.

[8] Appellant made a pretrial motion to suppress an in-court identification of himself by the victim of the alleged robbery and assault, Wade Swaim, on the ground that it would be tainted by an impermissibly suggestive pretrial identification procedure. Before trial the trial court conducted a *voir dire* with regard to this matter, hearing the testimony of several witnesses, which resulted in its denial of appellant's motion. Appellant maintains that the denial of his motion to suppress was prejudicial error.

An in-court identification by a witness who was involved in an illegal pretrial confrontation must be excluded unless it is first determined by the trial court after considering clear and convincing evidence that the in-court identification was of independent origin and, thus, not tainted by the unduly suggestive pretrial identification procedure. *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977); *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). An incompetent pretrial identification by a certain witness does not automatically render a subsequent in-court identification by the same witness incompetent also. In *State v. Accor* and *State v. Moore*, 277 N.C. 65, 175 S.E. 2d 583 (1970), the Supreme Court stated that, "[t]he admissibility of the in-court identifications depended upon whether the State was able to satisfy the court 'by clear and convincing evidence,' *United States v. Wade, supra* at 239, 18 L.Ed. 2d at 1164, 87 S.Ct. at 1939, that the in-court identifications were of independent origin, that is, based on observations made at the scene of the burglary and untainted by any illegality underlying the photographic identifications." 277 N.C. at 84, 175 S.E. 2d at 595.

In the case *sub judice* the trial court, after hearing extensive evidence on voir dire, found that Mr. Swaim's "identification in court . . . was based solely upon his observation of the two defendants, Gaither and Shelton, for about three minutes immediately prior to the time that he was struck on the head, and is completely free and independent of his observation of them or

observation of them later." The evidence presented on *voir dire* clearly supports the court's findings.

In *State v. Henderson*, supra, the Court adopted factors to be considered in evaluating the likelihood of irreparable mistaken identification. Those include:

> (1) The opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

285 N.C. at 12-13, 203 S.E. 2d at 18-19. The evidence in this case must be considered in light of these factors.

Mr. Swaim made two pretrial identifications of appellant. The first occurred when the police apprehended appellant fleeing from the scene of the robbery and returned him there in handcuffs. The second occurred on the day following the robbery and assault when the police showed Mr. Swaim five pictures of appellant and his codefendants. The evidence with regard to Mr. Swaim's opportunity to observe appellant at the time of the alleged crime tended to show the following: Appellant entered Mr. Swaim's shop and "milled around" near the victim's workbench. Appellant moved to Mr. Swaim's left and "cold-cocked" him in the head. Appellant and defendant Gaither then continued to beat up their victim. Mr. Swaim testified:

> The defendants stayed in my store approximately five minutes and were not wearing anything over their faces or heads. The lighting was good and I had no trouble seeing their faces. I gave them a good look and all this occurred within a 21 foot width of the store. There is no doubt in my mind that Mr. Shelton and Mr. Gaither are the ones that come into the store. . . . When the defendants came into the store I recognized them and I will recognize them from now on. . . ."

Mr. Swaim stated on cross-examination that he got a three or four minute look at appellant and Gaither. He testified that the police brought appellant back into his store for him to identify at

"approximately 4:30". This was about one half hour after the incident occurred.

This and other evidence clearly shows that the trial court's finding that Mr. Swaim's in-court identification of appellant as one of the perpetrators of these crimes was of independent origin from and untainted by the two pretrial confrontations was amply supported by competent evidence. Hence, these findings are conclusive. Consequently, we find that the trial court correctly denied appellant's motion to suppress.

[9] During the course of the trial the state attempted to establish that during the fracas appellant struck Mr. Swaim with a lamp, knocking him out. This was essential to the state's proof of the charge of assault with a deadly weapon. State's witness David Hedgecock, a Forensic Serologist with the S.B.I., was asked to compare a blood sample taken from Mr. Swaim with a residue of blood that was found on the lamp. Appellant objected to the admission of Mr. Hedgecock's testimony as to what sort of bloodstain he found upon the lamp on the ground that there had been an insufficient chain of custody established for the lamp. The trial court allowed Mr. Hedgecock to testify as to his findings despite appellant's objections. Appellant now contends that the trial court erred in receiving Mr. Hedgecock's testimony with regard to the lamp and the matching of blood samples prior to the establishment of a chain of custody.

Before Mr. Hedgecock was allowed to testify before the jury it was established through the testimony of Mr. Swaim and an employee of the police department, Bobby Thompson, that from the time the incident occurred on 11 December until 18 December the lamp was located in the locked repair store. Mr. Swaim testified that a police officer came and got the lamp from the store on 18 December. Mr. Thompson testified that he unlocked the evidence room at the police department on 18 December and Agent Pennica took the lamp therefrom to have the bloodstains tested. Appellant argued at trial that the chain of custody was broken from the time the lamp left Mr. Swaim's custody at the repair store until the time it was taken from the evidence room at the police department to be tested. Mr. Hedgecock then testified that the analysis of the bloodstains on the lamp showed that they were consistent with the victim's blood, but inconsistent with the

appellant's. Subsequently, during the trial Patrolman Ricky Hughes completed the gap in the chain of custody by testifying that he picked up the lamp from Mr. Swaim's store on 18 December and took it straight to the police station and locked it in the evidence room.

In this instance we find no error in the trial court's allowing Mr. Hedgecock to state his findings for the jury before the chain of custody with regard to the lamp had been completely shown. The order of the presentation of the evidence is within the discretion of the trial court. 1 Stansbury, N. C. Evidence, § 24 (Brandis rev. 1973). The trial court may permit the introduction of evidence that depends for its admissibility upon some preliminary showing which has not yet been made upon counsel's assurance that such showing will be made later. *Brown v. Neal*, 283 N.C. 604, 197 S.E. 2d 505 (1973); *State v. Duncan*, 282 N.C. 412, 193 S.E. 2d 65 (1972); 1 Stansbury, N. C. Evidence, § 24 (Brandis rev. 1973). In this case the state called Mr. Pennica and Mr. Hedgecock to testify as its first witnesses. The state specifically asked the trial court to allow these two witnesses to testify out of order, because the jury selection process had taken an inordinate amount of time, and both the witnesses were S.B.I. employees and were supposed to be in other counties on the following day. The court agreed to the state's request and overruled appellant's objection. We do not think the trial judge's action amounted to an abuse of his discretion. A complete chain of custody for the lamp was shown by Mr. Hughes's subsequent testimony.

[10] Appellant argues that the trial court erred in denying his motion to dismiss with regard to the charge of assault with a deadly weapon. He submits that the evidence was insufficient to show that a deadly weapon was utilized in the assault. He bases this contention on his argument that the evidence presented showing that the lamp was used in the assault was only "opinion evidence" and "supposition". Mr. Swaim was unsure as to whether he was actually ever assaulted with an object.

The question for the trial court on a motion to dismiss is whether, upon consideration of the evidence in the light most favorable to the state, there is a reasonable basis upon which the jury might find that the crime charged has been committed and the defendant was a perpetrator of the crime. *State v. Thomas*,

292 N.C. 527, 234 S.E. 2d 615 (1977); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). If there is any competent evidence to support the allegations of the indictment the motion to dismiss is properly denied. *State v. Barrow*, 292 N.C. 227, 232 S.E. 2d 693 (1977); *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). In this case the state could not produce any direct evidence that appellant assaulted Mr. Swaim with the lamp. However, it did present ample circumstantial evidence tending to prove its contention. When the motion to dismiss questions the sufficiency of circumstantial evidence, the court must determine whether a reasonable inference of the defendant's guilt could be drawn from the circumstances so that the case may be sent to the jury. *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972); *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965); *State v. Soloman*, 24 N.C. App. 527, 211 S.E. 2d 478 (1975). A reasonable inference that appellant hit Mr. Swaim with the lamp could be drawn from the evidence admitted. Mr. Swaim testified that appellant and defendant Gaither were beating him up when he received a "terrific blow to the head" which knocked him out. When he regained consciousness Mr. Swaim saw the bloodied lamp lying at his feet. He testified that the lamp had been directly beside appellant when appellant was standing next to him. The evidence of the blood comparisons made by the S.B.I. showed that the blood on the lamp was consistent with that of the victim and inconsistent with defendant's. That evidence lends further support to the allegation that appellant assaulted Mr. Swaim with the lamp. This is sufficient evidence to create a reasonable inference that appellant struck Mr. Swaim on the head with the lamp.

Furthermore, we think that appellant's argument that this evidence is not circumstantial evidence, but mere supposition, is without merit. "[C]ircumstantial evidence is that which is indirectly applied by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred." 1 Stansbury, N. C. Evidence, § 76, p. 233 (Brandis rev. 1973). The pertinent evidence summarized above fits squarely within this definition. Thus, for these reasons, we think the trial court correctly denied appellant's motion to dismiss.

[11] State's exhibit No. 11 consists of a ball peen hammer which was in the store at the time of the assault and robbery. The trial court allowed this hammer to be introduced into evidence over

appellant's objection. Appellant claims on appeal that this hammer was erroneously allowed into evidence, because it was irrelevant and it tended to inflame the jury unnecessarily.

"[E]vidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." 1 Stansbury, N. C. Evidence, § 77, p. 234 (Brandis rev. 1973). In this case there was an issue as to whether Mr. Swaim was assaulted with a deadly weapon. The evidence was unclear as to what sort of weapon, if any, was used to knock out the victim. The circumstantial evidence did strongly infer that Mr. Swaim was hit with a metal lamp. However, the jury could possibly have inferred from the evidence that the victim was struck with the hammer rather than the lamp. Mr. Swaim testified:

> The Ball-pen [sic] hammer had a hair on it and I gave it to the S.B.I. agent. I do not know whether I was hit with this hammer. The ball-pen [sic] hammer marked State's Exhibit No. 11 was the hammer that I had in my shop.

The jury might possibly have inferred from all of the evidence that appellant actually struck Mr. Swaim with the ball peen hammer rather than the lamp. Therefore, we think this hammer did have some relevancy to the case, and the trial court properly overruled appellant's objection to its admission.

[12] At the conclusion of the state's presentation of its evidence defendants Gaither and Jackson entered pleas of guilty pursuant to plea bargains with the state. Following the entry of the pleas, appellant put on his evidence, which consisted of his own testimony. At the conclusion of appellant's testimony the defense stated that there would be no further evidence for the appellant and rested its case. Later, appellant asked the Court to reopen his case so that he might call defendant, Gaither, to testify on his behalf. After hearing the arguments of counsel and Gaither's statement that he did not wish to testify, the trial court refused to allow appellant to reopen his case.

Appellant maintains that the trial court's refusal to reopen the case so that he could call Gaither was prejudicial error. He alleges that in so ruling the trial court abused its discretion, denied appellant his constitutional right to call witnesses and prepare his own defense, denied his constitutional right of con-

frontation and due process, and violated the North Carolina rules regarding fair and open plea bargaining.

In his brief appellant acknowledges that normally the decision to reopen a case and hear further evidence is within the trial court's discretion. *See State v. Person*, 298 N.C. 765, 259 S.E. 2d 867 (1979); G.S. 15A-1226(b). However, he argues that his motion to reopen the case was based on his federal and state constitutional rights to present evidence and confront his accusers. Therefore, his motion to reopen the case was a question of law and not at the court's discretion. Appellant arrives at his contention by analogizing his case with others in which the North Carolina Supreme Court has held that when a motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not discretion, thus, the trial court's decision on the motion is reviewable. *See State v. Smathers*, 287 N.C. 226, 214 S.E. 2d 112 (1975); *State v. Cradle*, 281 N.C. 198, 188 S.E. 2d 296, *cert. denied*, 409 U.S. 1047, 93 S.Ct. 537, 34 L.Ed. 2d 499 (1972); *State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970). All three of these cases involved the propriety of a trial court's ruling upon a motion for continuance. The Supreme Court held in each of these cases that the motion to continue would be considered a question of law because it was based upon the defendant's constitutional rights.

Appellant's argument is fundamentally flawed. Although constitutional rights may have been the bases of the motions in the authorities he cites, they were not at issue in his own case. Appellant submits that his motion to reopen his case was based upon his Sixth and Fourteenth Amendment rights under the Federal Constitution and his rights under Article I, Sec. 23 of the Constitution of North Carolina. However, under the facts and circumstances of this particular case we do not think that appellant's motion was based upon any constitutional right guaranteed by the due process clause of the Fourteenth Amendment. Specifically, appellant did not have the right pursuant to due process to have his case reopened.

The fundamental requirement of due process is an opportunity to be heard upon such notice and in such proceedings as are adequate to protect the constitutional right for which the constitutional protection is invoked. *Anderson National Bank v.*

Luckett, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692 (1944). In this case appellant asserts the denial of his Sixth Amendment right of confrontation. The right of confrontation includes the opportunity fairly to present one's own defense. *State v. Lane*, 258 N.C. 349, 128 S.E. 2d 389 (1962). However, as the Supreme Court said in *State v. Graves*, 251 N.C. 550, 112 S.E. 2d 85 (1960):

> We do not suggest that an accused may be less than diligent in his own behalf in preparing for trial. He may not place the burden on the officers of the law and the court to see that he procures the attendance of witnesses and makes preparation for his defense. But the officers and court have a duty to see that he has opportunity for so doing.

251 N.C. at 558, 112 S.E. 2d at 92. In the case *sub judice* appellant was given ample opportunity to present evidence in his defense. Defendant Gaither pled guilty at the close of the state's evidence. The record reveals that he was available and could have been called by appellant at any time before appellant rested. Under these circumstances we do not think that appellant had a due process right of confrontation after he voluntarily rested his case.

Without a constitutional right upon which to base his motion to reopen his case, defendant's motion is addressed to the trial judge's discretion and we will not review his decision on appeal. We have also rendered specious appellant's argument as to the binding effect of the plea bargain on defendant Gaither.

Having considered appellant's remaining arguments, and finding no incidence of prejudicial error involved in any of them, we conclude that appellant received a fair trial free from prejudicial error.

No error.

Judges MARTIN (Harry C.) and HILL concur.

WAKE COUNTY, EX REL. EVELYN CARRINGTON v. DANIEL TOWNES

No. 8010DC1024

(Filed 15 September 1981)

Bastards § 10; Constitutional Law § 40— civil paternity suit by State—indigent defendant—right to appointed counsel

An indigent defendant in a paternity suit instituted by the State has a right to court-appointed counsel pursuant to the due process requirements of the Fourteenth Amendment of the U.S. Constitution and the Law of the Land provision in Art. I, § 19 of the N.C. Constitution.

Judge MARTIN (Robert M.) dissents.

APPEAL by defendant from *Bullock, Judge.* Order entered 15 July 1980 in District Court, WAKE County. Heard in the Court of Appeals 29 April 1981.

Wake County (County), through its Department of Social Services' Child Support Enforcement Agency, initiated this action on 4 February 1980 in order to obtain a civil adjudication that the defendant, Daniel Townes, is the father of Cory Daniel Carrington and to obtain an order directing defendant to make support payments for the child. The child is the illegitimate son of Evelyn Carrington, and Ms. Carrington is a recipient of Aid to Families with Dependent Children (AFDC) funds. Based on Ms. Carrington's allegations that the defendant is the father of the child, the County, pursuant to statute, filed this action to establish paternity.

Upon being served with the Complaint, the defendant, who is indigent, contacted East Central Community Legal Services (Legal Services) for assistance. Legal Services told defendant that federal regulations (45 CFR 1601) and office policies prohibit Legal Services from representing individuals Legal Services believes have a right to court-appointed counsel. Legal Services, however, did agree to make a limited appearance for the purpose of ensuring that defendant received appointed counsel. At a preliminary hearing on 16 April 1980, defendant filed an affidavit of indigency and a motion seeking appointment of counsel claiming that such an appointment was required by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Section 19 of the North Carolina Constitution. The trial

court concluded in its order that "neither the due process clause of the United States Constitution nor Article I, Section 19 of the North Carolina Constitution guarantees an indigent defendant the right to court-appointed counsel in civil paternity actions. . . ." Defendant appeals from the denial of his motion.

East Central Community Legal Services, by Gregory C. Malhoit and M. Travis Payne, for defendant appellant.

North Carolina Civil Liberties Union, by Stanley Sprague, Amicus Curiae Brief for defendant appellant.

Wake County Attorney, by Shelley T. Eason, for plaintiff appellee.

Attorney General Edmisten, by Assistant Attorney General Henry H. Burgwyn and Associate Attorney Clifton H. Duke, Amicus Curiae Brief for plaintiff appellee.

BECTON, Judge.

The sole issue in this appeal is one of first impression in North Carolina: whether an indigent defendant in a paternity suit instituted by the State has a constitutional due process right to court-appointed legal counsel. Based on the Fourteenth Amendment due process requirements of the United States Constitution, *and* on the Law of the Land provision in Article I, Section 19 of the North Carolina Constitution,[1] we hold that an indigent defendant has a right to appointed counsel in paternity suits instituted by the State.

I

Due process must be afforded when a State seeks to deprive an individual of a protected liberty or property interest. *In-*

1. Although the Law of the Land provision in the North Carolina Constitution is synonymous with the due process clause of the United States Constitution, United States Supreme Court decisions interpreting the due process clause of the Fourteenth Amendment to the Federal Constitution are instructive, but they do not restrict or control our courts' interpretations of the Law of the Land provision in the State constitution. *Horton v. Gulledge*, 277 N.C. 353, 177 S.E. 2d 885 (1970). Moreover, our interpretation of State constitutional due process requirements may be more expansive than the minimal due process requirements of the United States Constitution. *See Lassiter v. Dept. of Social Services*, --- U.S. --- , 68 L.Ed. 2d 640, 101 S.Ct. 2153 (1 June 1981).

graham v. Wright, 430 U.S. 651, 51 L.Ed. 2d 711, 97 S.Ct. 1401 (1977). Once a fundamental interest is placed in jeopardy by State action, a court of review must focus its inquiry on the sufficiency of the procedures involved to ensure fairness to the potentially aggrieved individual. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 95 L.Ed. 817, 71 S.Ct. 624 (1951). At its minimum, then, due process requires that every individual forced by the State to resolve claims of right, duty and liability through the judicial process be afforded a meaningful opportunity to be heard. *Little v. Streater*, --- U.S. --- , 68 L.Ed. 2d 627, 101 S.Ct. 2202 (1 June 1981); *Boddie v. Connecticut*, 401 U.S. 371, 28 L.Ed. 2d 113, 91 S.Ct. 780 (1971); *State v. Parrish*, 254 N.C. 301, 118 S.E. 2d 786 (1961). Indeed, the touchstone of due process is the presence of fundamental fairness in any judicial proceeding adversely affecting the interests of an individual.

Right to counsel cases analyzed in terms of constitutional mandates of due process require the application of a balancing test to determine the amount of process due an indigent to ensure fundamental fairness. *Lassiter v. Department of Social Services*, --- U.S. --- , 68 L.Ed. 2d 640, 101 S.Ct. 2153 (1 June 1981). The old distinction of appointing counsel only in criminal cases and never in civil cases was abandoned by the United States Supreme Court in *In re Gault*, 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428 (1967). In *In re Long*, 25 N.C. App. 702, 214 S.E. 2d 626 (1975), this Court quoted with approval the Tenth Circuit's statement that "[i]t matters not whether proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of [a grievous loss]. . . which commands observance of the constitutional safeguards of due process." *Id.* at 706, 214 S.E. 2d at 628, *quoting Heryford v. Parker*, 396 F. 2d 393, 396 (10th Cir. 1968).

The analysis utilized by the United States Supreme Court in the recent decision of *Lassiter* to determine the right of indigents to appointed counsel in termination of parental rights hearings is useful to our inquiry. The *Lassiter* analysis begins with "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he *may* be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured." --- U.S. --- , 68 L.Ed. 2d at 649, 101 S.Ct. at 2159 (emphasis added). The

Supreme Court then applies a balancing test, first propounded in *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed. 2d 18, 96 S.Ct. 893 (1976), which requires the evaluation of three distinct factors in determining what procedures are necessary under the Fourteenth Amendment to ensure fundamental fairness. The test is also helpful in applying the due process protections of our State constitution. The three factors are:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335, 47 L.Ed. 2d at 33, 96 S.Ct. at 903. *See also Parham v. J. R.*, 442 U.S. 584, 61 L.Ed. 2d 101, 99 S.Ct. 2493 (1979); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 53 L.Ed. 2d 14, 97 S.Ct. 2094 (1977). Finally, the Court in *Lassiter* balances these *Mathews v. Eldridge* factors against one another "and then set[s] their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." *Lassiter*, --- U.S. at --- , 68 L.Ed. 2d at 649, 101 S.Ct. at 2159.

II

An action to establish paternity is civil in nature, *Bell v. Martin*, 299 N.C. 715, 264 S.E. 2d 161 (1980), with no *immediate* threat to personal liberty. It is not a crime in North Carolina to sire an illegitimate child or to be adjudicated the father of the child. *Id.* The civil nature of a paternity action then raises the presumption that there is no right to appointed counsel in such a proceeding. *Lassiter.* The ramifications of a paternity determination, however, are decidedly criminal in nature.[2] The failure of the defendant in a paternity suit to make subsequent support payments based on the adjudication of his parentage can, and often does, result in civil or criminal enforcement proceedings being brought against him. The

2. See Section II-A, *infra.*

penalty imposed in these proceedings is incarceration. *See* G.S. 49-2 (1979 Cum. Supp.), 49-8, 49-15, 50-13.4(f)(9) (1979 Cum. Supp.). Hence, we analyze the due process requirements of *Mathews v. Eldridge* against, at best, a weakened presumption that court-appointed counsel is not necessary in a paternity proceeding.

A. Interests of the Defendant

The first prong of the *Mathews v. Eldridge* test—the determination of the amount of due process necessary to ensure fundamental fairness—concerns the private interests of the defendant that are placed in jeopardy. The personal freedom of the defendant is the most significant and steadfastly-guarded interest to be considered.

1. Liberty Interest

The defendant contends that his freedom is at stake in this civil paternity proceeding because a judgment of paternity will be *res judicata* in any subsequent proceeding to enforce his obligations to make support payments or to punish him for refusing to make support payments. Under North Carolina law, a defendant's liberty interest may be adversely affected in two ways by a civil adjudication of paternity. First, G.S. 49-15 provides that once paternity has been determined, the duties and obligations of the adjudicated father may be "enforced in the same manner, as if the child were the legitimate child of such father." The parental obligations owed a legitimate child may be enforced in a proceeding for civil or criminal contempt under G.S. 50-13.4(f)(9). Therefore, once adjudicated the father of the illegitimate child and ordered to pay child support in a proceeding without benefit of counsel, defendant may be incarcerated under the contempt provisions of G.S. 50-13.4(f)(9) for failure to make such payments. Second, it is a misdemeanor for a parent to fail to adequately support his or her illegitimate child, G.S. 49-2 (1979 Cum. Supp.), and the penalty for this offense may be a prison term "not to exceed six months." G.S. 49-8(1). Moreover, failure to make the court-ordered support payments is a continuing offense which may result in successive six month terms of imprisonment. *See State v. Green*, 277 N.C. 188, 176 S.E. 2d 756 (1970).[3]

3. *State v. Green* was effectively reversed by *Argersinger v. Hamlin*, 407 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006 (1972) only on the issue of right to counsel for "petty" offenses.

The County argues on the other hand that an indigent defendant in a paternity suit has no liberty interest at risk. It argues further that the mere fact that an adjudicated father *may* face a criminal prosecution for subsequent failure to make support payments has no bearing on the parental adjudication proceeding. According to the County, a due process right to counsel does not depend upon the hypothetical and remote possibilities of future enforcement actions for nonsupport. The County also points out that defendant would have court-appointed counsel in a criminal nonsupport prosecution, *State v. Lee*, 40 N.C. App. 165, 252 S.E. 2d 225 (1979), and would be entitled to counsel in a criminal contempt proceeding. *Argersinger v. Hamlin*, 407 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006 (1972). Moreover, the County contends, based on *Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976), that the civil adjudication of paternity would not be *res judicata* in a subsequent criminal proceeding and that defendant would be able to raise the issue of paternity again.

Our reading of *Tidwell* and the more recent decisions of this Court in *Withrow v. Webb*, --- N.C. App. --- , 280 S.E. 2d 22 (1981) and *Williams v. Holland*, 39 N.C. App. 141, 249 S.E. 2d 821 (1978), convinces us that the adjudication of paternity in this action will be *res judicata* in a subsequent criminal proceeding. *Tidwell* is distinguishable from, and therefore not controlling on, the case *sub judice* because of the lack of identity of parties in the two proceedings in *Tidwell*. In that case, the issue of paternity had first been raised in a criminal prosecution. The plaintiff-wife swore out a warrant against the putative father for nonsupport and the *State* successfully prosecuted the case. In that trial, defendant was found to be the father and therefore criminally liable for nonsupport. Over ten years later the plaintiff-*wife* filed a civil Complaint in her name alleging the paternity of the defendant and requesting additional support payments of fifty dollars per week. The trial court refused to let defendant contest paternity and ordered that the payments be made. On appeal, the North Carolina Supreme Court reversed the civil judgment on the grounds that defendant should have been permitted to deny paternity. The Court specifically held "that, for the reason that the parties to the criminal and civil proceedings are not the same and the State and this plaintiff are not in privity, the defendant is not estopped in this present action to deny paternity. . . ." 290 N.C. at 114, 225 S.E. 2d at 826.

In the case before us, the State, through its subdivision (County), is the real party in interest in the civil paternity proceeding. Likewise, the State would be the prosecuting party in a criminal contempt *or* nonsupport hearing. The County's contention that it is not a party to the civil paternity action belies the reality of the AFDC situation. By virtue of accepting AFDC funds, Ms. Carrington's right to bring suit for support from the child's father is automatically assigned to the County. 42 U.S.C. § 651 *et seq.;* G.S. 110-128 (1979 Cum. Supp.). The County has a statutory duty to bring paternity proceedings against, and to establish support obligations from, putative fathers. G.S. 110-138, 139 (1979 Cum. Supp.). The County brings suit in its name, ostensibly on behalf of the mother and child. In actuality, under G.S. 110-128 and 110-135, the payment of AFDC funds by the State creates a debt owing to the State by the responsible parents of the child. Under our State's public assistance statutes, the mother receiving AFDC funds must cooperate with the County by giving the name and by assisting in the location of the nonsupporting, putative father. G.S. 110-131. The mother's failure to cooperate will result in her ineligibility for future AFDC funds. *Id.* In short, the State has an active and vested interest in paternity proceedings involving mothers and children receiving AFDC funds. As was found in *Little v. Streater,* it is clear that "the State's involvement in this paternity proceeding was considerable and manifest, giving rise to a constitutional duty" to provide court-appointed counsel. --- U.S. at --- , 68 L.Ed. 2d at 634, 101 S.Ct. at 2207; *see also Madeline G. v. David R.,* 95 Misc. 2d 273, --- , 407 N.Y.S. 2d 414, 416 (Family Ct. 1978). As a real party in interest, the State would be able to assert successfully the doctrine of *res judicata* in a subsequent criminal prosecution. Indeed, G.S. 110-132 specifically provides that a judgment of paternity, based on an acknowledgment by the father, is "*res judicata* as to that issue and shall not be reconsidered by the court."

In an indirect, but nonetheless significant way, the indigent defendant in a paternity action instituted by the County has his liberty placed in jeopardy. The availability of court-appointed counsel at the subsequent criminal proceeding comes too late. Counsel is of little value to the indigent defendant at that time because his best defense—denial of paternity—has already been determined at a prior hearing in which all the resources and ex-

pertise of the State were brought to bear on the unrepresented, indigent defendant. Defendant may be sent to jail without ever having had a *meaningful* opportunity to be heard on the issue of paternity. We agree with former Chief Justice Sharp who dissented in *State v. Green*:[4] "In common parlance, '[i]t's at that first trial [civil paternity hearing] a man needs a lawyer." 277 N.C. at 197, 176 S.E. 2d at 762. Moreover, it should be pointed out that in *Withrow v. Webb* and *Williams v. Holland* this Court cited with approval the principle

> [t]hat a judgment rendered by a court having jurisdiction to do so finding paternity to exist bars the relitigation of that issue by the parties to the original judgment is a well established rule of law in other jurisdictions that have considered the question. [Citations omitted.]

Williams, 39 N.C. App. at 147, 249 S.E. 2d at 825-26; *Withrow*, --- N.C. --- , 280 S.E. 2d at 24. *See also Brondum v. Cox*, 30 N.C. App. 35, 226 S.E. 2d 193 (1976), *aff'd.*, 292 N.C. 192, 232 S.E. 2d 687 (1977). The defendants in *Williams* and *Withrow* were prohibited from raising the issue of paternity at a proceeding subsequent to the one in which paternity was established. The doctrine of *res judicata* applied to bar relitigation of the issue of paternity which was raised in a prior proceeding *involving the same parties.*[5] *See generally Taylor v. Taylor*, 257 N.C. 130, 125 S.E. 2d 373 (1962).

2. Property and Familial Interest

Other important personal interests are at stake in a paternity suit. For example, defendant has several property interests at stake. An adjudication of paternity can mean up to eighteen years of child support payments—not an insubstantial amount. Moreover, paternity necessarily affects the distribution of defendant's estate upon death, G.S. 29-1, *et seq.;* Workers' Compensation

4. See Footnote 3, *supra.*

5. Other states have recognized the *res judicata* effect of a paternity determination in a subsequent criminal nonsupport action. In several of these jurisdictions, the courts have found a right to appointed counsel in AFDC-related paternity actions instituted by the state. *See Artibee v. Circuit Judge*, 397 Mich. 54, 243 N.W. 2d 248 (1976); *Reynolds v. Kimmons*, 569 P. 2d 799 (Alaska 1977); *Salas v. Cortez*, 24 Cal. 3d 22, 593 P. 2d 226, 154 Cal. Rptr. 529 (1979).

benefits, G.S. 97-1; Social Security benefits, 42 U.S.C. 402(d)(1); and insurance proceeds.

Paternity also has a direct effect on the family unit by creating a parent-child relationship. As pointed out in *Little v. Streater*, "[j]ust as the termination of such [family] bonds demands procedural fairness, [citation omitted], so too does their imposition." --- U.S. at --- , 68 L.Ed. 2d at 637, 101 S.Ct. at 2209. A paternity adjudication can also seriously damage the reputation of the defendant and have a deleterious effect on an already established family of the defendant. *See Hepfel v. Bashaw*, 279 N.W. 2d 342, 345 (Minn. 1979).

It has been rightly noted that a paternity adjudication dramatically affects the personal interest of the child as well. "[I]t must now be accepted that the child's interest in an accurate determination of paternity at least equals that of the putative father." 279 N.W. 2d at 346; Krause, Illegitimacy: Law and Social Policy 108 (1971). The child's rights of support, inheritance and custody are directly affected by a paternity proceeding. More important, the child's health interests are involved. An accurate family medical history can be critical in the diagnosis and treatment of a child's injuries and illnesses.

"The [property and familial] interests implicated here are substantial." *Little v. Streater*, --- U.S. at --- , 68 L.Ed. 2d at 637, 101 S.Ct. at 2209.

B. Risks of an Erroneous Adjudication of Paternity

The second prong of the *Mathews v. Eldridge* test requires an analysis of the risk that the procedures used will lead to an erroneous determination of paternity, and an analysis of the value of granting the defendant additional procedural safeguards such as appointed counsel. Without counsel to advise an indigent defendant in a paternity suit of his right to a blood grouping test, to conduct vigorous cross-examination of the State's key witness and to assist the defendant through the complexities of the paternity hearing, the risk of an erroneous adjudication of parentage is great.

The frequently cited study made by Professor Harry D. Krause bears witness to the tremendous potential for erroneous adjudications of paternity. Krause's research revealed that it is

not uncommon for 95% of paternity disputes to result in findings of parentage. Yet, in a study based on 1000 cases, 39.6% of the accused men were conclusively shown by blood tests not to be the fathers. Of equal significance is another study in which 18% of a group of accused men who acknowledged paternity were proven by blood tests not be the fathers of the children they acknowledged. Krause, Illegitimacy: Law and Social Policy 149-51 (1971).

The reasons for erroneous accusations made by mothers of illegitimate children are not altogether clear. As noted by the California Supreme Court:

> There are many reasons why the man named by a mother as the father of her child may not necessarily be the father. She may simply not know which of several possible men is in fact the father. Additionally, she may wish to protect the actual father or protect herself from retribution from him. (See generally, Poulin, *Illegitimacy and Family Privacy* (1976) 70 Nw. U. L. Rev. 910, 923-24). Since cooperation with the district attorney is mandatory for women receiving AFDC, a mother may also simply supply a name in order to avoid termination of welfare benefits. (Gliaudys, *supra*, 53 State Bar J. at p. 322). Further, studies have shown that much testimony regarding the parties' sexual contacts in paternity suits is unreliable. (See Krause, Illegitimacy: Law and Social Policy (1971), pp. 107-108).

Salas v. Cortez, 24 Cal. 3d at 31 n.7, 593 P. 2d at 232 n.7, 154 Cal. Rptr. at 535 n.7.

Moreover, many indigent defendants are illiterate and unfamiliar with judicial process. As a result, they are often unable to appreciate fully the significance of the proceeding against them and unable to understand the requests for admissions, interrogatories and requests for documents. Failure to answer these discovery requests can be used against the defendant; in fact, failure to respond to a request for admission of paternity may even be deemed as true, thereby "resolving" the ultimate issue in the case. G.S. 1A-1, Rule 36.

In *Little v. Streater*, the United States Supreme Court held that an indigent defendant who faces the State in a paternity suit has, upon demand, a constitutional right to a free blood grouping

test. In the Court's opinion, ". . . access to blood grouping tests for indigent defendants . . . would help to insure [sic] the correctness of paternity decisions. . . ." --- U.S. at --- , 68 L.Ed. 2d at 637, 101 S.Ct. at 2209. In finding a due process right to free blood tests, the Court used the *Mathews v. Eldridge* test to analyze the paternity adjudication procedures involved.

In our opinion, an indigent defendant's right to a free blood grouping test may be rendered meaningless without counsel to advise him of his right to demand such a test, to explain the test's significance, to ensure that the test is properly administered and to ensure that the results are properly admitted into evidence. As pointed out by the Supreme Court of Minnesota "the importance of blood tests magnifies the necessity for the timely assistance of counsel, to ensure that the defendant is apprised of his right to request blood tests and to inform him of their significance." *Hepfel v. Bashaw*, 279 N.W. 2d at 347-48.

For the unrepresented indigent defendant in a paternity suit, the complexities of a jury trial provide another barrier to his "meaningful opportunity to be heard." In an AFDC situation, the State attorney has available unlimited resources and expertise while the defendant has no money, little, if any, experience with the judicial process, and no one to help represent his interests. In short, "the full power of the state is pitted against an indigent person in an adjudication of the existence of a fundamental biological relationship entailing serious financial, legal and moral obligations." *Salas v. Cortez*, 24 Cal. 3d at 32, 593 P. 2d at 233, 154 Cal. Rptr. at 536.

The additional safeguard of appointing counsel to indigent defendants in paternity suits would greatly reduce the risk of erroneous determinations of paternity.

> [B]y intervening heavily on behalf of one side in what has traditionally been a private dispute, the state has skewed the outcome of the case. The chances that the significant consequences of fatherhood will be imposed on an innocent man obviously increase dramatically if, because he is unable to afford counsel, the defendant offers no defense. They increase still further if counsel for the plaintiff [the State] is a specialist in prosecuting such claims. . . . Unless the rights of indigent paternity defendants are protected, courts risk find-

ing not the right man, but simply the poorest man to be the father of a child.

24 Cal. 3d at 31, 593 P. 2d at 232, 154 Cal. Rptr. at 535.

Because of the risk associated with relying on the present procedural safeguards, we find ourselves in agreement with the Minnesota Supreme Court: "the *accurate* determination of paternity, given the present adversary nature of the proceeding, is best promoted by a system that ensures the competent representation of both sides to the controversy." *Hepfel v. Bashaw*, 279 N.W. 2d at 347 (emphasis added).

C. Interests of the Government

The last prong of the *Mathews v. Eldridge* test focuses on the interests of the government. The government interests are primarily two-fold: economic and minimization of litigation. Requiring the State to pay for court-appointed counsel will most likely increase the costs of establishing the paternity of a child receiving public assistance.[6] This increase in cost, however, must be weighed against the State's and the defendant's interest in an accurate determination of paternity. The fairer and more accurate fact-finding which will result from equal representation may encourage the man finally adjudged the father to make support payments. Understandably, a person erroneously determined to be the father will be less likely to maintain support payments to a child he knows is not his. *See State v. Camp*, 299 N.C. 524, 263 S.E. 2d 592 (1980). Moreover, "[a]ppointment of counsel need not lead to protracted litigation. . . . Faced with strong scientific evidence of paternity, many defendants [after having participated in and been represented by counsel in pre-trial discovery] arrive

6. It is important to note, however, that the North Carolina State Department of Human Resources collects on the average three dollars ($3) for every one dollar ($1) paid out in AFDC funds. North Carolina Department of Human Resources, Child Support Collection Statistics (1979). Equally important is the will of the people, expressed through the Legislature, to shoulder the additional cost of appointed counsel in closely-related proceedings. After the United States Supreme Court held, in *Lassiter v. Dept. of Social Services*, that the due process clause of the Fourteenth Amendment does not *require* the appointment of counsel for indigent parents in every parental status determination proceeding, the North Carolina General Assembly, on 10 July 1981, passed an act requiring the appointment of counsel for indigent parents in parental rights termination proceedings. Rat. Ch. 0966.

at a settlement with the district attorney without the expense of a trial." *Salas v. Cortez*, 24 Cal. 3d at 33, 593 P. 2d at 234, 154 Cal. Rptr. at 536-37. The State's financial and administrative interests, while important, are not "significant enough to overcome private interests as important as those here. . . ." *Lassiter v. Dept. of Social Services*, --- U.S. --- , 68 L.Ed. 2d at 650, 101 S.Ct. at 2160.

III

The final step in concluding our analysis is to balance the three *Mathews v. Eldridge* factors against one another and then weigh them collectively against the weakened presumption in this case that no right to appointed counsel exists in a civil paternity suit instituted by the State. On the imaginary scales of justice, the defendant's substantial liberty, property and familial interests (*see* IIA, *supra*); the significant risk of an erroneous adjudication of paternity under the present procedures (*see* IIB, *supra*); and the State's minimal counterveiling monetary interests (*see* IIC, *supra*) overwhelm the already weakened presumption against the right to appointed counsel in cases of this nature. When the State marshalls its many resources against an indigent defendant to have him adjudicated the father of the child receiving public assistance, that defendant is entitled to the protection afforded by court-appointed counsel based on the due process clause of the Fourteenth Amendment *and* on the Law of the Land provision of the North Carolina Constitution.

Our decision is not inconsistent with existing case law in North Carolina. Although the State cites *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980) for purposes of analogy, our reading of that case is supportive of our holding. The State contends that *Jolly* stands for the proposition that court-appointed counsel is not constitutionally mandated in a civil contempt proceeding, and therefore, by analogy, court-appointed counsel should not be required in a paternity suit. The Court in *Jolly*, however, said only that counsel is not *automatically* required in a civil contempt proceeding; each proceeding must be evaluated on a case-by-case basis. 300 N.C. at 93, 265 S.E. 2d at 143. *See also Gagnon v. Scarpelli*, 411 U.S. 778, 36 L.Ed. 2d 656, 93 S.Ct. 1756 (1973). The Court did not feel compelled to appoint counsel in *Jolly* because of the relatively simple, uncomplicated nature of the civil con-

tempt proceeding. The Court's actual holding is that "due process requires appointment of counsel for indigents in nonsupport civil contempt proceedings only in those cases where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness." 300 N.C. at 93, 265 S.E. 2d at 143. Given the fundamental rights at stake, and the complex nature of a paternity suit, we see our holding as consistent with our Supreme Court's concern for an adequate and fundamentally fair presentation of the merits in these types of civil proceedings.

Our decision today also has support in other jurisdictions. In *Salas v. Cortez* and *Madeline G. v. David R.*, the courts held that the defendant in a state-instituted paternity case had a Fourteenth Amendment due process right to counsel. In *Artibee v. Circuit Judge*, 397 Mich. 54, 243 N.W. 2d 248 (1976), and *Reynolds v. Kimmon*, 569 P. 2d 799 (Alaska 1977), the courts also found a right to counsel but based the right on state constitutional due process grounds. In *Hepfel v. Bashaw*, the court did not reach the questions of the constitutionality of court appointed counsel in paternity cases brought by the State but instead ordered counsel appointed based on its supervisory powers to ensure the fair administration of justice. *See generally*, Annot. 4 A.L.R. 4th 363 (1981). In addition, the National Conference of Commissioners on Uniform State Laws has proposed a Uniform Parentage Act which specifically provides for court-appointed counsel to indigent persons unable to pay for counsel. The Uniform Parentage Act § 19(a) (1973). Four state legislatures have adopted the Act: Hawaii (Hawaii Rev. Stat. § 584-19 (1975)); Montana (Mont. Rev. Codes Ann. § 40-6-119 (1975)); North Dakota (N.D. Cent. Code § 14-17-18 (Supp. 1977)); and Wyoming (Wyo. Stat. § 14-2-116 (1977)).

An adjudication of paternity imposes on an individual duties and obligations of great significance. For the accused father, a paternity proceeding puts at risk his liberty, his property and his family relationships. When these interests are threatened by the powers of the State, our federal and state constitutions require that certain basic procedural due process protections be afforded so that the individual has a meaningful opportunity to be heard. Given the interests involved in, and the implications of, a paternity proceeding, court-appointed counsel for the indigent defendant

is essential to his having a *meaningful* opportunity to be heard. We must not be niggardly or equivocal in appointing counsel for indigents when rights as fundamental as these are at stake. Due process and basic, fundamental fairness demand that counsel be appointed in paternity suits instituted by the State. In reaching this decision, we find it necessary to reverse the judgment of the trial court and remand for a new paternity hearing only after the trial court appoints counsel for the defendant.

Reversed and remanded.

Judge WHICHARD concurs.

Judge MARTIN (Robert M.) dissents.

DORIS WILLIAMS v. RONALD RICHARDSON

No. 816DC50

(Filed 15 September 1981)

1. Divorce and Alimony § 26.3— jurisdiction to modify foreign child custody decree

A court in this State had jurisdiction to modify a Virginia child custody order where the court's conclusion that the children have a significant connection with this State and that there is available in this State substantial evidence relevant to the children's care, protection, training, and personal relationships was supported by the court's findings of fact that the mother and children moved to this State in order to be near the job of the mother's second husband, the move was unrelated to the custody proceeding pending in Virginia, and a county department of social services in this State has investigated the parties and the children.

2. Divorce and Alimony § 23.6— jurisdiction of child custody action—action pending in another state

The trial court did not err in exercising jurisdiction in a child custody proceeding on the ground that an identical action was pending in Virginia where judgment was entered by the Virginia Court on 7 February 1980, the action in this State was begun by the mother on 25 February 1980, and the mother, who was the losing party in the Virginia proceeding, showed that she had no interest in appealing the Virginia judgment when she filed her action in this State. G.S. 50A-6(a).

3. **Divorce and Alimony § 26— abduction of child—jurisdiction to modify foreign custody decree**

A North Carolina court was not required by G.S. 50A-8(b) to decline jurisdiction of a proceeding to modify a Virginia child custody decree because the mother had abducted one of the children and brought her to this State if the court properly determined that it was in the best interest of the children that the court exercise jurisdiction despite the abduction; however, the trial court's conclusion that it should exercise jurisdiction in this case was unsupported by findings of fact, and the case must be remanded for such findings.

4. **Appeal and Error § 16; Divorce and Alimony § 26— action to modify foreign custody decree—appeal from denial of jurisdictional motion—abandonment of appeal**

The district court was not divested of jurisdiction to enter a final order in an action to modify a foreign child custody decree because defendant gave notice of appeal from the denial of his motion to dismiss the action for lack of jurisdiction where the record shows that defendant abandoned his right to an immediate appeal and considered the court's ruling to be interlocutory in nature and involving matters which could be presented after the case was heard on its merits.

5. **Divorce and Alimony § 26.2— modification of foreign custody decree—changed circumstances—punitive measure**

In order to modify a foreign child custody decree, the trial court must detail a substantial change in circumstances affecting the welfare of the child unless the court finds that the foreign decree was a disciplinary or punitive measure. G.S. 50A-13.

6. **Divorce and Alimony § 25.3; Infants § 6.4— custody action—private examination of child by court**

A trial judge may not question a child privately in a custody proceeding except by consent of the parties.

APPEAL by defendant from *Long, Judge.* Judgment entered 19 August 1980 in District Court, HALIFAX County. Heard in the Court of Appeals 5 June 1981.

Plaintiff and defendant were formerly husband and wife. Two children were born of the marriage—Tammy Renee in July 1971 and Christopher Scott in February 1974. The parties were divorced in October 1977 in the Circuit Court of Sussex County, Virginia. Mrs. Williams was given custody of the children, with overnight visitation rights granted to Mr. Richardson. In addition, Mr. Richardson was ordered to pay $250 per month for child support. Mrs. Williams married her present husband in 1978 and moved to Emporia, Virginia, taking the two children with her. Mr. Richardson worked in Emporia at the time and exercised his visitation rights regularly.

In May 1979, Mr. Richardson was transferred by his employer to Georgia. In July, he filed a petition in the Juvenile and Domestic Relations Court of the City of Emporia seeking temporary and permanent custody of the children. A hearing was scheduled for 2 August. Both parties appeared, and Mrs. Williams was granted a continuance so she could secure the services of an attorney. The hearing was rescheduled for 16 August. Mr. Richardson appeared in court that day, but Mrs. Williams did not. (Mrs. Williams moved with her husband and the children to Severn, North Carolina, on 6 August. Severn is two miles inside the State of North Carolina. On 23 August the family moved to Rich Square, North Carolina.) The court granted Mr. Richardson visitation privileges and ordered that home study reports be conducted on the parties.

On 16 August, the day Mrs. Williams was to appear in the Emporia Court, she filed a petition for a writ of habeas corpus in the District Court of Northampton County, North Carolina. No mention was made of the pending proceeding in Virginia. Mrs. Williams alleged in the petition that Mr. Richardson had threatened to take the children to Georgia. She further alleged the Virginia decree was of no effect since she then resided in North Carolina. Mrs. Williams failed to appear at the hearing on the petition. The trial judge, upon learning of the pendency of the Virginia case, vacated the writ. Subsequently, Mrs. Williams, through counsel, gave notice of appeal.

Mrs. Williams continued to avoid appearing at the Virginia court hearings. On 8 November 1979, the court found her in contempt for denying visitation privileges to Mr. Richardson and for failing to appear. Nevertheless, the trial court was reluctant to proceed without Mrs. Williams, and a new hearing was scheduled for 7 February 1980. The court granted Mr. Richardson visitation rights every other weekend. These rights were exercised by Mr. Richardson's mother since he could not commute readily from Georgia.

On 7 February 1980, Mrs. Williams again failed to appear. The Virginia court heard evidence and reviewed the home study reports. Thereafter, the court found that a change of custody would be in the best interest of the children and granted permanent custody to Mr. Richardson. Mrs. Williams was granted

visitation rights. Mr. Richardson filed a copy of the Virginia court order in Northampton County, gained custody of the children, and returned with them to Georgia.

On 21 February 1980, Mrs. Williams went to Georgia, removed Tammy from school, and returned with Tammy to North Carolina. She was unable to locate her son, who remained with the father. Mr. Richardson sought and received from the Virginia court an order to have Tammy returned to her father. The order was ineffective, however, because the child was in North Carolina.

On 25 February 1980, Mrs. Williams began this action in the Northampton County District Court asking for temporary custody of the children. Mr. Richardson moved to dismiss for lack of jurisdiction, and a hearing was conducted on 13 March. Both parties were present and represented by counsel. The trial judge reviewed the court records, heard arguments and statements of counsel, and made the following conclusions of law.

> 1. It is in the best interests of said minor children that this Court assume jurisdiction because (i) the children and the plaintiff have a significant connection with this State and (ii) there is available in this State substantial evidence relevant to the children's present or future care, protection, training and personal relationships.
>
> 2. This Court should not decline to exercise jurisdiction because the plaintiff took one of the children from the defendant in Georgia and returned her to North Carolina in violation of the Virginia Court Order because the interests of the children require a full, complete and impartial hearing on the question of custody and the action of the plaintiff was represented to be on advice of counsel. It is just and proper under all the circumstances that this Court assume jurisdiction.
>
> 3. This Court may, if the evidence later presented should so justify, modify the custody decree of the Virginia Court because (i) that Court does not now have jurisdiction under the jurisdictional prerequisites substantially in accordance with Chapter 50A of the General Statutes of North Carolina and (ii) this Court does meet these jurisdictional prerequisites.

Thereafter, the court awarded temporary custody of the children to Mrs. Williams and made further orders in anticipation of a full and complete evidentiary hearing. The evidentiary hearing was held in Halifax County on 8 July and 19 August, 1980. The court took testimony, made findings of fact that both parties were fit and suitable to have custody of the children, and further included in its order most of the findings made in the order granting Mrs. Williams temporary custody. The court concluded that Mrs. Williams should have primary custody of both minor children, and that such custody was in the best interests of the children. The court further concluded that the minor children are entitled to reasonable and adequate support from the defendant and that defendant is able to provide such support. The court thereupon ordered that Mrs. Williams have custody of both children with Mr. Richardson to have visitation privileges. In addition, the court ordered that Richardson make support payments. Mr. Richardson gave timely notice of appeal from the order.

William W. Aycock, Jr., for plaintiff appellee.

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

HILL, Judge.

Appellant brings forth eight assignments of error which can be grouped into three categories.

I.

Was it proper for the North Carolina trial court to exercise jurisdiction in this case?

Mr. Richardson contends that it was not proper for the North Carolina court to exercise jurisdiction. In support of this position, he argues that the district court could not take jurisdiction because the Virginia court retained jurisdiction of the dispute.

Virginia has adopted the Uniform Child Custody Jurisdiction Act, and it is clear that the Virginia court had jurisdiction to modify its original custody order. *See* Va. Code § 20-126 (Cum. Supp. 1981). At the time Richardson filed his action, Virginia was the home state of the children and Mrs. Williams was living in the

State of Virginia. The Virginia order granting custody of the children to Richardson, unless punitive, was binding on the parties and the courts of this State so long as it was not properly modified. *See* G.S. 50A-12, -13; *9 Uniform Laws Annotated* 152 (1979).

The question thus becomes whether it was proper for the North Carolina court to modify the Virginia order.

> If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Chapter . . . and (2) the court of this State has jurisdiction.

G.S. 50A-14.

Although the Virginia court had jurisdiction to modify its original custody order, its jurisdiction ended at the time of the modification. None of the requirements of § 20-126 of the Virginia Code could be met after that time. Still, it would not have been proper for the North Carolina court to modify the Virginia order unless it had jurisdiction under G.S. 50A-3.

> A court of this State, authorized to decide child custody matters, has jurisdiction to make a child custody determination by . . . modification decree if: It is in the best interest of the child that a court of this State assume jurisdiction because . . . (i) the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence, relevant to the child's present or future care, protection, training, and personal relationships.

G.S. 50A-3(a)(2).

Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine custody. G.S. 50A-3(c).

[1] The district court concluded as a matter of law in its order of 13 March 1980 that the children have a significant connection with this State and there is available in this State substantial evidence relevant to the children's care, protection, training, and personal relationships. The conclusion is supported by the facts as

found. The district court found that on 6 August 1979, Mrs. Williams and the children moved to North Carolina in order to be near Mrs. Williams' new husband's job. The move was unrelated to the custody proceeding pending in Virginia. The court further found that the Department of Social Services in Northampton County had investigated the parties and the children. We find that the North Carolina court could properly exercise jurisdiction to modify the Virginia order.

[2] In his second argument relating to jurisdiction, Richardson argues that the North Carolina court erred in exercising jurisdiction, because, at the time the case was filed, an identical action was pending in Virginia.

G.S. 50A-6(a) requires that North Carolina decline jurisdiction of a custody action if a similar action is pending in another state. Judgment was entered by the Virginia court on 7 February 1980. The action before this Court began on 25 February 1980. Virginia permits a losing party 30 days to file a motion for a new trial; that is, until 9 March 1980 in this case. However, the right to appeal alone is insufficient to continue jurisdiction when the party demonstrates abandonment of such right. By filing her action in North Carolina, Mrs. Williams demonstrated that she had no interest in appealing the Virginia judgment. Richardson's second argument is without merit.

[3] In his third argument relating to jurisdiction, Richardson contends the North Carolina court was required by G.S. 50A-8(b) to decline jurisdiction.

The statute provides that:

> *Unless required in the best interest of the child,* the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody . . .. (Emphasis added.)

Certainly, this Court does not condone Mrs. Williams' abduction of her child. In the vast majority of cases, such action will result in the refusal by the courts of this State to exercise jurisdiction to modify a custody decree. Nevertheless, the district court concluded as a matter of law that, despite the abduction, it should

not decline to exercise jurisdiction. The court reasoned that "the interests of the children require a full, complete and impartial hearing on the question of custody . . . and the action of [Mrs. Williams] was represented to be on advice of counsel."

Whether Mrs. Williams abducted her child from Georgia upon the advice of counsel is irrelevant. The only proper inquiry for the district court was whether it was required, in the best interest of the children, to exercise its jurisdiction at a time when it ordinarily would be mandated not to do so. We find that, although the record could support a conclusion that it was in the best interest of the children that the State exercise jurisdiction to modify the custody order, there are no findings of fact which would support such a conclusion. The case must be remanded for such findings.

In his fourth argument relating to jurisdiction, Mr. Richardson argues that the present case is in effect an appeal of the decision rendered in the Virginia court. Mr. Richardson bases his argument on the fact that of the twenty findings of fact made by the North Carolina court only three represent events occurring after the Virginia order granting Richardson custody was issued.

The repetitiveness of the findings is irrelevant. The important inquiries are, first, whether North Carolina had jurisdiction to modify the Virginia order. That question must be answered on remand. The second important inquiry is whether the North Carolina court made a finding of a substantial change of circumstances that would support a modification. That inquiry is addressed *infra.*

In his fifth argument relating to jurisdiction, Richardson argues the district court erred by accepting jurisdiction of the action because there was no existing cause of action in North Carolina between the parties.

The initial pleading filed by Mrs. Williams was entitled "Motion." Nevertheless, the substance of the pleading is that of a complaint and was treated as such by both parties. The responsive pleading filed was an answer. The court referred to the original pleading as a complaint. It was assigned a file number. The action throughout was treated by both parties as a complaint and a new action. The substance controls over the form. This assignment of error is without merit.

[4] Appellant contends in his sixth argument relating to jurisdiction that the district court was divested of jurisdiction to enter a final order in this cause when both parties had filed notice of appeal in prior actions. The trial court had previously dismissed a habeas corpus proceeding brought by Mrs. Williams, and she had appealed. Mr. Richardson had moved to dismiss the present action before the court for lack of jurisdiction. The motion was denied, and Mr. Richardson gave notice of appeal. Neither appeal was perfected.

Ordinarily, an appeal lies immediately from refusal to dismiss a cause for want of jurisdiction. *Kilby v. Dowdle*, 4 N.C. App. 450, 166 S.E. 2d 875 (1969). However, such an appeal may be abandoned by action of the parties. Appellant abandoned his right to an immediate appeal and considered the order to be interlocutory in nature and involving matters which could be presented after the case was heard on its merits, as evidenced by the following:

(1) After the court ordered evidentiary hearings the appellant requested a continuance in order to have a Virginia social service report available.

(2) Later, appellant consented that the hearing on the merits be transferred from Northampton County to Halifax County.

(3) Then the appellant moved that the matter be referred back to the Virginia court for it to take further evidence and make findings with respect to whether Virginia or the North Carolina courts should decide the question of which parent should have custody. The appellant's appeal from the 13 March 1980 order was for failure of the court to grant an absolute dismissal of the proceedings in North Carolina.

(4) The appellant appeared at the evidentiary hearings held on 8 July 1980 and 19 August 1980, cross-examined witnesses, presented evidence and arguments to the court and in every respect fully participated in the trial on the merits. He did not at either hearing contend the court was without jurisdiction to hear the case on the merits because of the earlier notice of appeal.

(5) Finally, the appellant consented to an order which stated that in addition to the 19 August 1980 order "all prior interim orders entered herein, defendant has given due and timely notice of appeal to the North Carolina Court of Appeals." Thus, the appellant acknowledged that the 13 March 1980 order was an interim or interlocutory order.

This assignment of error is without merit and overruled.

In summation, we hold that the North Carolina court could properly exercise jurisdiction to modify the Virginia decree despite Mrs. Williams' abduction of her daughter if it was in the best interest of the children that this State exercise its jurisdiction. The case must be remanded for such findings.

II

Should the district court's modification of the prior Virginia custody decree be reversed because there is no finding of a substantial change of circumstances?

[5] A court of this State may modify a previous custody order only upon a showing of changed circumstances affecting the welfare of the child. G.S. 50-13.7; *Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d 129 (1978). Mr. Richardson correctly points out that none of the district court's findings addressed the issue of changed circumstances.

A possible reason for this failure can be found in finding of fact #11 of the district court's order assuming jurisdiction of the action. In the finding, which is incorporated into the final order, the district court states that the Virginia court "found in its Order that there had been a substantial change in the circumstances of the parties and that a change in custody would be in the best interests of the parties; however, the Court failed to find any facts to support these conclusions." Given that finding, we can only conclude that the district court did not feel a need to detail a change of circumstances when the order revoking Mrs. Williams' custody did not show a change of circumstances. While such an analysis by the district court would be logical, it would also be erroneous.

The courts of this State *shall* recognize and enforce a modification decree of a court of another state. *See* G.S. 50A-13. "Recognition and enforcement is *mandatory* if the state in which

the prior decree was rendered 1) has adopted [the Child Custody Jurisdiction] Act." (Emphasis added.) *9 Uniform Laws Annotated* 151 (1979). Only by making recognition and enforcement mandatory can the purposes of the Act detailed in G.S. 50A-1(a) be realized.

Nevertheless, the mandate of G.S. 50A-13 will cause problems if the prior decree (here the Virginia modification) is a disciplinary or punitive measure. *Id.* at p. 152. "Although the Uniform Act requires recognition and enforcement of out-of-state custody decisions in general, punitive decrees do not command the respect that is due other out-of-state custody decrees and should not be recognized under the Act." Bodenheimer, *Child Custody Problems*, 65 Calif. L. Rev. 978, 1003-4 (1977). It could be implied from the district court's findings that it believed the Virginia modification order to be punitive and unworthy of recognition. However, upon our examination of the Virginia modification order, we find it equally possible that the Virginia court's finding that Mrs. Williams failed to appear and bring the children to court as ordered supports that court's conclusion that there had been a substantial change in circumstances, thus destroying any contention that the order is punitive.

The case must be remanded to the district court for findings in this area. Assuming that the trial court decides to exercise jurisdiction, in order to modify the Virginia decree, the court must find the decree to be punitive or detail a substantial change in circumstances.

III

Did the district court commit reversible error by not allowing the parties' daughter to testify to her preference regarding custody?

[6] At the close of hearing, Mr. Richardson's counsel offered Tammy to be privately questioned by the trial judge in his chambers. Mrs. Williams' counsel objected. A trial judge may not question a child privately in a custody proceeding except by consent of the parties. *Smith v. Rhodes*, 16 N.C. App. 618, 192 S.E. 2d 607 (1972). The assignment of error is overruled.

The case must be remanded to the trial court for findings of fact consistent with this opinion. If it is found that it is not in the

best interest of the children that the State exercise its jurisdiction, the Virginia order will stand. If it is found to be in the best interest of the children that this State exercise jurisdiction, the Virginia order will continue to be effective unless it is found to be punitive, or the trial court finds a substantial change of circumstances since the Virginia order was issued.

Remanded.

Judges MARTIN (Robert M.) and CLARK concur.

STATE OF NORTH CAROLINA v. WILLIAMS AND HESSEE, A LIMITED PARTNERSHIP; IRVIN P. BREEDLOVE, JR., TRUSTEE; CLAUDE B. WILLIAMS, JR., AND WIFE, JERRY W. WILLIAMS

No. 8015SC1178

(Filed 15 September 1981)

1. **Eminent Domain § 3.4— expansion of State Park—State's right to acquire property**

The State has the right to condemn property to expand a State Park in order to protect a historic "swimming hole" and to assure the public of continued access to the site. G.S. 146-22.1(5), (6) and (8).

2. **Eminent Domain § 7.7— failure of State to file Environmental Impact Statement or negative declaration—defendants' waiver of right to object**

The State was not required to file an Environmental Impact Statement in order to condemn property to expand a State Park, but the State should have filed a negative declaration pursuant to Section 25.0105 of the North Carolina Administrative Code. The requirement to file such a declaration, however, may be waived by the failure of the landowner party in a condemnation proceeding to assert a violation of the Environmental Policy Act, or rules and regulations adopted pursuant thereto, as a defense in his responsive pleading as required by G.S. 1A-1, Rule 12(b).

3. **Eminent Domain § 3— acquisition of land for public purpose—failure to show arbitrary and capricious**

Appellants' claim that the State acted arbitrarily and capriciously in condemning their land was meritless where the evidence showed acquisition of appellants' land was for a proper public purpose and the State complied with procedural requirements for condemnation. Neither did evidence that the State originally negotiated to acquire a smaller tract than it actually condemned and that the State had previously been financially unable to purchase the land from the former owner require a finding that the acquisition of appellants' property was arbitrary and capricious.

State v. Williams and Hessee

APPEAL by defendants from *Bailey, Judge.* Judgment entered 15 August 1980 in Superior Court, ORANGE County. Heard in the Court of Appeals 27 May 1981.

On 11 February 1980, the State of North Carolina instituted condemnation proceedings against defendants Williams and Hessee, a limited partnership; Irvin P. Breedlove, Jr., Trustee; Claude B. Williams, Jr., and his wife. The State sought to condemn 11.95 acres more or less, in which defendants held an interest, for the purpose of expanding the Eno River State Park. The events leading up to the State's action are as follows: In November 1979 the North Carolina Department of Natural Resources and Community Development recommended that the land at issue be acquired through condemnation, if necessary. The Department indicated that the purpose of the acquisition was "[t]o complete state ownership of the Cole Mill Access Area, Eno River State Park, providing protection and public access to an area known as the Bobbit's (sic) Hole." In a Department memorandum it was emphasized that the master plan for the Park proposed a horse trail on the land at issue and that the State wished to protect and assure continued access to Bobbitt Hole, an historic swimming hole located on the property. Defendants had offered to sell the State an easement to the property, but said offer was found to be unfeasible for specified reasons. The Department of Natural Resources and Community Development then requested the Department of Administration to acquire said property. After investigating all aspects of the proposed acquisition, the Department of Administration found it to be in the best interest of the State and necessary for inclusion in the Eno River State Park. After unsuccessfully negotiating with defendants to purchase the property, the Department of Administration recommended that the Governor and Council of State authorize acquisition of the property by condemnation. On 5 February 1980 the Governor and Council of State approved this recommendation, and condemnation proceedings were promptly filed.

In their answer defendants denied the authority of the State to condemn their land and alleged that the taking of the property was neither urgently needed nor within the best interest of the State. Defendants then alleged nine defenses to the condemnation. First, defendant alleged that the condemnation was not for a public purpose and was instead arbitrary and capricious. They

based this defense upon contentions that the land was taken solely to construct a horse trail, and that the taking was not authorized by statute thus constituting a deprivation of defendants' property without due process of law. As their second defense, defendants alleged that the State was estopped from taking the property since it had refused an offer to sell by the former owners of the property. Third, defendants alleged that the State ultimately took more property than it originally informed defendants it would take. Fourth, and fifth, defendants alleged that the State was unlawfully attempting to take defendant Williams' easement to his home consisting of a driveway constructed on property owned by the defendant partnership. Sixth, defendants alleged that the State had attempted to defraud defendants in their offer to purchase the property. Seventh, defendants alleged that they would be irreparably harmed if a temporary restraining order were not issued. Eighth, defendants alleged that they should be compensated for the remainder of their property which would be damaged by the taking. Defendants finally alleged that a preliminary injunction should be issued pending adjudication of the merits.

On 12 August 1980 the matter was heard before Judge James H. Pou Bailey, sitting without a jury, to determine all issues other than just compensation. After considering testimony of witnesses for both sides, the pleadings and exhibits, the court decided in the State's favor. Judge Bailey specifically concluded that the State had the power to condemn the land at issue, that said condemnation was for a public purpose, that the State met all the statutory procedural requirements for condemnation, that the question of whether the taking was excessive is a legislative rather than a judicial issue, that defendants have not established that the action of the State was arbitrary or capricious, that the filing of an Environmental Impact Statement is not a prerequisite to the acquisition of land by condemnation, and that the State acquired fee simple title to the land at issue by filing the complaint, declaration of taking and notice of deposition and by depositing into the court a sum estimated to be just compensation.

From this order defendants appeal.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., and Special Deputy Attorney General T. Buie Costen, for the State.

Eugene C. Brooks, III, for defendant appellants.

CLARK, Judge.

[1] Defendants first argue that the State did not have the right to acquire their property for the purpose as set forth in the complaint. The exhibits attached to the complaint indicated that the purpose for taking the property was the "Expansion of Eno River State Park." Defendants specifically argue that a strict interpretation of G.S. 146-22.1(5), which provides for the condemnation of "[l]ands necessary for public parks and forestry purposes," does not authorize the use of the power of eminent domain for the "expansion" of the Park. Defendants point out that unlike subsection (5), other subsections of G.S. 146-22.1 specifically authorize the acquisition of land for the "expansion" of State facilities. They then cite *State v. Club Properties*, 275 N.C. 328, 167 S.E. 2d 385 (1969), as support for their argument. We find this case to be clearly distinguishable. Therein the North Carolina Supreme Court held that the Department of Administration did not have the legislative authority to condemn land for the purpose of conveying the land to the United States Government for a federal park. The Court emphasized that the right to exercise the power of eminent domain must be conferred by statute, either in express words or by necessary implication. The necessary implication of the language in G.S. 146-22.1(5) allows for the condemnation of the land involved in the case on appeal, particularly when this land had been included within the original master plan of the Park. We further emphasize that State witnesses presented evidence of other purposes of the condemnation. These were to place a horse trail along the top of the bluff overlooking the river in this area, to protect the historic "swimming hole" known as Bobbitt Hole and to assure the public of continued access to the site. G.S. 146-22.1(6) and (8) authorize condemnation of lands for these specified purposes. For example subsection (6) authorizes condemnation of "[l]ands involving historical sites, together with such adjacent lands as may be necessary for their preservation, maintenance and operation." Subsection (8) authorizes condemna-

tion of "[l]ands necessary to provide public access to the waters within the State."

[2] Defendants next argue that the State had no authority to condemn the lands at issue without first filing an Environmental Impact Statement (EIS) as required by G.S. 113A-4. This statute in pertinent part provides:

> "(2) Any State agency shall include in every recommendation or report on proposals for legislation and actions involving expenditure of public moneys for projects and programs significantly affecting the quality of the environment of this State, a detailed statement by the responsible official setting forth the following:
>
> a. The environmental impact of the proposed action;
>
> b. Any significant adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> c. Mitigation measures proposed to minimize the impact;
>
> d. Alternatives to the proposed action;
>
> e. The relationship between the short-term uses of the environment involved in the proposed action and the maintenance and enhancement of long-term productivity; and
>
> f. Any irreversible and irretrievable environmental changes which would be involved in the proposed action should it be implemented."

Judge Bailey, in his order, concluded that the "filing of an Environmental Impact Study is not a prerequisite to the acquisition of land by condemnation." He emphasized that a mere change in ownership of land would have no impact on the property. We agree that the State was not required to file an EIS, but base our decision on other reasoning. Specifically, defendants, in their answer, failed to allege any adverse environmental impact that the condemnation of their land might have. In fact defendants did not even allege the State's failure to file an EIS. In *Lewis v.*

White, 287 N.C. 625, 216 S.E. 2d 134 (1975), citizens and taxpayers of the State filed a complaint seeking to enjoin the Art Museum Building Commission and others from constructing an art museum at the Polk Prison site in Wake County. Plaintiffs alleged *inter alia* that the Commission had failed to comply with the Environmental Policy Act by filing an EIS as required by that Act. The Court upheld the trial court's dismissal of this claim and noted:

> "Nothing in this Act makes the filing of such statement a condition precedent to the commencement of construction of a building for which State funds have been appropriated. Furthermore, the complaint does not purport to state any respect in which the construction of an art museum at the present site of the Polk Prison could adversely affect the environment of the State or its natural beauty or the beneficial use of its natural resources. It is perfectly obvious that, nothing else appearing, the substitution of an art museum for a prison will not adversely affect the environment.
>
> In the absence of any allegation in the complaint as to how such proposed substitution could adversely affect 'the quality of the environment of the State,' we find no error in the conclusion and order of the Superior Court dismissing Claim No. 9."

287 N.C. at 639-40, 216 S.E. 2d at 143-44.

In the case *sub judice*, the condemnation of defendants' land for the Eno River State Park was "[t]o complete state ownership of the Cole Mill Access Area, Eno River State Park, providing protection and public access to an area known as the Bobbit's (sic) Hole." At trial further evidence tended to show that Bobbitt Hole was an historical site, that the land to be condemned was situated between lands already owned by the State and incorporated in the Park and that the acquisition of defendants' land was necessary in order to have contiguous hiking and horse trails in the Park. We feel that these purposes are clearly consistent with the declaration of the Environmental Policy Act as defined in G.S. 113A-3. This statute provides:

> "The General Assembly of North Carolina, recognizing the profound influence of man's activity on the natural en-

> vironment, and desiring, in its role as trustee for future generations, to assure that an environment of high quality will be maintained for the health and well-being of all, declares that it shall be the continuing policy of the State of North Carolina to conserve and protect its natural resources and to create and maintain conditions under which man and nature can exist in productive harmony. Further, it shall be the policy of the State to seek, for all of its citizens, safe, healthful, productive and aesthetically pleasing surroundings; to attain the widest range of beneficial uses of the environment without degradation, risk to health or safety; and to preserve the important historic and cultural elements of our common inheritance."

We note, however, that *Lewis v. White, supra,* was decided prior to the enactment of the environmental regulations which were promulgated by the North Carolina Department of Administration. These regulations can be found in Title 1, Chapter 25 of the North Carolina Administrative Code. Pursuant to Section 25.0105, any property which "significantly" affects the environment requires the filing of an EIS with certain exceptions. The first of these exceptions provides:

> "(1) When the proposed project will clearly have no significant impact upon the environment or if the benefits to be accrued from the proposed project clearly outweigh any adverse environmental effect; In such cases a negative declaration should be filed pursuant to provisions of 1 NCAC 25.0202; . . ."

Though this Code provision requires the filing of a negative declaration when the State agency determines that an Environmental Impact Statement is not required by G.S. 113A-4, the requirement may be waived by the failure of the landowner party in a condemnation proceeding to raise the environmental issue. In their answer the defendants made a general denial to the allegations in the complaint and alleged several other defenses, none of which raised the environmental issue. We know of no reason why a landowner party in a condemnation proceeding should not be required to assert a violation of the Environmental Policy Act, or rules and regulations adopted pursuant thereto, as a defense in his responsive pleading as required by G.S. 1A-1, Rule 12(b). The

failure of the defendants to assert in their answer this defense or to otherwise raise the issue before hearing constituted a waiver.

[3] In defendant's final argument, they contend that the acquisition of their property was carried out in an arbitrary and capricious manner. This argument appears to be based upon several beliefs including the following: that the land was not condemned for a public purpose, that the State failed to comply with the procedural requirements for condemnation, that the State originally negotiated to acquire a smaller tract than the one ultimately condemned and that the earlier refusal to buy the land at issue from the previous owner estopped the State from acquiring the land from defendants. The evidence presented to the trial court refutes each of these beliefs.

Defendants' first contention that their property was not condemned for a public purpose appears to be based upon the assumption that the property was to be condemned only for a horse trail. Defendants argue that such a purpose "can be utilized by only a small and select group of citizens." Instead Judge Bailey found and the evidence showed the following:

> "5. The purpose of the State in attempting to acquire the land in question was for inclusion in the Eno River State Park. The acquisition of this tract will complete State ownership on the north bank of the Eno River from Willett Road in Orange County to Cole Mill Road in Durham County. The tract in question constituted an in-holding between two State-owned tracts within the Eno River State Park. Proposed Park uses in this area include: family and group picnicking areas, canoe launch and landing, river crossings, family wilderness area, and hiking and bridle trails.
>
> 6. The approved master plan for the park calls for the establishment of an equestrian trail and a nature trail on the subject property. An informal swimming area will also be established in conjunction with the 'Bobbitt Hole', which is a historically popular swimming hole bordering the property. Acquisition of the property will provide scenic protection for this unique feature of the river as well as providing environmental protection for the fragile floodplain portion of the subject property. The acquisition will also insure public access to the 'Bobbitt Hole' and a traditional hiking trail

> located on the property. The subject tract is an integral part of the Cole Mill access area within the park."

We further emphasize that condemnation of land for the purpose of a public park has been held to be for a proper public purpose. *See State v. Club Properties, supra.*

The allegation that the State failed to comply with the procedural requirements for condemnation is also groundless. The State presented evidence that an application for acquisition of this land was filed with the Department of Administration, that the application was investigated, that a determination was made to the effect that the acquisition was in the State's best interest, that negotiation proceedings were then begun and that after no purchase price could be agreed upon condemnation of the land was approved by the Governor and Council of State. This conduct by the State was in compliance with G.S. 146-22 *et seq.*, concerning acquisitions of State lands. The condemnation proceedings, which were instituted after negotiations failed, complied with the requirements of G.S. 136-103 *et seq.*, concerning condemnation procedures of the Department of Transportation.

Defendants' next contention that the State originally negotiated to acquire a smaller tract than that actually condemned is correct, but does not constitute an arbitrary and capricious undertaking by the State. The evidence tended to show that the State first approached the partnership about purchasing a portion of their land, *estimated* to contain 10.90 acres, in April 1979. The owners indicated that they were not interested in selling. Williams stated that "the Eno River would run red with blood before the State would get the property." Subsequent to this meeting the property was appraised. During this time 5.43 acres of the land desired by the State was conveyed to Williams and his wife, individually. On 1 August 1979 the State made an offer to the partnership of $3,650 per acre with the exact acreage to be determined by a survey. This offer was refused. Thereafter on 25 January 1980, the State again made an offer to purchase that portion of the partnership's land previously sought, excluding the 5.43 acres conveyed to Williams and his wife, plus an additional portion of the partnership's property. This additional portion was to compensate for the acres conveyed to Williams. The State indicated that it altered the specific area to be condemned, so that

only the partnership's property would be affected. This final offer, which indicated that the acreage was to be determined by survey and that the estimated acreage was 11.95 acres, was also rejected. On 11 February 1980 the State initiated the condemnation proceedings indicating that the property to be condemned contained 11.95 acres more or less. This land actually contained 12.0136 acres. We fail to see how the condemnation of property first estimated to contain 10.90 acres, later estimated to contain 11.95 acres and finally determined to contain 12.0136 acres could constitute an arbitrary and capricious taking. The North Carolina Supreme Court has emphasized that in ordinary condemnation proceedings, " 'the question of necessity and of the proper extent of a taking is legislative and is subject to determination by such agency and in such way as the State may delegate.' [Citations omitted.]" *Highway Comm. v. Equipment Co.*, 281 N.C. 459, 470, 189 S.E. 2d 272, 278 (1972).

Finally, defendants argue that the State is estopped from condemning this land, since the State had earlier refused to purchase the land when it was offered for sale by the former owner, Bruce Jennette. Jennette and his wife conveyed the property to the partnership on 10 July 1978. Jennette's testimony indicates that prior to this conveyance, agents of the State informed him that the State did not have the money to buy the land but would be interested in acquiring the same in the future. This conduct by the State clearly does not estop the State from later acquiring the property at issue from the partnership. The State neither intentionally nor through culpable negligence induced defendants to buy the land when it earlier failed to purchase the land from Jennette because of financial inability. See *Webber v. Webber*, 32 N.C. App. 572, 232 S.E. 2d 865 (1977).

Other reasons allegedly supporting defendant's argument that the State acted arbitrarily and capriciously in condemning the land at issue have been considered by this Court and have been determined to be meritless.

Affirmed.

Judges MARTIN (Robert M.) and HILL concur.

CAROL A. THELEN v. GILBERT C. THELEN

No. 8026DC1025

(Filed 15 September 1981)

1. **Rules of Civil Procedure § 33— waiver of objection to answers to interrogatories**

Defendant waived objection to plaintiff's unsigned and unverified answers to interrogatories by failing to make a motion to strike or a motion for an order compelling proper answers, and the trial court's order could properly be based upon such answers to interrogatories.

2. **Rules of Civil Procedure § 44— authentication of foreign court order**

An order of a Maryland court was not sufficiently authenticated for admission into evidence where the order contained the signature of the clerk of the Maryland court and an attestation by the presiding judge, but neither certificate was affixed with the official seal of the Maryland court. G.S. 1A-1, Rule 44.

3. **Rules of Civil Procedure § 60— motion for relief from judgment**

A motion for a new trial made pursuant to G.S. 1A-1, Rule 60(b) is addressed to the sound discretion of the trial court, and its decision is not reviewable on appeal absent a showing of abuse of discretion.

4. **Rules of Civil Procedure § 60.2— relief from judgment—excusable neglect—meritorious defense**

The trial court properly concluded that plaintiff was entitled under G.S. 1A-1, Rule 60(b) to a new hearing on a petition under the Uniform Reciprocal Enforcement of Support Act upon the ground of excusable neglect where plaintiff was not present at the original hearing but was represented by an assistant district attorney pursuant to G.S. 52A-10.1; the assistant district attorney made only a pro forma appearance in which he called the case for trial and presented the written record to the court; the neglect of the assistant district attorney was not imputed to plaintiff since plaintiff had a right to assume that her interests would be protected by the district attorney's office, she received no notice of the hearing, and she had no indication of the need for personal action on her part; and plaintiff presented sufficient allegations to raise *prima facie* a meritorious defense upon a new hearing in that she alleged a need for increased support based upon rising expenditures for her minor children, and she alleged an incorrect representation of her financial circumstances and those of defendant at the original hearing as a result of the fraud of the defendant and neglect of her own attorney.

APPEAL by defendant from *Bennett, Judge.* Judgment entered 23 May 1980 in District Court, MECKLENBURG County. Heard in this Court of Appeals 29 April 1981.

Plaintiff and defendant were divorced by order filed 13 March 1978 in the Circuit Court for Montgomery County, Mary-

land. Plaintiff was awarded custody of the two minor children of the parties. Incorporated into the divorce decree was a separation agreement which provided that defendant pay to plaintiff the sum of $800 for support for herself and the minor children. Subsequent to the divorce defendant moved to Mecklenburg County, North Carolina.

On 5 February 1979 in Howard County, Maryland, plaintiff initiated, by petition under the Uniform Reciprocal Enforcement of Support Act (hereinafter "URESA"), an action alleging that defendant had failed to provide reasonable support since November of 1978 and requesting support from the defendant in the amount of $1,000 per month. The petition was transmitted to the Mecklenburg County Clerk of Court, and on 27 February 1979 defendant was served by the Mecklenburg County Sheriff's Department with notice of a show cause hearing to be held in the Mecklenburg County District Court (trial court) on 6 March 1979. Defendant employed private counsel to represent him in this matter, and the hearing was continued. Defendant then filed an answer to the petition, alleging, among other things, a change of circumstances justifying a decrease in support payments and breach of the separation agreement by plaintiff. Extensive interrogatories and a request for production of documents were served on plaintiff. Pursuant to a trial court order, the Maryland State Attorney for Howard County submitted answers to the interrogatories and produced certain documents as requested.

On 12 July 1979 a hearing was held on plaintiff's URESA petition, and the trial court entered an order on the same day. The trial court found that defendant was earning substantially less money than at the time of the entry of the original support decree and that expenses for maintenance of the minor children had decreased since March of 1978. The trial court found that the above events constituted a substantial and material change of circumstances which would permit a reduction in support payments and ordered the defendant to make future child support payments in the total amount of $400 a month. The trial court also determined that defendant was not liable for any arrearages in support payments.

On 20 December 1979 plaintiff filed a motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure, asking

that the court set aside the 12 July 1979 order on grounds of mistake, inadvertence, surprise and excusable neglect on the part of her attorney and on grounds of fraud, misrepresentation and other misconduct of the defendant. In her motion, plaintiff alleged, in pertinent part, (1) that she was not notified of the 12 July 1979 hearing; (2) that she was not represented by the Office of the District Attorney of Mecklenburg County at the hearing, as required by G.S. 52A-10.1; (3) that this failure of representation by the district attorney constituted neglect of counsel and she should not be prejudiced by this neglect; (4) that defendant had presented to the court information regarding the parties' respective financial situations which was false and could be refuted by plaintiff at a proper hearing; (5) that she is entitled to support arrearages by orders of the Maryland courts; and (6) that she has valid defenses to the arguments raised by defendant. Attached to plaintiff's motion were copies of orders entered in the Circuit Court of Howard County, Maryland, which ordered defendant to pay to plaintiff arrearages in child support of $3,900 by Order dated 8 March 1979 and $4,479 by judgment dated 4 April 1979.

On 12 March 1980 a hearing was held on plaintiff's motion. At the hearing the attorney for defendant, Mr. William K. Diehl, Jr., testified, in pertinent part, that he personally did not give the plaintiff any notice of the 12 July 1979 hearing and could not recall if he specifically notified plaintiff's Maryland attorney as to the hearing date. He could not recall whether anyone representing plaintiff's interest was present in the courtroom for the hearing, unless it was someone who called the case, submitted documents and left. Mr. Diehl did not recall participation by the district attorney at the hearing. He stated that this particular URESA action was handled in a typical manner for this type of case. Although defendant was not called as a witness, he was in the courtroom and tendered to the court for cross-examination. No one on behalf of plaintiff requested a continuance of the hearing. Mr. Diehl stated that he did not notify the lawyer from Maryland about the 12 July proceeding because no one had ever indicated to him that they desired to participate in the hearing on behalf of the plaintiff.

On 23 May 1980 the court entered the following order:

A hearing was held in this matter on March 14, 1980, on petitioner's Rule 60(b) motion to set aside judgment entered on July 12, 1979. Based upon evidence presented at that hearing and matters of record appearing in the file (including affidavits of both parties, insofar as admitted into evidence, and petitioner's answers to interrogatories of the respondent),

the Court makes the following findings of fact:

1. This URESA matter was duly calendared and heard on July 12, 1979, and based on that hearing an order was entered setting child support to be paid by respondent at $400.00 per month.

2. At the time that hearing was held there existed in the State of Maryland two prior orders then in effect between the parties, one dated March 8, 1979, ordering payment by respondent of $3,900.00 in arrearages and one dated March 13, 1978, setting support payments for the petitioner and children at $800.00 per month. The July 12, 1979, order specifically denies recovery of any arrearage.

3. An attorney from the Mecklenburg County District Attorney's office was present at the hearing. As respondent's attorney testified in this motion hearing, the district attorney did his or her "usual job" at the hearing—specifically calling the case for trial and presenting the written record to the court. No further evidence was presented in behalf of the petitioner.

4. Petitioner was not present at the hearing, and no one other than the district attorney appeared in her behalf.

5. At the time of the hearing, petitioner was represented in this matter by a Maryland attorney. Whether that attorney had notice of the July 12, 1979, hearing is not clear from the evidence. Petitioner, herself had no notice of the July 12, 1979, hearing and was afforded no opportunity to appear and testify in her own behalf or present other additional evidence and argument.

Respondent's attorney testified at this motion hearing that he did not inform petitioner's Maryland attorney of the

July 12, 1979 hearing and did not know that the case was to be heard himself until he came to court on July 12. Thus, while petitioner was represented by at least two attorneys at the time, one did not appear for the hearing, the other (Mecklenburg District Attorney) appeared on essentially a pro forma basis, and neither informed the petitioner of the hearing.

6. No one appearing at the July 12, 1979, hearing requested a continuance so that petitioner could be afforded an opportunity to appear and present evidence.

7. Petitioner's verified motion, insofar as it is admitted to evidence, her responses to interrogatories, respondent's affidavit of July 12, 1979, and other pleadings appearing of record reveal that petitioner has a meritorious defense to the allegations of the respondent and the findings in the court's order of July 12, 1979, and had such a defense on that date.

8. The record reveals that prior to July 12, 1979, the petitioner pursued this matter with due diligence and proper care under the circumstances.

The Court therefore concludes as a matter of law that:

1. Failure of the district attorney's office to perform anything more than a pro forma service in appearing for the petitioner at the July 12, 1979, hearing, and the failure of either the district attorney's office or petitioner's Maryland attorney (or both) to actually notify her of the July 12, 1979, hearing constitutes neglect on the part of petition's [sic] attorneys, or either of them, which is not imputable to the petitioner. Petitioner's failure to appear at the hearing to present her case is, therefore, excusable neglect.

2. Under Rule 60(b) of the North Carolina Rules of Civil Procedure, petitioner is entitled to relief from the order of July 12, 1979, and to a rehearing on the issues joined by the pleadings. (*DISHMAN v. DISHMAN*, 37 N.C. App. 543 (1978); *NORTON v. SAWYER*, 30 N.C. App. 420 (1976).

It is therefore ORDERED that the order issued July 12, 1979, is hereby set aside and this matter is to be recalen-

dared for hearing on the merits of the pleadings within 39 days of this order.

This the 23rd day of May, 1980.

s/ WALTER H. BENNETT, JR.
District Court Judge

From this order, defendant appeals.

Stack and Stephens, by Richard D. Stephens, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., for defendant-appellant.

BECTON, Judge.

[1] Defendant initially assigns error to the trial court's reliance upon certain evidence in its decision to grant plaintiff's Rule 60(b) motion and set aside the prior order. He first argues that plaintiff's answers to interrogatories were an inappropriate basis for the trial court's 23 May 1980 ruling since the answers were unsigned and unverified as required by G.S. § 1A-1, Rule 33(a). However, we note that the record reveals that these documents were received by defendant sometime after 18 June 1979 and were considered by the court in the prior order of 12 July 1979. We can find no evidence of a motion to strike nor a motion for an order compelling proper answers, pursuant to G.S. 1A-1, Rule 37(a), made by defendant at any time during these proceedings. Under these circumstances, we deem that any objection to form by defendant has been waived. *Greene v. United States*, 447 F. Supp. 885 (N.D. Ill. 1978); *cf. Harrington Mfg. Co. v. Powell Mfg. Co.*, 26 N.C. App. 414, 216 S.E. 2d 379, *cert. denied* 288 N.C. 242, 217 S.E. 2d 679 (1975), (absent some overriding constitutional privilege defendant waived its right to object to interrogatories by failing to serve answers or objections to particular questions within time period specified by G.S. 1A-1, Rule 33). The answers to interrogatories, then, formed sufficient bases upon which the trial court reached its conclusions.

[2] Defendant next excepts to the court's reliance upon the 8 March 1979 order of the Maryland court, which awarded arrearages of $3,900 in support payments to plaintiff. He argues

that this document was not sufficiently authenticated to be considered by the trial court in its decision. The document in question bears the signature of the Clerk of the Circuit Court for Howard County, Maryland and an attestation by the presiding judge but neither certificate is affixed with the official seal of the Circuit Court of Howard County. Defendant is correct—this document does not satisfy G.S. 1A-1, Rule 44 which mandates the requirements for authentication of an out-of-state official record. However, we do not find prejudicial error. "When findings that are unchallenged, or are supported by competent evidence, are sufficient to support the judgment, the judgment will not be disturbed because another finding, which does not affect the conclusion, is not supported by evidence." *Dawson Industries, Inc. v. Godley Construction Co.*, 29 N.C. App. 270, 275, 224 S.E. 2d 266, 269, *disc. review denied*, 290 N.C. 551, 226 S.E. 2d 509 (1976). Although the trial court may have erred in its reliance upon this unauthenticated document, we hold the grant of a new trial can be sustained upon the answers to interrogatories which were sufficient to support the trial court's order.

[3] By his remaining assignments of error, defendant contends that plaintiff failed to establish any entitlement to relief under Rule 60(b) and the court therefore erred in granting her a new hearing. A motion for a new trial, made pursuant to G.S. 1A-1, Rule 60(b), is addressed to the sound discretion of the trial court and its decision is not reviewable on appeal absent a showing of abuse of discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). The trial court's findings of fact are conclusive on appeal, if supported by competent evidence, and our review is limited to the correctness of the conclusions of law derived from the facts found. *Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 219 S.E. 2d 787 (1975).

[4] The trial court concluded, from the facts found, that plaintiff was entitled to a new hearing upon the ground of excusable neglect. G.S. 1A-1, Rule 60(b)(1). The general standards for setting aside an adverse judgment in a situation alleged to have been brought about by the negligence of the complaining party's attorney were set out in *Dishman v. Dishman*, 37 N.C. App. 543, 547, 246 S.E. 2d 819, 822-823 (1978), as follows:

> What constitutes "excusable neglect" depends on what may be reasonably expected of a party in paying proper at-

> tention to his case under all the surrounding circumstances. When a litigant has not properly prosecuted his case because of some reliance on his counsel, the excusability of the neglect on which relief is granted is that of the litigant, not of the attorney. The neglect of the attorney will not be imputed to the litigant unless he is guilty of inexcusable neglect. The law does not demand that a litigant in effect be his own attorney, when he employs one to represent him. The litigant must exercise proper care. But the litigant who employs counsel and communicates the merits of his case may reasonably rely on his counsel and counsel's negligence will not be imputed to him unless he has ample notice either of counsel's negligence or of a need for his own action. (Citations omitted.)

We hold that the facts found by the trial court fully support its conclusion of excusable neglect. The actions of the district attorney for Mecklenburg County, appointed by G.S. 52A-10.1 to represent plaintiff in this hearing, did not constitute adequate representation of a client's interests as required by law. An attorney owes to his client the duty to employ his best efforts in the prosecution of the litigation entrusted to him. *Petrou v. Hale*, 43 N.C. App. 655, 260 S.E. 2d 130, *disc. review den.* 299 N.C. 332, 265 S.E. 2d 397 (1979). "[T]he strength of the attorney's role as advocate is crucial to the success of our judicial system: his duty vigorously to represent his client requires him to present everything admissible that favors his client and to scrutinize by cross-examination everything unfavorable." *State v. Staley*, 292 N.C. 160, 161, 232 S.E. 2d 680, 682 (1977). The professional obligation of the district attorney, as appointed counsel, to his client and the court is equivalent to that of privately retained counsel. *Cf., State v. Aycoth*, 272 N.C. 48, 157 S.E. 2d 655 (1967) (discussing professional obligation of court-appointed counsel to his client). The statutory appointment of the "official who prosecutes criminal actions for the State" to represent the obligee in URESA proceedings is not just an empty formality but is designed to guarantee to the complainant effective assistance of counsel in this State. G.S. 52A-10.1; *cf. State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976) (discussing right to appointed counsel of indigent criminal defendant). What constitutes proper representation of the obligee by the appointed attorney under G.S. 52A-10.1

cannot be defined by rigid rules but must be determined by the circumstances and necessities of each case. In the case at hand, we hold that the pro forma appearance and presentation of the record to the trial court by the Mecklenburg County district attorney did not meet the standard of competence and diligence required of counsel for the appropriate representation of plaintiff.

We find no reason to impute the neglect of the district attorney in this matter to the plaintiff. Here plaintiff filed her petition in Maryland and entrusted her affairs to local and state government officials who were charged with certain uniform statutory duties. She had a right to assume that her interests would be protected by the District Attorney's office. Plaintiff received no notice of the 12 July 1979 hearing and the record is unclear as to the notice given plaintiff's Maryland attorney. Plaintiff had no indication of the need for personal action on her part or that her interests would not be safeguarded by the officials appointed to represent her.

Even though the facts found justify the court's conclusion of excusable neglect, the judgment should not have been set aside unless the plaintiff also had a meritorious defense to defendant's allegations. *Doxol Gas v. Barefoot,* 10 N.C. App. 703, 179 S.E. 2d 890 (1971). At a hearing for a Rule 60(b) motion it is not required that a meritorious defense be proved, only that a *prima facie* defense exists. *Wynnewood Corp. v. Soderquist,* 27 N.C. App. 611, 219 S.E. 2d 787 (1975). In her interrogatories and in her verified petition, with accompanying documents, plaintiff alleges her need for increased support based upon rising expenditures for the minor children. She additionally alleges that an incorrect representation of her financial circumstances and those of defendant was presented to the trial court as a result of the "fraud" of the defendant and neglect of her own attorney. We find that plaintiff has presented sufficient allegations to raise, *prima facie,* a meritorious defense upon a new hearing.

We find no error in the trial court's order setting aside the order of 12 July 1979 and directing a new hearing on the merits of the pleadings in this matter. Accordingly, we

Affirm.

Judge MARTIN (Robert M.) and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. JAMES HARVEY LETTERLOUGH

No. 8119SC198

(Filed 15 September 1981)

1. **Criminal Law § 91— speedy trial—delays caused by mental examination, State's continuance, and withdrawal of counsel**

Time delays in trial caused by (1) a 20-day continuance requested by the State to prepare for trial, (2) a mental examination for defendant, and (3) appointment and preparation of new counsel for defendant were properly excluded from computation of the statutory speedy trial period. Had defendant been concerned that his right to a speedy trial was being violated, he should have insisted on an earlier trial date rather than agreeing to a later one. G.S. 15A-701(b)(1), (7).

2. **Criminal Law § 86.8— exclusion of testimony—failure to show prejudice**

While cross-examination of a State's witness as to whether he had been charged in the present case should have been allowed for the purpose of showing bias, the exclusion of the witness's answer was not prejudicial error as (1) the record was devoid of any clue as to what the witness's answer would have been and (2) a potential inference of bias by the witness was negated through other questions.

3. **Criminal Law § 34.4— inference of earlier offense—admissibility of testimony**

Testimony elicited on redirect that a witness first met defendant when the witness was "on the chain gang" was admissible even though it incidentally bore on defendant's character as it was relevant for a purpose other than proving character.

APPEAL by defendant from *Albright, Judge.* Judgment entered 2 October 1980 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 2 September 1981.

Defendant was indicted for the murder of Sandra Glasgow Fox (aka Sandra Fox Letterlough) on 4 March 1980. From a verdict of guilty of murder in the second degree, defendant appeals.

The evidence disclosed that the defendant, James Harvey Letterlough, had known Sandra Fox for approximately three years. The two worked at the same company and often rode to work together. For some time prior to January 1980 Sandra had been living with the defendant. However, early in January she left him. At trial Sandra's sister testified that on 17 January 1980 the defendant had come to the family home where Sandra was living. He ordered Sandra to "get her stuff" and stated that "he would make her go with him."

On the morning of 22 January 1980, defendant and two other men picked Sandra up for work. This was the last time she was seen alive by members of her family.

State's witness David Ledwell testified that one evening in late January the defendant came to his home. Defendant informed Mr. Ledwell that he had killed Sandra and that he needed Ledwell's help to bury the body. Defendant had a gun in his belt. Under the circumstances Ledwell decided that he should comply with defendant's demand. He accompanied the defendant to an abandoned house near defendant's home. Sandra's naked body was lying on the ground. Ledwell saw blood on her side. Using a pick and shovel brought by defendant, the pair dug a shallow grave and placed Sandra's body in the grave. After defendant had poured gasoline over her, they covered the body with dirt. Defendant informed Ledwell that he had killed Sandra because he had "caught her running around" on him. Several days later defendant told Ledwell that he had thrown the pick and shovel in the woods and buried Sandra's clothes.

Approximately three weeks later Mr. Ledwell, worried about the incident, related his experience to several friends. He took them to the abandoned house and pointed out the grave. The police were called and the body removed. An autopsy, performed 15 February 1980, revealed that death resulted from two stab wounds in the left chest. The medical examiner estimated that Sandra had been dead about three weeks. The pick and shovel and Sandra's clothes were recovered.

Defendant offered no testimony on his own behalf.

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

Oldham & Alexander, by C. Pierre Oldham, for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant in his brief presents three assignments of error for our consideration.

[1] First, he assigns as error the trial court's denial of his motion to dismiss the indictment for failure to grant a speedy trial pursuant to N.C.G.S. 15A-701 and 15A-703.

The pertinent dates are as follows:

5 March 1980	—Indictment
28 April 1980	—State moved for a continuance pursuant to N.C.G.S. 15A-701(b)(7). Motion granted. Continuance set to end 19 May 1980, next regularly scheduled session of Randolph County Criminal Superior Court.
14 May 1980	—Defendant moved for commitment to a state mental health facility for a mental exam. Motion granted 15 May 1980.
21 May 1980	—Defendant was returned from Dorothea Dix Hospital.
2 June 1980	—Next regularly scheduled session of Randolph County Criminal Superior Court.
2 July 1980	—Defendant's privately retained counsel moved to withdraw. Request granted 3 July 1980.
14 July 1980	—Attorney appointed for defendant. Defense counsel agreed that 8 September or 29 September 1980 would be a satisfactory trial date, allowing both parties time for trial preparation.
29 September 1980	—Trial began.

In his order on defendant's motion to dismiss pursuant to N.C.G.S. 15A-701 and 15A-703, Judge Albright found, as a matter of law, that the running of time for purposes of the statute began 5 March 1980 and concluded on 28 September 1980. The total time between indictment and trial was thus 207 days, well outside the 120 days mandated in the statute.

Judge Albright excluded from computation the period between 28 April and 2 June 1980. Defendant assigns as error the exclusion of the period between 28 April and 19 May 1980, the

time allowed on the state's motion for a continuance. Defendant does not argue against the exclusion of time from 14 May to 21 May 1980 while he was undergoing mental examination. At the outset, then, the 19 May date is of no relevance. Defendant was confined at Dorothea Dix hospital on that date and could not be present for trial. We will, however, discuss the appropriateness of Judge Albright's excluding the full period between 28 April and 2 June 1980.

N.C.G.S. 15A-701(b)(7) provides that the time granted for a continuance is to be excluded where the judge finds that the ends of justice served by the continuance outweigh the best interests of the public and the defendant in a speedy trial. It is not the purpose of the Speedy Trial Act to force the state to trial absent essential witnesses or proper preparation. "Section 15A-701(b)(7) should be given a liberal and commonsense construction to avoid injustice either to the defendant or to the public. The safeguard in the Act requiring that the judge set forth in the written record his reasons for granting the continuance will prevent abuse of judicial discretion." Price, *The North Carolina Speedy Trial Act*, 17 Wake Forest L. Rev. 173, 203 (1981).

Judge Lupton, in granting the continuance, found that a twenty-one day extension of time was both reasonable and necessary for trial preparation. We agree.

Under N.C.G.S. 15A-701(b)(1)(a), any period of delay resulting from a mental examination is excluded in computing the time within which trial must begin. In *State v. Harren*, 302 N.C. 142, 273 S.E. 2d 694 (1981), the Court held that for purposes of allowing a defendant to undergo mental examination, the time excludable from computation runs from the date of entry of the order of commitment to the date the mental examination report becomes available to both the defendant and the state. The record does not indicate when the report became available. However, Judge Albright was clearly correct in holding that the period of exclusion should run until 2 June 1980, the date of the next regularly scheduled session of criminal superior court after defendant's release on 21 May. In fact, had the report not been available on 2 June, a further exclusion of time would have been warranted. *State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515 (1981). To do otherwise would deprive the defendant of the benefit of the results of the medical examination he requested.

Defendant would allow for the exclusion of some period of time for new counsel to be appointed and to prepare his defense. Defendant objects specifically to the exclusion of time between 8 and 29 September.

In *State v. Bradsher*, 49 N.C. App. 507, 271 S.E. 2d 915 (1980), this Court held that the trial court correctly excluded from computation the time during which withdrawal of counsel and appointment of new counsel took place. In *State v. Rogers*, 49 N.C. App. 337, 271 S.E. 2d 535 (1980), this Court held that the time necessary for acquiring and preparing new counsel was appropriately omitted under N.C.G.S. 15A-701(b)(1).

Defendant is entitled to competent and effective representation of counsel. *State v. Hensley*, 294 N.C. 231, 240 S.E. 2d 332 (1978). Between 3 July (withdrawal of counsel) and 14 July (appointment of new counsel) defendant was not represented by counsel. Judge Albright could have but did not exclude this period of time in his order.

Two trial dates were suggested as being convenient for both parties, 8 September and 29 September. By stipulation the state and newly appointed defense counsel agreed to a trial date of 29 September. Had defendant been concerned that his right to a speedy trial was being violated, he should have then insisted on trial being set for 8 September. After agreeing to 29 September, he may not now complain of delay resulting from his own reticence while trial dates were being discussed. Moreover, Judge Albright found that seventy-six days represented a reasonable period of time for defense counsel to prepare for trial. We agree.

Thus, from the total of 207 days, Judge Albright excluded from computation a period of thirty-four days (28 April to 2 June 1980) and seventy-six days (14 July to 28 September 1980) for a total of 110 days. He concluded that pursuant to N.C.G.S. 15A-701 and 15A-703, defendant had been awaiting trial for ninety-seven days, well within the 120-day limit specified in the statute for indictments returned before 1 October 1980.

We hold that there is no merit to defendant's contention that Judge Albright erred in denying the motion to dismiss on the ground that a speedy trial was not afforded him.

[2] Defendant next assigns as error the trial court's limiting defendant's cross-examination of David Ledwell. Testimony was as follows:

> Q. Mr. Ledwell, have you ever been charged with anything in this crime?
>
> MR. KASTNER: OBJECTION, Your Honor.
>
> THE COURT: SUSTAINED.

It can be assumed that the thrust of defense counsel's question was to challenge the witness's credibility by showing bias; that is, Ledwell's testimony implicated him as an accessory after the fact, a situation which would make the witness potentially susceptible to state pressure or promises. When the purpose of the inquiry is character impeachment, a defendant may not be asked if he has been *charged* with a crime. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971); *State v. Long*, 14 N.C. App. 508, 188 S.E. 2d 690 (1972). However, inquiry into whether a witness is currently under indictment should be permissible when the purpose of the inquiry is to show bias. The absolute exclusion of testimony that would clearly show bias may constitute reversible error. 1 Stansbury's N.C. Evidence § 45 (Brandis rev. 1973); *State v. Roberson*, 215 N.C. 784, 3 S.E. 2d 277 (1971).

We find, however, that while cross-examination of Ledwell concerning any charges brought against him in the case should have been allowed, the error was not prejudicial and does not merit a new trial.

This record is devoid of any clue as to what Ledwell's answer would have been had the state's objection not been sustained. The defendant offers the case of *Alford v. United States*, 282 U.S. 687, 75 L.Ed. 624 (1939), for the proposition that the answer to defense counsel's question is immaterial. This may be the case in determining whether testimony was properly excluded at the time of the objection. However, in order for the propriety of the exclusion to be reviewed on appeal, "the record must sufficiently show what the purport of the evidence would have been." Stansbury, *supra*, § 26. This the defendant has failed to do and the Court cannot, without more, determine that the exclusion was prejudicial. *State v. McCoy, supra; State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979).

Moreover, defense counsel was permitted, without objection, to ask Ledwell if he had been promised anything for his testimony and whether the witness himself had committed the crime for which the defendant had been charged. Ledwell replied in the negative to both questions, thus overcoming any potential inference of bias.

[3] Finally, defendant assigns as error the trial court's refusal to grant his motion for mistrial based on the following testimony elicited by the state on redirect of witness Ledwell:

> Q. Now, in answer to Mr. Oldham's question, you said that you had known Mr. Letterlough for about ten or twelve years?
>
> A. Yeah. Somewhere in there.
>
> Q. Where were you when you were—when you first met Mr. Letterlough?
>
> A. When I first met Harvey?
>
> Q. Where were you?
>
> A. When I first met him and I knowed him good, I was on the chain gang.
>
> Q. All right, now—
>
> MR. OLDHAM: OBJECTION, Your Honor and MOVE TO STRIKE.

At the threshold of defendant's assignment of error is the rule that unless the accused testifies as a witness or produces evidence of good character to repel the charges against him, the state may not introduce evidence of defendant's bad character. Stansbury, *supra*, § 104. There is, however, an exception to this rule. Evidence relevant for some purpose other than proving character may be introduced although it incidentally bears on defendant's character. *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979); *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978); *State v. Watson*, 287 N.C. 147, 214 S.E. 2d 85 (1975); *State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

We note first that Ledwell's testimony that *he* was on the chain gang when he first met defendant is not direct evidence

that defendant himself was on the chain gang. Moreover, the evidence was not offered to show defendant's propensity to commit a crime similar to the one for which he was on trial. The state elicited the information to establish the existence of a relationship which would make plausible defendant's coming to Ledwell for help to bury the body. Evidence incompetent for one purpose may be admissible for another proper purpose. Stansbury, *supra*, § 79.

Nor was the inference arising from the testimony of such force as to prejudicially influence the jury in their consideration of defendant's innocence or guilt. The burden on the appellant is not only to show error, but to show prejudicial error. *State v. Sledge, supra; State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969). The record is replete with competent evidence from which the jury could find the defendant guilty.

After carefully examining the record on appeal, we conclude that the defendant received a fair trial, free from prejudicial error.

No error.

Judges MARTIN (Robert M.) and BECTON concur.

WACHOVIA BANK AND TRUST COMPANY, N.A., TRUSTEE UNDER THE WILL OF LOUIS BOUNOUS, APPELLEE v. FRANK L. BOUNOUS, INDIVIDUALLY AND FRANK L. BOUNOUS, EXECUTOR OF JUSTINE BOUNOUS, APPELLANT

No. 8025DC1206

(Filed 15 September 1981)

1. **Judgments §§ 21.1, 34.2— consent judgment—failure to conduct hearing to ascertain consent**

Absent any circumstances to put the court on notice that one of the parties does not actually consent to the judgment, a judge may properly rely upon the signatures of the parties as evidence of consent.

2. **Appeal and Error § 57.2— findings not supported by evidence—other findings support judgment**

Where, even disregarding several erroneous factual findings, there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed.

Wachovia Bank v. Bounous

APPEAL by defendant from *Crotty, Judge.* Order entered 23 July 1980 and modified and corrected 31 July 1980 in District Court, BURKE County. Heard in the Court of Appeals 29 May 1981.

Appellee claims title to certain land in Burke County as trustee, having succeeded to that office as successor to the First National Bank of Morganton, under the following language of the will of Louis Bounous:

> "I give, devise and bequeath to my sister, Gistine (Justine) Bounous, a tract of land upon which she now lives containing about 25 acres, the same being located on the South side of U.S. Highway No. 70 in Lovelady Township, Burke County, for and during the term of her natural life, and upon her death, the remainder in fee simple absolute to the First National Bank of Morganton, North Carolina, as Trustee, to be held and administered by said Trustee for the uses and purposes set forth in Article VII of this my Will."

Article VII of the will provides for the payment of trust income to the widow of Louis Bounous (Dovie Bounous), who was still living at the time of the institution of this action in 1978.

Justine Bounous died on 24 October 1977. Appellant claims title to the land as sole beneficiary under the will of his sister, Justine Bounous, asserting that Justine Bounous acquired title to the property by her actual, open, notorious, continuous, exclusive, hostile, and adverse possession of the tract from 1915 to 1977.

Shortly after the death of Justine Bounous, appellant prepared a burial plot on the tract for the interment of his sister's remains. Appellee's opposition to this proposed action by appellant led to the first civil proceeding in this matter. Appellee obtained a temporary restraining order and sought a permanent injunction to prevent appellant from burying Justine Bounous upon the tract. By consent judgment defendant and his wife Mary Bounous agreed not to bury decedent's body upon the land in question.

Soon thereafter, appellee served on appellant as executor a request for payment of past-due ad valorem taxes out of the assets of the estate of Justine Bounous, and demanded removal from the land of all personal property, including a mobile home, within thirty days. Appellant did not comply giving rise to this

present civil action. Appellee filed complaint seeking (1) payment of the past-due ad valorem taxes, (2) removal of all personal property from the premises within thirty days, or the cost including attorney's fees of such removal by appellee if appellant failed to comply, (3) damages for appellee's expenses incurred in preventing appellant's attempts to bury the remains of Justine Bounous upon the premises, and (4) costs to be taxed to appellant. Appellant answered denying the material allegations of the complaint and asserting title by devise from Justine Bounous, fee simple owner of the property at her death by adverse possession. Appellant sought a declaration of title in himself, that appellee's claim of title be forever barred, that appellee's action be dismissed, and that costs be taxed to appellee. Appellee replied denying the allegations of appellant in his counterclaim and later amended its complaint to seek damages for appellant's wrongful failure to relinquish the property in the amount of $15,000.00.

On 21 May 1980 a consent judgment was entered in District Court by the Honorable L. Oliver Noble, Jr., reciting that appellee and appellant had reached the following agreement:

(1) Appellant and his wife would execute a quit-claim deed naming appellee as grantee;

(2) Appellee was to recover $2,000.00 in satisfaction of appellant's liability, if any, under the first consent judgment settling the burial site of Justine Bounous;

(3) Appellant would remove the mobile home from the premises within sixty days and agreed not to return on penalty of contempt;

(4) Appellee was given the right to remove the mobile home if it remained on the premise beyond sixty days and appellant agreed to pay appellee's costs of removal agreeing that failure to make payment for such costs upon demand would constitute contempt;

(5) Appellant was given the right to purchase the property when and if appellee sold it for $1.00 above the highest reasonable offer; and

(6) Costs would be taxed to appellant.

Beneath the judge's signature appears the following language:

"WE CONSENT TO ENTRY OF THE FOREGOING JUDGMENT AND AND AGREE TO BE BOUND BY THE TERMS THEREOF:

WACHOVIA BANK & TRUST CO., N.A.
By: s/Ben (Illegible)
Vice-President

PATTON, STARNES & THOMPSON, P.A.
By: (ILLEGIBLE)
Counsel for Plaintiff

s/FRANK L. BOUNOUS
s/FRANK L. BOUNOUS, EXECUTOR
Executor Estate of Justine Bounous

HAIRFIELD & ROBINSON
By: s/Harold M. Robinson
Counsel for Defendants"

Nine days later appellant filed a motion for relief from the judgment under G.S. 1A-1, Rule 60(b)(6) on the grounds that (1) appellant "did not understand the nature, extent, effect and consequences of the Consent Judgment . . . ," (2) the land in question was worth in excess of $30,000 and thus the District Court lacked jurisdiction in the matter, and (3) "the trial court failed to conduct an independent hearing to make an independent determination of a factual and legal basis for the entry of this Judgment." A hearing on appellant's motion was held before the Honorable Edward J. Crotty.

MOVANT'S EVIDENCE

Appellant testified that he was almost eighty years old. He had a first grade education. He had never been declared incompetent. He understood what a check was and had a little money in a checking account. Appellant is hard of hearing. He went to see his lawyers several times, but he never talked to them because he could never hear them. He does not read, nor understand, some words. He wrote to Raleigh about title to the property and received a reply explaining adverse possession and homesteading but he did not understand it. Appellant hired a lawyer because he had

trouble hearing and he did not understand things very well. He hears a noise when someone talks, but cannot make out the words. He can hear and understand his daughter's voice better than other voices. The lawyers never told appellant what the papers he signed were until after he signed them. He assumed the papers were necessary to get his case to trial. He glanced over the papers but there were words in them that he did not understand and he failed to get any understanding of the effect of the papers. The lawyers told him nothing about the papers except where to sign. After the papers were signed, appellant wrote a check to his attorneys. He understood that the money was to go to the Bank, but he never knew what it was for.

Appellant's daughter testified that the papers were never explained to her or her parents. She was out of the room for about five minutes when the papers were signed. She understood that the $2,000.00 was to go to the Bank to get them off her daddy's back. She went to the clerk's office and read the papers after they were filed. Not until then did she realize her father had given up all claim to the land. The day the quitclaim deed was signed, Mr. Robinson did not communicate with her father, and Mr. Hairfield had a map over two hundred years old and an old deed from England showing it to her mother and father. It was never explained to her that a deed would be signed.

Mrs. Bounous testified that she had not been told what she was signing. Her husband was asleep when the papers were ready to be signed and she had to call him. She has never seen Mr. Robinson. Mr. Hairfield told her to sign a paper and she did.

NON-MOVANT'S EVIDENCE IN DEFENSE OF MOTION

Harold Robinson testified that he represented appellant in his lawsuit. He was aware of appellant's hearing difficulty. Sometimes he spoke to appellant through his daughter, and on other occasions he was able to make himself understood by speaking loudly. Even though it was difficult at times, Mr. Robinson was always able to communicate with appellant. The consent judgment at issue in this case came about after lengthy negotiations between Robinson and appellee Bank's attorney. The compromise settlement was reached with appellant's express knowledge, permission, and consent. He explained the consent judgment to ap-

pellant and to appellant's daughter. Robinson's law partner, Mr. Hairfield, repeated Robinson's explanation of the legal papers in a much louder voice immediately after Robinson had explained them. Robinson never explained to Mrs. Bounous that she would be signing a quitclaim deed that would give up any right that she may have had in the property. He did explain at length the significance of all the documents to appellant and to appellant's daughter.

The court found that the compromise settlement was negotiated by appellant's attorney, Mr. Robinson, with the permission of appellant and that appellant indicated his understanding of the terms of the agreement. He concluded that the consent judgment and quitclaim deed were knowingly signed by appellant with his informed consent after explanation of the consequences by two competent and reputable attorneys. Appellant's motion for relief from the consent judgment was denied.

Patton, Starnes & Thompson by Robert L. Thompson for plaintiff appellee.

Brewer & Brady by Robert M. Brady for defendant appellant.

ARNOLD, Judge.

[1] Appellant argues that Judge Noble erred by failing to conduct an independent hearing to ascertain the existence of actual consent on the part of all parties to the consent judgment, and that Judge Crotty in turn erred by failing to grant relief under Rule 60 based upon the lack of such investigatory hearing. The argument is meritless.

Judge Noble was presented with a document purporting to be a negotiated settlement of the parties' lawsuit. It was signed by all parties. The evidence before Judge Crotty was that the only person present when Judge Noble signed the judgment was appellee's attorney. There is no evidence that Judge Noble was ever aware of appellant's alleged lack of consent to the judgment.

"It is a settled principle of law in this State that a consent judgment is the contract of the parties entered upon the records of a court of competent jurisdiction with its sanction and approval." *Highway Comm. v. Rowson*, 5 N.C. App. 629, 631, 169 S.E. 2d 132, 134 (1969). "Persons *sui juris* have a right to make any contract not contrary to law or public policy." *Construction*

Co. v. Contracting Co., 1 N.C. App. 535, 538, 162 S.E. 2d 152, 154 (1968). "It is the general rule that one who signs a contract is presumed to know its contents . . . ." *Ellis v. Mullen*, 34 N.C. App. 367, 370, 238 S.E. 2d 187, 189 (1977).

We believe that it is beyond question that, absent any circumstances to put the court on notice that one of the parties does not actually consent thereto, a judge may properly rely upon the signatures of the parties as evidence of consent to a judgment. There was no evidence at the hearing on appellant's Rule 60(b) motion that Judge Noble had any reason to doubt the genuineness of appellant's consent. We refuse to impose upon the trial courts of this State the onerous responsibility of holding investigatory hearings to determine the genuineness of the consent of every party who signs a consent judgment. Whether appellant's advanced age and hearing impairment constitute circumstances which alter the general rule stated above will not be considered on this appeal since it does not appear that Judge Noble was ever apprised of these circumstances.

Appellant's reliance on the cases of *Owens v. Voncannon*, 251 N.C. 351, 111 S.E. 2d 700 (1959); *Lee v. Rhodes*, 227 N.C. 240, 41 S.E. 2d 747 (1947); *Lalanne v. Lalanne*, 43 N.C. App. 528, 259 S.E. 2d 402 (1979); *et al*, is misplaced. In all those cases the lack of assent of one of the parties to the judgment was manifested to the trial court *before* the judgment was signed or one of the parties failed to sign the judgment. This not being so in the case *sub judice*, these cases have no applicability to the present situation. Appellant's first argument must be overruled.

[2] Appellant next attacks the basis in competent evidence upon which the findings and conclusions of the Order of 31 July 1980 were based. The findings of the court will not be reviewed if there is any competent evidence in the record to support them. *Transit, Inc. v. Casualty Co.*, 285 N.C. 541, 206 S.E. 2d 155 (1974). An exception to a finding of fact not supported by evidence must be sustained and the finding of fact disregarded. *Harrelson v. Insurance Co.*, 272 N.C. 603, 158 S.E. 2d 812 (1968).

Appellant excepts to every material finding of fact in the Order. We have examined all of appellant's exceptions and believe that three of them must be sustained.

In finding of fact No. 7 the court found that Attorney Robinson had a reputation for being painfully honest. No reputation evidence was offered at the hearing. There was no evidence upon which the court could properly base a finding as to Robinson's reputation for honesty. This portion of finding of fact No. 7 must be disregarded.

In its conclusions of law, the court made the additional finding that the significance of the quitclaim deed was explained to appellant "by two competent and reputable attorneys." Again, there was no evidence before the court that the attorneys were either competent or reputable. This portion of the court's conclusions must also be disregarded.

In finding of fact No. 10 the court found that appellant's wife signed the quitclaim deed "to insure that valid non-warranty title would be conveyed by said deed." The evidence of the movant was that Mrs. Bounous did not know what she had signed. The only evidence for the non-movant was Robinson's statement that he "did not advise Mrs. Bounous that she would be signing a quitclaim deed that would give up any right that she may have in the property." There was, therefore, no evidence to support this finding and it must be disregarded.

The only issue before Judge Crotty on this motion was whether appellant was entitled to relief from the consent judgment. It was therefore immaterial whether the lawyers who explained the contents of the judgment were "painfully honest," "competent," or "reputable." It was similarly immaterial whether Mrs. Bounous was advised of the significance of the quitclaim deed. It was the judgment that was before the court, and Mrs. Bounous did not sign the judgment nor was she a party to the action. We hold that, even disregarding these three erroneous factual findings, there were sufficient findings of fact based on competent evidence to support the trial court's conclusions of law and order.

That portion of the proceedings at the hearing of appellant's Rule 60(b) motion contained in the record reflects no evidence or argument that appellee's action exceeded the jurisdictional amount for cases tried in District Court. At any rate, no argument is brought forward on appeal and we deem this ground for

relief from judgment abandoned at this point, if not earlier abandoned at the hearing.

Affirmed.

Judges MARTIN (Robert M.) and HILL concur.

CATAWBA ATHLETICS, INC. v. NEWTON CAR WASH, INC.

No. 8025SC917

(Filed 15 September 1981)

1. Vendor and Purchaser § 2— option to purchase—time for giving notice

Where a contract provided that a lease and option to purchase should terminate on 30 April 1978 and required the tenant, in order to exercise the option, to "give the landlord thirty (30) days written notice of his intention to exercise said option," the tenant's notice of intent to exercise the option could not be given at any time within the period of the lease but had to be given at least 30 days before the termination date, and notice by letter dated 4 April 1978 was ineffective to exercise the option.

2. Vendor and Purchaser § 1.4— repudiation of option—no waiver of notice

Defendant optionor did not waive the written notice requirement of an option to purchase by informing plaintiff optionee prior to the date the notice of intent to exercise the option had to be given that it did not intend to comply with the terms of the option.

APPEAL by plaintiff from *Ervin, Judge.* Judgment entered 9 June 1980 in Superior Court, CATAWBA County. Heard in the Court of Appeals 6 April 1981.

Plaintiff alleges that it and defendant entered into a written lease and option to purchase agreement on 31 May 1973 whereby defendant-landlord leased to plaintiff-tenant real property located at 103 South Avenue, Newton, North Carolina, and that the option to purchase gave plaintiff the right to purchase the leased property for a purchase price of $50,000 with the stipulation that all sums paid as rent would be deducted from the purchase price. Plaintiff took possession of the leased property on 31 May 1973 and operated a sporting goods business upon the premises. At the time this action was brought plaintiff still occupied the leased premises and operated its business therein.

Plaintiff further alleged that sometime in March 1977 its president, Howard Houck, went to the office of defendant's president, Claude S. Abernathy, Jr., to discuss plaintiff's intention of exercising the option to purchase. At this meeting, Abernathy informed Houck that defendant did not intend to honor the terms of the lease and option to purchase agreement. Abernathy allegedly told plaintiff that defendant would not sell the property for the stipulated sum less the rental payments which had been received from plaintiff, because he, Abernathy, had not understood when he executed the agreement that the contract so provided.

Plaintiff alleged that on 4 April 1978 plaintiff sent defendant written notice of its intention to exercise the option to purchase and that it stood ready, willing and able to tender the agreed upon purchase price. Subsequently, defendant advised plaintiff that it had received its notice of its intention to exercise its option on 6 April 1978, that the written lease and option to purchase would not be honored, and that plaintiff should vacate the premises no later than midnight on 30 April 1978 when the lease terminated. Following this notice plaintiff once again tendered the purchase price stipulated in the contract to defendant, and it was not accepted.

Plaintiff asked for specific performance of the lease and option to purchase contract and for an order temporarily restraining defendant from interfering with plaintiff's possession or management of its business pending the final hearing in the action.

Plaintiff's request for a temporary restraining order was granted by court order entered 25 April 1978.

On 4 May 1978, a consent order was entered in this matter. By virtue of this order plaintiff agreed to continue paying $300 per month as rental for the property in question. This money was to be placed in an escrow account held by the Clerk of the Superior Court pending the final determination of the controversy. Thereafter, the balance in the account would be distributed in accord with the outcome of the case. In the meantime plaintiff could occupy and conduct its busines out of the disputed premises.

As a defense to plaintiff's action defendant averred that plaintiff had not properly given written notice of its intention to

exercise the option to purchase within the time specified in their contract. Defendant maintained that the option to purchase had lapsed due to the fact that it had not been exercised in a timely manner.

Defendant also asserted a counterclaim against plaintiff. Defendant insisted that because plaintiff had not vacated the leased premises at the termination of the lease, and following repeated demand to do so, plaintiff had been damaged by being deprived of the possession of its premises. As a result defendant claimed it had been damaged to the extent of the rental value of the property of $500 per month.

Defendant asked that the court adjudge him entitled to immediate possession of the premises in question; that the court order the sheriff to eject plaintiff from its premises; that it be awarded damages due to plaintiff's unlawful retention of the property; that defendant be awarded damages in an amount equivalent to the fair rental value of the property from 1 May 1978; that the amounts collected in lieu of rental and held in escrow by the clerk of court be turned over to it; and that the court's temporary injunction restraining defendant be dissolved.

Plaintiff filed a reply to defendant's answer on 20 September 1978. In its reply plaintiff averred that defendant was estopped and had waived the defense of untimely notice under the lease agreement. Plaintiff alleged that this waiver occurred when Abernathy advised Houck in March of 1977 that defendant did not intend to honor the lease and option to purchase agreement. Plaintiff also pleaded the consent order of 28 April 1978 in defense of defendant's counterclaim for damages based on plaintiff's alleged illegal retention of possession of the leased premises.

Defendant filed a motion for judgment on the pleadings on 17 March 1980. Subsequently, on 23 April 1980 plaintiff filed its response to defendant's motion for judgment on the pleadings and combined with it its own motion for summary judgment. In its motion for summary judgment plaintiff averred that the single question before the trial court was whether its option was exercised within the time framework of the lease option which, by the exact terms of the agreement, could be exercised at any time between 31 May 1973 and 30 April 1978. Plaintiff contended that the 30 days written notice of intent to exercise the option to purchase could be given at any time before the expiration of the lease.

The trial court heard arguments on defendant's motion for judgment on the pleadings and plaintiff's motion for summary judgment on 25 April 1980. Upon considering these motions, the trial court properly treated defendant's motion for judgment on the pleadings as a motion for summary judgment as matters outside of the pleadings had been presented for consideration. By its order entered 9 June 1980, the trial court granted partial summary judgment for defendant on all issues except that of damages. Plaintiff's motion for summary judgment was denied. The trial court ordered, among other things, that the temporary injunction which was entered against defendant in the consent order, which enjoined defendant from evicting plaintiff from the leased premises, be dissolved; that defendant be given possession of the premises in question; that the sum paid into and held in escrow in lieu of rental be paid to defendant; and that the remaining issue of damages be tried by a jury. Plaintiff appealed from the court's order.

Lefler, Gordon and Waddell, by Lewis E. Waddell, Jr., for plaintiff appellant.

Thomas W. Warlick and Isenhower, Long, Gaither and Wood, by J. Michael Gaither, for defendant appellee.

MORRIS, Chief Judge.

[1] The major question presented for review is whether plaintiff gave timely notice of its intention to exercise its option to purchase the property in question. To answer this question requires construction of the contract. The pertinent portions of the lease and option to purchase provide:

> I. This lease and option shall begin as of the date hereof and, unless sooner terminated as herein provided, shall exist and continue until the 30th day of April, 1978.
>
> . . .
>
> IX. The Tenant is hereby given the option to purchase the leased property owned by the Landlord at any time during the term of this lease or at the end of the lease period at a price of Fifty Thousand ($50,000) Dollars. Such option shall be exercised by the Tenant by written notice to the Landlord at his usual place of business or at such other address as the Landlord may provide in writing to the Tenant.

. . .

(e) The election of the Tenant to exercise this option must be evidenced by a notice in writing addressed to the Landlord, mailed to the office of the Landlord, or to such other place as the Landlord may, from time to time, designate by notice in writing to the Tenant. If the Tenant elects to exercise the option, he shall give the landlord thirty (30) days written notice of his intention to exercise said option.

(f) If the Tenant fails to exercise said option, the lease will terminate and the Tenant will surrender and vacate the leased property within such period provided above.

When the language of a contract such as this lease and option to purchase is clear and unambiguous, the legal effect of the contract is a matter of law for the court. *Kent Corporation v. Winston-Salem*, 272 N.C. 395, 158 S.E. 2d 563 (1968); *Bank v. Corbett*, 271 N.C. 444, 156 S.E. 2d 835 (1967). If the contract is clearly expressed, it must be enforced as it is written, and the court may not disregard the plainly expressed meaning of its language. *Barham v. Davenport*, 247 N.C. 575, 101 S.E. 2d 367 (1958). Options, "being unilateral in their inception, are construed strictly in favor of the maker, because the other party is not bound to performance, and is under no obligation to buy. It is generally held that time is of the essence in such contract, and the conditions imposed must be performed in order to convert the right to buy into a contract for sale." *Winders v. Kenan*, 161 N.C. 628, 633, 77 S.E. 687, 689 (1913); quoted in *Carpenter v. Carpenter*, 213 N.C. 36, 40, 195 S.E. 5 (1938); and *Ferguson v. Phillips*, 268 N.C. 353, 355, 150 S.E. 2d 518 (1966). To render an option to purchase enforceable there must be an acceptance by the optionee which is in accord with all of the terms specified in the option. *Trust Co. v. Medford*, 258 N.C. 146, 128 S.E. 2d 141 (1962); *Eward v. Kalnen*, 14 N.C. App. 619, 188 S.E. 2d 742 (1972); *Builders, Inc. v. Bridgers*, 2 N.C. App. 662, 163 S.E. 2d 642 (1968).

The lease and option to purchase under scrutiny specify that, "[t]he election of the Tenant to exercise this option must be exercised by a notice in writing addressed to the Landlord . . . . If the Tenant elects to exercise the option, he shall give the landlord thirty (30) days written notice of his intention to exercise said option." Plaintiff submits that this language permitted it to accept the offer contained in the option by giving defendant the required

written 30-day notice at any time during the entire option period and "up to the last day of same." The lease and option to purchase specify that the lease and option to purchase began on 31 May 1973, and unless sooner terminated, existed and continued "until the 30th day of April, 1978." The uncontradicted evidence reveals that plaintiff mailed defendant written notice of its intention to exercise its option by letter dated 4 April 1978. Plaintiff argues that this notice was in compliance with the contract because it was mailed before the expiration of the lease and option to purchase on 30 April 1978, it being plaintiff's position that notice to exercise the option could be given any time within the period of the lease, even up to the date of its termination on 30 April 1978.

We disagree. The written notice given by plaintiff was insufficient to constitute a valid acceptance of defendant's offer to sell the property contained in the lease and option to purchase. The contract clearly specifies that to exercise the option the tenant must give the landlord 30 days written notice of its intention. Under the contract the lease and option to purchase both terminated on 30 April 1978. In order properly to exercise the option to purchase plaintiff must have given defendant written notice at or before 30 March 1978.

The notice requirement must have reference to some future date or event. To have any significance, the notice requirement must mean that the notice must be given 30 days before plaintiff is entitled to purchase. Since the option and, thus, the right or offer to purchase were to terminate on 30 April 1978, the notice must have been given at least thirty days before that date. This was the obvious meaning of the agreement.

The timeliness of the notice was essential to this contract as it is to the usual option to purchase agreement. *See Ferguson v. Phillips*, supra; *Barham v. Davenport*, supra; *Douglass v. Brooks*, 242 N.C. 178, 87 S.E. 2d 258 (1955). The purpose of the notice requirement was, first, to give defendant ample time to fulfill its offer and, second, as the contract stipulated, it functioned as evidence that plaintiff had exercised the option and accepted defendant's offer. For these reasons, we think it was essential that the notice be given in accordance with the stipulations of the offer. Since the uncontradicted evidence shows that plaintiff did

not give the proper notice as required by the option to purchase, plaintiff cannot have specific performance of the lease and option to purchase.

[2] In its reply plaintiff raised the issue of whether defendant had waived the notice requirement of the lease and option to purchase by informing plaintiff prior to 30 March 1978 that it did not intend to honor the terms of this agreement. This contention is based upon the theory that notice from the optionor that it would not carry out the terms of the option made unnecessary the giving of notice by the optionee of its intent to exercise the option.

The pleadings and affidavits do give rise to an issue of fact as to whether defendant's president, Abernathy, advised plaintiff's president, Houck, in March 1977 that defendant did not intend to comply with the terms set forth in the lease and option to purchase. However, this issue is immaterial. As a matter of law, even if defendant's president had notified plaintiff of its intention not to fulfill the option, plaintiff would still be bound to give the thirty-day written notice required by the option.

An option to purchase given by the owner of land imposes no obligation on the optionee to purchase the land. The option is merely a continuing offer to sell the land which is irrevocable until the expiration of the time limit of the option. An option "is a contract to give another the right to buy, and not a contract to sell." *Winders v. Kenan*, supra, at 633, 77 S.E. at 689. The option can ripen into a sale or binding contract of sale only by the optionee's exercise of the option, i.e., acceptance of the offer unconditionally as made. 77 Am. Jur. 2d, Vendor and Purchaser, § 40, p. 219; *Trust Co. v. Medford*, supra. The fact that the optionor, before the time for exercising the option expired, gave notice that it would not comply with its contract will not excuse the optionee from giving proper notice of his election to purchase and offering to comply with the terms of the option. The reason being, that until the option is accepted in accordance with the terms of the original contract, no contract to purchase exists, and the optionor is under no obligation to convey the property. See generally 77 Am. Jur. 2d, Vendor and Purchaser, § 40, p. 220. An optionee, such as plaintiff in this case, is not entitled to specific performance of a contract to purchase when the contract does not exist because it has not been accepted. Thus, since, as established,

plaintiff did not give proper notice of his intent to exercise the option to purchase it is immaterial whether defendant had previously repudiated the lease and option to purchase agreement.

Upon a thorough examination of the record we find that there were no issues of material fact, defendant was entitled to judgment as a matter of law. Accordingly the judgment of the trial court is

Affirmed.

Judges MARTIN (Harry C.) and HILL concur.

DEBORAH CARPENTER, ACKNOWLEDGED DAUGHTER; VINEZ PATRICIA TINSLEY, GUARDIAN AD LITEM FOR SHAUNA L. TINSLEY, ALLEGED ACKNOWLEDGED MINOR CHILD OF ROBERT F. KENAN, DECEASED, PLAINTIFF v. TONY E. HAWLEY, CONTRACTORS; AMERICAN CASUALTY INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8010IC1084

(Filed 15 September 1981)

1. **Master and Servant § 85— workers' compensation—authority of Industrial Commission to determine paternity**

The Industrial Commission has the authority to make a determination as to the paternity of an illegitimate child for the limited purpose of establishing who is entitled to the compensation payable under North Carolina's Workers' Compensation Act.

2. **Master and Servant § 79.1— workers' compensation—finding of paternity—sufficiency of evidence**

In a workers' compensation proceeding, there was sufficient evidence for the Commission to find plaintiff was the illegitimate daughter of the deceased where the evidence tended to show (1) the mother of plaintiff was living in "open and notorious adultery" with deceased at least one year prior to the birth of plaintiff and for eight or nine years thereafter, (2) deceased had told plaintiff that he was plaintiff's father, and (3) deceased had provided plaintiff with $25 to $30 a week for her support.

3. **Master and Servant § 79.1— workers' compensation—finding that illegitimate child acknowledged—sufficiency of evidence**

In a workers' compensation proceeding, it is not necessary that an illegitimate child's status be established in a written instrument or judicial pro-

ceeding in order for the Commission to be able to find that an illegitimate child had been acknowledged.

4. Master and Servant § 79.1— workers' compensation—finding of partial support—sufficiency of evidence

The Commission did not err in finding that one of deceased's illegitimate children was only partially dependent upon the decedent at the time of his death where the evidence tended to show that plaintiff had lived with her grandparents, that her grandparents provided food, clothing and shelter for her throughout her life, and that from the time she was thirteen her grandparents received $101 per month in welfare payments for use in her support.

5. Master and Servant § 79.1— workers' compensation—denial of compensation to partially dependent child—constitutionality

The provision of the Workers' Compensation Act which provides that persons wholly dependent upon decedent for support are entitled to payments provided for in the Act to the exclusion of those who have another, albeit partial, source of support has a fair and substantial relation to the object of the legislation and is constitutional. G.S. 97-38.

APPEAL by plaintiff from the Industrial Commission. Opinion and award filed 8 August 1979. Heard in the Court of Appeals 5 May 1981.

On 27 December 1978, Robert F. Kenan, an employee of Tony E. Hawley Construction Company, suffered a fatal injury by accident which arose out of and in the course of his employment. An action was brought to recover workers' compensation benefits, and the sole issue for hearing was the determination of the person or persons entitled to receive the compensation benefits that became due as a result of Mr. Kenan's death.

Deborah Carpenter, age 20 and born 6 November 1960, is the daughter of the decedent, Robert F. Kenan, such paternity having been established pursuant to the terms of G.S. 110-132. The decedent executed an acknowledgment of paternity on 21 December 1977, which was thereafter affirmed by Eloise C. Montgomery, mother of Deborah Carpenter, on 18 January 1978. The decedent contemporaneously executed a voluntary support agreement whereby he agreed to pay the sum of $15 per week for the support of Deborah Carpenter beginning on 13 January 1978. The decedent made a total payment of $200, and his last payment was in the amount of $80 and was made on 13 October 1978.

Deborah Carpenter lived with her grandparents, both of whom were employed and provided food, clothing and shelter for

her. Occasionally the grandparents gave her money, and they received $101 per month in welfare payments for use in the support of Ms. Carpenter.

Shauna L. Tinsley, age 15 and born 27 October 1965, is the daughter of Vinez Patricia Tinsley and the alleged daughter of the decedent. Vinez P. Tinsley separated from her husband in 1963 and shortly thereafter began living with the decedent in Pine Level, North Carolina. After Shauna's birth they lived together for eight or nine additional years. The decedent admitted to Shauna that he was her father and provided $25 to $30 each week for her support.

The Deputy Commissioner hearing the case found that Shauna is the acknowledged illegitimate minor child of the decedent and wholly dependent upon him for support. He further found that Deborah was only partially dependent upon the decedent at the time of his death. Shauna was therefore found to be entitled to receive the entire compensation payable under the Workers' Compensation Act. Deborah appealed and the case was then heard before the Full North Carolina Industrial Commission. It adopted the opinion and award of the Deputy Commissioner as its own and affirmed his findings. Deborah appeals from this decision.

Barringer, Allen & Pinnix, by Thomas L. Barringer and M. Jean Calhoun, for plaintiff appellant, Deborah Carpenter.

Knox V. Jenkins, Jr. for appellee, Vinez P. Tinsley, Guardian Ad Litem for Shauna L. Tinsley.

Young, Moore, Henderson & Alvis, by B. T. Henderson, II and Robert C. Paschal for defendants Tony E. Hawley Contractors and American Casualty Insurance Company.

ARNOLD, Judge.

Plaintiff contends that the Industrial Commission erred in finding and concluding that Shauna L. Tinsley was the acknowledged illegitimate child of the deceased, Robert F. Kenan, that Deborah Carpenter was only partially dependent upon the deceased, and that Shauna was entitled to the entire award.

On appeal from an order of the Industrial Commission the jurisdiction of the courts is limited to the questions of law,

whether there was competent evidence before the Commission to support its findings of fact and whether such findings justify the legal conclusions and decision of the Commission. *Gaines v. L. D. Swain & Son, Inc.*, 33 N.C. App. 575, 235 S.E. 2d 856 (1977).

[1] At the outset plaintiff argues that the Industrial Commission does not have the authority to determine the paternity of an illegitimate child. She contends that by statutorily establishing procedures by which an illegitimate child may establish its paternity the General Assembly has indicated the exclusive procedures and impliedly indicated that paternity cannot be established in any other manner. We reject this contention. The Industrial Commission has exclusive original jurisdiction of the rights and remedies afforded by North Carolina's Workers' Compensation Act. *Thomason v. Red Bird Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952). Its function is to hear the evidence of the parties, make findings of fact and determine the issues in dispute. G.S. 97-84. In our view, this necessarily includes determining the paternity of an illegitimate child when such a determination is necessary to resolve a dispute as to who is entitled to the compensation due under the Workers' Compensation Act. The Industrial Commission has made such a determination a number of times since the passage of the Act in 1929, and the General Assembly has not amended the Act. We have concluded that for the limited purpose of establishing who is entitled to the compensation payable under North Carolina's Workers' Compensation Act, the Industrial Commission has the authority to make a determination as to the paternity of an illegitimate child.

[2] Plaintiff further argues, however, that even if the Commission could make such a determination, it committed error in finding that Shauna L. Tinsley was the acknowledged illegitimate daughter of the deceased. Since Shauna's mother was married to someone other than the deceased at the time Shauna was born plaintiff maintains that Shauna is presumed to be the legitimate daughter of the husband, and that the evidence is insufficient to overcome this presumption.

Under North Carolina law a child born of a married woman is presumed to be legitimate and this presumption can be rebutted only by facts and circumstances which show that the husband did not have access or was impotent. *Ray v. Ray*, 219 N.C. 217, 13

S.E. 2d 224 (1941). The fact that the wife is living in open and notorious adultery has been recognized by the courts as a potent circumstance tending to show nonaccess. *Ray v. Ray, supra.* The term "open and notorious adultery" has generally been held to encompass only cases in which the couple engaging in adultery publicly reside together as if married to each other, and this, as well as the fact that they are not wife and husband, are both known in the community of their residence. Black's Law Dictionary (5th ed. 1979); *Wake County Child Support Enforcement ex rel. Bailey v. Matthews,* 36 N.C. App. 316, 244 S.E. 2d 191 (1978). North Carolina law in effect at the time of trial rendered the wife incompetent to prove non-access. *State v. Wade,* 264 N.C. 144, 141 S.E. 2d 34 (1965); *Ray v. Ray, supra.* It should be noted that this rule, already undermined by many modifications (*see Wake County, ex rel. Helen Manning v. Green,* 53 N.C. App. 26, 279 S.E. 2d 901 (7 July 1981)), has now been abrogated entirely by the General Assembly of North Carolina in all civil and criminal proceedings in which paternity is at issue. G.S. 8-57.2 (effective 10 October 1981). However, since this statute was not in effect at the time of the trial below, evidence of non-access came from third persons.

The record shows that Fester Creech, the assistant chief of police of Pine Level, North Carolina, and an employee of the local propane gas company, testified that for at least one year prior to the birth of Shauna, Vinez Tinsley and Robert F. Kenan, the decedent, lived together as man and wife in a farmhouse in Pine Level. Mr. Creech testified that for a period of at least one year prior to the birth of Shauna, and for a number of years thereafter, he made gas deliveries monthly to their residence and, additionally, he went there almost every Saturday to make collections. Mr. Creech testified further that the decedent told him on several occasions that he and Vinez P. Tinsley had a new baby. This evidence is sufficient to support the Commission's finding that the presumption of legitimacy was rebutted.

The Commission's finding of fact that Shauna is the illegitimate daughter of Robert F. Kenan is also supported by competent evidence. In addition to Mr. Creech's testimony, as previously discussed, Shauna testified that the decedent told her he was her father, called her daughter and had a close relationship with her. She also testified that he provided $25 to $30 a

week for her support. Moreover, plaintiff testified that her father had told her Shauna was his child.

[3] Plaintiff contends, however, that even if the evidence establishes that Shauna is the decedent's illegitimate daughter, it is insufficient to support the Commission's finding that Shauna is the *acknowledged* illegitimate child of the decedent within the meaning of G.S. 97-2(12).

G.S. 97-2(12) provides:

> (12) Child, Grandchild, Brother, Sister.—The term "child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him. . . . "Child," "grandchild," "brother," and "sister" include only persons who at the time of the death of the deceased employee are under 18 years of age.

By using the word "acknowledged" in describing illegitimate children covered by the act, plaintiff asserts that the legislature intended to require that an illegitimate child's status be established in a written instrument or judicial proceeding. Since no formalities of any kind were ever undertaken with regard to Shauna during the decedent's lifetime, plaintiff argues that she cannot be an acknowledged illegitimate child within the meaning of G.S. 97-2(12).

Contrary to plaintiff's assertions, the word "acknowledged" is not a term of art meaning requiring a formal declaration before an authorized official. In regard to paternity actions, the term "acknowledgment" generally has been held to mean the recognition of a parental relation, either by written agreement, verbal declarations or statements, by the life, acts, and conduct of the parties, or any other satisfactory evidence that the relation was recognized and admitted. Black's Law Dictionary (5th ed. 1979). Although we find no North Carolina case precisely defining the term, this definition is consistent with the decided cases involving the paternity of illegitimate children for purposes of North Carolina's Workers' Compensation Act. The evidence introduced at the hearing, as previously discussed, is sufficient to support the Commission's finding of fact and conclusion of law that

Shauna is the acknowledged illegitimate child of the decedent and is therefore conclusively presumed wholly dependent upon him for support, and entitled to the compensation payable under North Carolina's Workers' Compensation Act.

[4] Plaintiff's fourth assignment of error is that the Industrial Commission erred in failing to find that the plaintiff, Deborah Carpenter, was a person wholly dependent upon Robert Kenan within the meaning of G.S. 97-38. It appears from the record that plaintiff had turned 18 just prior to her father's death. At such time by operation of law she became an adult and could no longer be considered a "child" as defined in G.S. 97-2(12). She therefore lost the conclusive presumption provided in G.S. 97-39 that she was wholly dependent upon her father for support. G.S. 97-39 provides further, however, that in cases where the presumption does not apply, "questions of dependency in whole or part shall be determined in accordance with the facts as the facts may be at the time of the accident. . . ."

The record shows that plaintiff had lived with her grandparents, both of whom were employed until recently, since she was a baby, that her grandparents provided food, clothing and shelter for her throughout her life and occasionally gave her money, and that from the time she was thirteen or fourteen her grandparents received $101 per month in welfare payments for use in her support. Plaintiff further testified that she also received money from her father and lesser amounts from her mother. For the year 1978 the decedent made support payments of $200 and gave plaintiff approximately $100. The Commission's findings of fact to this effect are supported by competent evidence and are therefore binding upon this Court. These findings justify the Commission's conclusion that plaintiff was never wholly dependent upon decedent for her support.

[5] Plaintiff's final assignment of error is that G.S. 97-38 and 97-10.1 are unconstitutional. Her position is that G.S. 97-38, which awards full compensation to Shauna as a wholly dependent person and denies compensation to plaintiff as a partially dependent person, violates the equal protection clauses of the United States and North Carolina Constitutions.

To withstand an equal protection claim, a legislative classification must be reasonable, must not be arbitrary, and must

rest on some ground of difference having a fair and substantial relationship to the object of the legislation. This is to insure that all persons similarly circumstanced shall be treated alike. *Association of Licensed Detectives v. Morgan*, 17 N.C. App. 701, 705, 195 S.E. 2d 357, 360 (1973). Plaintiff argues that the legislature has made "persons wholly dependent for support" a special class of persons, and that there is no reasonable relation between this classification and the objectives of the Workers' Compensation Act. We disagree. One of the primary purposes of the Act is to grant certain and speedy relief to injured employees, or in the case of death, to their dependents. *Cabe v. Parker-Graham-Sexton, Inc.*, 202 N.C. 176, 162 S.E. 223 (1932). It substitutes a system of short-term money payments for common law and statutory rights of action and grounds of liability. We find that it is reasonable to provide that those persons wholly dependent upon the decedent for support are entitled to the payments provided for in the Act to the exclusion of those who have another, albeit partial, source of support, and that this difference has a fair and substantial relation to the object of the legislation.

Equally without merit is plaintiff's due process argument. She argues that G.S. 97-10.1, which provides that the rights and remedies granted to the employee's dependents against an employer are exclusive, is arbitrary legislation unrelated to the valid objective of compensating injured employees or their dependents. North Carolina's Workers' Compensation Act has been upheld against a number of constitutional attacks and plaintiff's arguments do not persuade us to hold otherwise.

Accordingly, the decision of the Industrial Commission is affirmed.

Affirmed.

Judges VAUGHN and BECTON concur.

Atkins v. Zoning Board of Adjustment

MR. AND MRS. T. L. ATKINS; MARIAN G. AUSTIN; MR. AND MRS. FRANK BORDEAUX; MR. AND MRS. CHARLES R. BROWN; MR. AND MRS. SAM BRYANT; H. G. CAMPBELL; MR. AND MRS. JERRY R. COOPER; MR. AND MRS. RICKEY DEESE; DAVID DODD, JR.; DAVID EUDY; MR. AND MRS. FRANK FOX; MR. AND MRS. LEROY GILL; MR. AND MRS. FRANK GODFREY; MR. AND MRS. JAMES W. GRIFFIN; MR. AND MRS. JOHN HAMMONDS, JR.; PAULINE HAMMONDS; MR. AND MRS. ERNEST HELMS; MR. AND MRS. KEVIN M. HELMS; MR. AND MRS. EARL M. HERRING; MR. AND MRS. DAVID W. HILLIARD; MR. AND MRS. CHARLES F. HOLT, SR.; CHARLES F. HOLT, JR.; SANDRA HOLT; GEORGE HUNT; MR. AND MRS. BILL LAWRENCE; MR. AND MRS. NELSON L. LONDON; MR. AND MRS. FRANK MANESS; MR. AND MRS. MIKE MILLS; MR. AND MRS. M. T. MEANS; JAMES McCOLLOM; MR. AND MRS. HEATH NASH; WILLIAM HEATH NASH, JR.; MR. AND MRS. JOEL BRUCE NEWELL; MARGARET A. NELSON; T. B. PLYLER; MR. AND MRS. ARNOLD D. PRICE; MR. AND MRS. JASON B. RUSHING; MR. AND MRS. BRUCE SNYDER, JR.; R. C. SNYDER; MR. AND MRS. JAMES E. STARNES; MR. AND MRS. LEON R. SIMON; MR. AND MRS. JOE N. SUTTON; JEAN TUCKER; MR. AND MRS. LARRY G. WHITE; MR. AND MRS. L. K. WILLIAMS; AND MR. AND MRS. BOBBY R. WALLACE, PETITIONERS v. THE ZONING BOARD OF ADJUSTMENT OF UNION COUNTY, NORTH CAROLINA (CONSISTING OF CHARLES YANDLE, CHAIRMAN OF THE BOARD; LEON MOORE, VICE CHAIRMAN OF THE BOARD; CHARLES McGEE, JACK HAYWOOD, CLARK RUMMAGE, MEMBERS OF THE BOARD; AND WILLIE McDOW AND G. C. FUNDERBURK, ALTERNATE MEMBERS OF THE BOARD), RESPONDENTS

No. 8020SC1093

(Filed 15 September 1981)

1. **Municipal Corporations § 30.15— zoning ordinance—nonconforming use—uses and structures begun after ordinance date**

A zoning board of adjustment had no authority to grant Class A nonconforming status to uses and structures added to a landowner's agricultural supply business where the new uses and structures were not lawful at their inception because they were begun after the effective date of the zoning ordinance and because no building permit was issued. Furthermore, the board of adjustment had no authority to grant Class A nonconforming use status to proposed uses and structures which were not in being at the time the landowner filled his petition for Class A nonconforming use status.

2. **Municipal Corporations § 30.15— zoning—nonconforming use—Doctrine of Accessory Uses**

Under the Doctrine of Accessory Uses, a landowner is permitted to maintain an accessory or incidental use in connection with a permitted nonconforming use of land if the accessory use is truly incidental to the primary nonconforming use and does not change the basic nature of the use of the property.

3. Municipal Corporations § 30.15— zoning—additional uses not incidental to nonconforming uses

Where property was being used for the storage and sale of grain, fertilizer, and lime and for seed cleaning on the effective date of a zoning ordinance, use of the property for the storage and transportation of sand, gravel, and lumber was not incidental to such nonconforming uses of the property and was not permitted under the Doctrine of Accessory Uses.

APPEAL by respondents from *Collier, Judge.* Judgment entered 18 June 1980 in Superior Court, UNION County. Heard in the Court of Appeals 5 May 1981.

This case came before the superior court upon a petition for a writ of certiorari to review the 18 June 1980 decision of the Union County Zoning Board of Adjustment (Board) which granted to James Dennis Rape's agricultural service business Class A nonconforming use status. The petitioner-appellees alleged (1) that they were owners of property adjacent to property owned by Rape in an area zoned residential; and (2) that, although Rape has maintained an agricultural service business on his land as a prior nonconforming use since 2 June 1975 when the applicable Union County Zoning Ordinance (Ordinance) became effective, Rape expanded the nonconforming use of his land after 2 June 1975 without applying for Class A status.[1] After expanding the nonconforming use, Rape, in 1980, filed a petition requesting the Board (1) to grant Class A nonconforming use for the structures *and* for the uses which were existent on Rape's property on 2 June 1975; (2) to designate those structures and uses erected or undertaken since 2 June 1975 as Class A nonconforming uses and structures; and (3) to allow as Class A nonconforming use, the enlargement of the facility by the addition of 10,000 square feet to a warehouse and the enlargement of grain storage bins by 100,000 bushels.[2] The Board granted Rape the relief he requested.

Upon review, the superior court ordered the Board to modify its order by (1) deleting therefrom its conclusion that the alterations to the property made after 2 June 1975 constituted Class A

1. In 1978, Rape petitioned to have his property rezoned "heavy industrial," but his petition was denied by the Board.

2. According to Rape, the expansion of his facilities was necessary because the area farmers accepted him and his business grew from a one-million dollar enterprise in 1975 to a three-million dollar enterprise in 1979.

nonconforming uses and by (2) adding a conclusion that the only uses and structures allowed be those lawfully in being on the property as of 2 June 1975. The Board appeals.

Perry & Bundy, by H. Ligon Bundy and Henry B. Smith, Jr., for respondent appellants.

Dawkins, Glass & Lee, P.A., by Koy E. Dawkins, for petitioner appellees.

BECTON, Judge.

I

[1] This is not the usual proceeding on appeal in which we must determine if the findings of fact and conclusions of law of an administrative board are supported by competent evidence. Indeed, after the trial court found and concluded that the Board's findings and conclusions were supported by competent, material and substantial evidence, the trial court determined, as a matter of law, that certain uses and structures, described in the Board's Order, "were not being conducted on the effective date of the Ordinance and therefore not lawful non-conforming uses nor otherwise lawful in their inception." We agree with the trial court. The uses and structures placed upon the property after 2 June 1975 or proposed to be added in the future, are not Class A nonconforming uses and structures as defined by the Ordinance.

A.

The facts are undisputed. On and prior to 2 June 1975 Rape had on his approximately four-acre tract the following: (a) one 37,000-bushel bin; (b) one 21,000-bushel bin; (c) one 80 x 20 storage building; (d) one office building addition started but not completed; (e) one 10 x 40 weigh scale; (f) one grain elevator; and (g) one 80 x 28 storage facility for fertilizer. On and prior to 2 June 1975 Rape's property was being used for the storage and sale of grain, fertilizer, and lime and for seed cleaning. Following 2 June 1975 the following additions and alternations were made on Rape's property: (a) one 14,000-bushel bin with dryer; (b) one grain elevator 60 feet in height; (c) one 12,000-bushel bin; and (d) one 10 x 25 tool shed. Additionally, the 80 x 20 storage building was removed in December 1979 leaving only the foundation, to which

was added a retaining wall four feet high and six inches wide in the shape of a horseshoe, which was used to store sand, rocks and lumber.

Rape supplies his local customers with lime which he gets from lime suppliers in Tennessee and Virginia. Driving to his lime suppliers became expensive, especially with the rising cost of fuel, so Rape decided to stock sand, rocks and lumber and to sell and deliver those products along the route to his lime suppliers.

B.

We look first to the enabling legislation and then to the Ordinance. G.S. 153A-345 authorizes boards of county commissioners to appoint boards of adjustment to assist in the administration of zoning ordinances, and this statute also defines the powers that boards of adjustment have. G.S. 153A-345(d) gives boards broad discretionary power to vary the provisions of zoning ordinances relating to land use and construction or alteration of structures, and provides as follows:

> (d) When practical difficulties or unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the board of adjustment may, in passing upon appeals, vary or modify any regulation or provision of the ordinance relating to the use, construction or alteration of buildings or structures or the use of land, so that the spirit of the ordinance is observed, public safety and welfare secured, and substantial justice done.

In accordance with the enabling legislation, the Ordinance, itself, contains provisions for nonconforming use in Article VII and provisions for variances[3] in Article XII. Nonconforming use is defined in Article IV, Section 41.48 of the Ordinance as "[a]ny use of a building or land which does not conform to the use regulations of this ordinance . . . at the effective date of the ordinance. . . ." The relevant portions of Article VII follow:

> Section 70. *Non-conforming Uses*
>
> Non-conforming uses and structures are those which do not conform to a provision or requirement of this ordinance

3. Rape did not request a variance; rather, he petitioned for a Class A nonconforming use designation.

but were lawfully established prior to the time of its applicability. Class A non-conforming uses or structures are those which have been so designated by the Board of Adjustment, after application by any interested person or the Zoning Administrator upon findings that continuance thereof would not be contrary to the public health and safety or the spirit of this Ordinance, that the use or structure does not and is not likely to significantly depress the value of nearby properties [sic] *that the use or structure was lawful at the time of its inception,* and that no useful purpose would be served by strict application of the provisions or requirements of this ordinance with which the use or structure does not conform. All non-conforming uses and structures not designated as Class A are Class B non-conforming uses or structures.

70.1 *Procedures for Obtaining Class A Designation, Conditions*

A written application shall be filed setting forth the name and address of the applicant, giving a legal description of the property to which the application pertains and including such other information as may be necessary to enable the Board of Adjustment to make a determination of the matter . . . . The decision shall be in writing and shall set forth the findings and reasons on which it is based. Conditions shall be attached, including any time limit, where necessary, to assure that the use or structure does not become contrary to the public health and safety, or the spirit and purpose of this ordinance. No vested interest shall arise out of a Class A designation.

70.3 *Regulations Pertaining to Class A Nonconforming Uses And Structures*

No Class A nonconforming use shall be resumed if it has been discontinued for a continuous period of at least 180 days or if it has been changed to a nonconforming use for any period. *No Class A structure shall be used, altered, or enlarged in violation of any condition imposed in its designation.* No Class A nonconforming use shall be rebuilt, for use as a nonconforming structure, if the cost of reconstruction ex-

ceeds sixty percent (60%) of the reproduction cost of such structure. (Emphasis added.)

Article IV, Section 60 of the Ordinance is also significant. This section states: "No building or land shall be hereafter used and no building or part thereof shall be erected, moved or altered except in conformity with the regulations herein specified for the district in which it is located, except as hereinafter provided in this ordinance."

C.

Having set forth relevant portions of the enabling legislation and the Ordinance, we turn to the Board's arguments. Because Section 70.3 of the Ordinance provides that "[n]o Class A structure shall be used, altered or enlarged in violation of any condition imposed in its designation," the Board argues that "this clearly implies that the alterations are permitted when they are not contrary to the conditions imposed by the Board." In further support of this argument, the Board points out that since Section 70.4 of the Ordinance expressly prohibits the enlargement or alteration of Class B nonconforming structures then, by implication, the alteration or enlargement of Class A nonconforming uses and structures is allowed since no such clear expression appears in Section 70.3.

Our response is threefold. First, Section 70.3 applies only to a Class A structure or use *previously designated* by the Board. Rape was merely *applying* for a Class A designation. Because Rape's agricultural service business was established and operating prior to 2 June 1975 and because Rape did not seek Class A nonconforming use status until 1980, Rape's agricultural service business had, during that period of time, Class B nonconforming use status by operation of the Ordinance. The last sentence of Article VII, Section 70 reads: "All non-conforming uses and structures not designated as Class A are Class B nonconforming uses or structures." Rape made alterations and enlargements to his agricultural service business in violation of Article VII, Section 70.4 which, in relevant part, reads: "No Class B nonconforming structure shall be enlarged or structurally altered [other than through ordinary maintenance]." Having violated the Ordinance, Rape cannot now seek its blessing by the

ratification he requested. Having failed in his effort in 1978 to have his property zoned "heavy industrial," Rape cannot now obtain what amounts to spot zoning in circumvention of the Ordinance. Although the enabling legislation and the Ordinance give the Board the power under certain circumstances to allow expansion of Class A nonconforming use, Rape's problem is that he never obtained a Class A nonconforming use prior to his expansion.

Second, Section 70.3 applies only when a condition was imposed at the time the structure or use was given a Class A designation. Rape was never granted a Class A designation to which a condition could have been imposed. Third, alterations or enlargements of Class A nonconforming uses and structures are allowed if, and only if, they are made "in conformity with the regulations . . . in this ordinance." Article IV, Section 60. Rape's alterations and enlargements were not made in conformity with the regulations.

In addition to our factual analysis, we are guided by policy considerations. That is, although zoning ordinances are "in derogation of the right of private property and provisions therein granting exemptions or permissions are to be liberally construed in favor of freedom of use," *In Re Application of Construction Co.*, 272 N.C. 715, 718, 158 S.E. 2d 887, 890 (1968), our courts have nevertheless limited the expansion of nonconforming uses with a view toward their eventual elimination. As was said in *In Re O'Neal*, 243 N.C. 714, 721, 92 S.E. 2d 189, 194 (1956):

> [Z]oning serves a two-fold purpose—one, to preserve the true character of a neighborhood by excluding new uses and structures prejudicial to the restricted purposes of the area, *and gradual elimination of such existing structures and uses*; and, second, to protect an owner's property or existing residence, business or industry from impairment which would result from enforced accommodation to new restrictions. . . . (Emphasis added.)

We hold that the Board had no authority to grant Class A nonconforming status to uses and structures added after 2 June 1975, the effective date of the Ordinance. The new uses and alterations made by Rape were not lawful at their inception because they were begun after the effective date of the Ordinance

and because no building permit was issued. Professor Anderson puts it this way:

> To qualify as a nonconforming use, the use in issue must exist on the date specified in the ordinance. Thus, if a nonconforming use as defined by the ordinance as one which existed before the passage of the restrictive ordinance, a use may be continued after passage only if it existed prior to that date. . . . A use commenced after the specified day gains no right to continue as a nonconforming use.

Anderson, American Law of Zoning 2d § 6.10 (1976). Additionally, according to Professor Anderson, "[t]he failure of a landowner to obtain a building permit required by law, before establishing a use, may render the use unlawful from its inception and disqualify it to continue as a nonconforming use." *Id.* Sec. 6.16; cf. *Eggert v. Board of Appeals*, 29 Ill. 2d 591, 195 N.E. 2d 164 (1963) (the Supreme Court of Illinois held that an owner, who, without a building permit, converted a three-family dwelling to one which accommodated seven families was not entitled to continue as a nonconforming user).

We summarily reject the Board's argument that it had authority to grant a Class A nonconforming use designation to uses and structures which were merely prospective and not in being at the time Rape filed his petition. Additionally, since Rape failed to comply with the Ordinance, it is not necessary to determine whether a nonconforming user may expand his operation in order to accommodate an increase in business when the expansion does not change the fundamental nature of the business.[4]

II

In a closely related argument, Rape contends that the Board properly authorized the addition of uses which were merely incidental to his nonconforming use. In addition to authorizing an increase in the number of structures located on Rape's property, the Board authorized Rape to store sand and gravel and to

4. Some courts have adopted the "Doctrine of Natural Expansion" which Rape urges upon us. *See, for example, Silver v. Zoning Board of Adjustment*, 435 Pa. 99, 255 A. 2d 506 (1969); *Frost v. Lucey*, 231 A. 2d 441 (Me. 1967); *Great South Bay Marine Corporation v. Norton*, 58 N.Y.S. 2d 172 (1945), aff'd. 272 A.D. 1066, 75 N.Y.S. 2d 304 (1947).

transport sand, gravel and lumber if those products were sold in conjunction with the hauling of grain, lime and fertilizer in order to avoid "dead-heading"[5] and if those products were transported in trucks owned or regularly leased by Rape.

[2, 3] Under the Doctrine of Accessory Uses, a landowner is permitted to maintain an accessory or incidental use in connection with a permitted use of land if the accessory use is truly incidental to the primary nonconforming use and does not change the basic nature of the use of the property. Anderson, American Law of Zoning 2d § 630 (1976); *Jackson v. Pottstown Zoning Board of Adjustment*, 426 Pa. 534, 233 A. 2d 252 (1967). Given the nature of Rape's agricultural service business, we are not convinced that the stockpiling or transportation of sand, gravel or lumber is incidental to any use of Rape's property permitted by the Ordinance. Rape's reliance on *In Re O'Neal* is misplaced. In *O'Neal*, the operators of a nonconforming nursing home, in order to comply with fireproofing requirements of the North Carolina Building Code, opted to construct a fireproof building which, in terms of its size and scale of operation, would have conformed substantially to the nonconforming use existent at the time the ordinance in question was adopted. The operators of the nursing home did not intend to demolish the old building but, rather, proposed to use it for porches, sitting rooms, and other recreational purposes. Whether the old building could have been used, for what may have been accessory purposes, was not squarely before the court. In dicta the court said:

> If this should occur, the question may then arise as to whether the present two-story frame building must be used for residential purposes only in conformity with Residence 1 District restrictions, or whether the facts presented are such that the Board of Adjustment, in its discretion, will permit limited use thereof by patients resident in the new building for some or all of the purposes indicated in Mr. O'Neal's statement. In such case, it will be for the Board of Adjustment to determine whether, in its discretion, it will so exercise the power conferred upon it [by the section of the Ordinance relating to variances].

5. The sand, gravel and lumber were transported and sold in order to avoid having to drive empty trucks to the lime suppliers and in order to off-set rising fuel costs.

243 N.C. at 725, 92 S.E. 2d at 196.

Rape, too, may be entitled to a "variance"; that question is not before us. We hold that an "accessory use" has not been established. *Compare City of Brevard v. Ritter*, 14 N.C. App. 207, 188 S.E. 2d 41 (1972) in which this Court held that the construction of a pilot's lounge and auxiliary hangar at the defendants' "nonconforming" private airport was not a recreational use within the meaning of a zoning ordinance allowing "camps, parks, picnic areas, golf courses and similar recreational uses." *Id.* at 214, 188 S.E. 2d at 45.

Having determined that the trial court's order was proper in all respects, we accordingly

Affirm.

Judge VAUGHN and Judge ARNOLD concur.

JENNE EDER CRUTCHLEY v. WILLIAM F. CRUTCHLEY

No. 801DC1176

(Filed 15 September 1981)

1. **Arbitration and Award § 5; Divorce and Alimony § 29— disputes concerning spousal support—arbitrable**

Disputes concerning spousal support are arbitrable in North Carolina. G.S. 1-567.2(a).

2. **Arbitration and Award § 5; Divorce and Alimony §§ 19, 24.5— modification of arbitrated award—ninety-day time limit**

Where plaintiff filed a motion requesting modification of an order confirming an arbitration award and the award itself so as to increase the amount for alimony and child support more than ninety days after delivery of a copy of the award, she had waived her ability to contend that the award is imperfect. G.S. 1-567.14(a)(3).

3. **Arbitration and Award § 9; Divorce and Alimony §§ 16.8, 18.10— arbitration of dispute concerning spousal support—failure to find facts**

G.S. 50-16.8(f) requiring a trial judge to find facts from the evidence presented is inapplicable to the situation where the parties agreed to arbitrate the issue of spousal support.

4. Arbitration and Award § 9; Divorce and Alimony § 19.1— modification of arbitrated award—time limit expired

The portion of a judicially confirmed arbitrator's award concerning support of plaintiff may not be modified after the statutory time periods for modifying an award and for appealing a confirmation order have expired.

APPEAL by plaintiff from *Beaman, Judge.* Order entered 21 July 1980 in District Court, PASQUOTANK County. Heard in the Court of Appeals 27 May 1981.

Plaintiff's complaint, filed 22 March 1976, alleged that the parties had three minor children, that defendant had abandoned her and had committed acts constituting grounds for divorce from bed and board and that plaintiff was a dependent spouse. Plaintiff's prayer for relief included requests for a divorce from bed and board, alimony pendente lite, permanent alimony, custody of the parties' minor children and child support, title to the parties' residence and two vacant lots and counsel fees. On 14 May 1976, defendant filed his answer to plaintiff's complaint, denying the material allegations of the complaint, pleading several affirmative defenses as bars to plaintiff's action, and counterclaiming for a divorce from bed and board and for custody of the children.

On 18 October 1976, the court entered an order approving the parties' consent to arbitration. That order reads as follows:

CONSENT ORDER

PRESENT, HIS HONOR, GRAFTON G. BEAMAN, DISTRICT JUDGE PRESIDING:

This cause coming on to be heard and being heard, and the following disposition being made by consent:

1. Dr. B. C. West, Jr. is hereby appointed arbitrator in this cause, and he shall be guided by the following procedure:

(a) He shall review the pleadings appearing in this cause in order to familiarize himself with the contentions of the parties.

(b) The arbitrator's report in this case shall be final and binding on all parties.

(c) The arbitrator shall file his report in the office of the Clerk of Superior Court of Pasquotank County within a rea-

sonable time after he has had opportunity to make a review and study of the matter.

(d) The arbitrator shall have full power and authority to require each of the parties to appear before him as he may deem advisable, to offer to him such evidence as he deems necessary, including documents, reports, checks, bookkeeping entries; income tax returns, and any and all other evidence that the parties desire to present to said arbitrator, and further including oral evidence that said parties desire to present to said arbitrator, it being the intent and purpose hereof that the said arbitrator shall have the opportunity to receive and consider, and the parties shall have the opportunity to present to the arbitrator, full and complete evidence pertaining to the case. The arbitrator shall interview any witnesses which the parties may bring before him and consider all other relevant evidence, and he shall have full subpoena power.

(e) The arbitrator is authorized and empowered to interview the parties, their witnesses, and review their documentary and oral evidence in conference, in an informal manner, open and formal hearing not being necessary.

2. It is the intent and purpose hereof that the said arbitrator is fully authorized and empowered to bring this controversy to a conclusion and, as aforesaid, his report shall constitute the final and binding decision with respect to this case.

3. After filing his report, the arbitrator shall suggest to the Court the amount of his compensation and a determination with respect to same shall be made by the Court.

WHEREUPON, it is ORDERED, ADJUDGED AND DECREED that the foregoing consent of the parties with respect to arbitration is approved and so ordered.

This 18th day of October, 1976.

s/GRAFTON G. BEAMAN
District Court Judge Presiding

The order was also signed by the parties and their attorneys.

On 1 December 1977, the court granted defendant's motion for confirmation of the aribtrator's award. The order confirming the arbitrator's award reads as follows:

> The undersigned District Court Judge, upon receiving a motion for a confirmation of the award of arbitrator in this case, and having first reviewed the record and making a finding that an arbitrator's award has been made; that the award is made under proper authority and that the same is fair and in the best interest of the children and the parties, and further finding that each party by consent order dated October 18, 1976, agreed that the arbitrator's decision shall be final and binding and it appearing that the arbitrator's award is now subject to confirmation;
>
> It is hereby ORDERED that the award of arbitrator is hereby CONFIRMED, and that this case therefore be removed from the docket as having been settled by arbitration.
>
> This 1st day of December, 1977.
>
> s/ GRAFTON G. BEAMAN
> District Court Judge

The arbitrator's award granted plaintiff custody of the two oldest children, child support of $200 per month per child, payment of 75% of their medical, dental and college expenses by defendant and visitation rights with the youngest child, of whom defendant was given custody. Plaintiff was also awarded $130 per month for 36 months as back alimony, $500 per month as alimony and possession of the residence until her death, remarriage or cohabitation. The support awards were made subject to a yearly cost of living increase. The arbitrator's award also contained provisions for a property division and provided that defendant would pay plaintiff's attorney's fees and the arbitrator's fees. It did not contain a recitation of facts or reasons for the decision.

On 30 November 1978, plaintiff filed a motion in the cause requesting modification of the order confirming the arbitration award and the award itself so as to increase the amounts of alimony and child support and to strike the cohabitation restriction. Plaintiff alleged that because the order confirming the arbitration award contained no findings of fact as required by N.C. Gen. Stat. § 50-16.8(f) and unlawfully limited the duration of

alimony payments by the cohabitation restriction, the order of confirmation should be modified "to correct these irregularities" pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(5) and (6). Plaintiff also alleged that because the amounts of alimony and child support were inadequate when awarded and did not reflect the standard of living to which the parties were accustomed before their marital problems began, the confirmation order should be modified and plaintiff should be granted arrearages pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(6). Finally, plaintiff alleged that the alimony and child support awards should be increased due to substantial changes in circumstances which occurred after the award was confirmed.

On 30 January 1980, defendant replied to plaintiff's motion in the cause and denied the material allegations contained therein. On 21 July 1980, the trial court entered an order denying plaintiff's motion which was signed with the parties' consent out of term on 11 August 1980. In the order, the court stated that the arbitrator's award was binding and that the remedy of motion in the cause was not available to plaintiff. The court refused to hear any evidence in support of plaintiff's motion for these reasons. Plaintiff appeals from this order.

Haywood, Denny & Miller by George W. Miller, Jr., for the plaintiff-appellant.

White, Hall, Mullen, Brumsey & Small by Gerald F. White and Jennette, Morrison & Austin by John S. Morrison, for the defendant-appellee.

MARTIN (Robert M.), Judge.

Plaintiff's sole assignment of error, based on an exception to the order appealed from, reads as follows:

> That the Court below committed error in dismissing the plaintiff's motions in the cause for the reason that the arbitrator's award entered on December 1, 1977, and the subsequent order of the Court confirming said award dated December 1, 1977, on its face failed to comply with the procedure in actions for alimony and alimony *pendente lite* as provided by G.S. 50-16.8(f) and for the further reason that all of said orders are subject to modification as provided by G.S. 50-16.9(a).

Thus the *only* question before this Court on this appeal concerns the validity and effect of the portion of the arbitrator's award concerning support of the plaintiff-appellant.

[1] The threshold question which we must determine is whether disputes concerning spousal support are arbitrable.[1] The Uniform Arbitration Act, adopted in North Carolina in 1973, N.C. Gen. Stat. § 1-567.1 *et seq.*, governs written agreements to arbitrate, in the absence of a stipulation to the contrary between the parties, unless the agreement is one between employers and employees or their representatives. N.C. Gen. Stat. § 1-567.2(b). The 18 October 1976 consent order was a written agreement between plaintiff and defendant to arbitrate, as discussed more fully *infra*. It did not contain a stipulation that the Uniform Arbitration Act was inapplicable. The Act, therefore, governs our determination of the validity and effect of the parties' agreement to arbitrate the issue of spousal support in this case.

N.C. Gen. Stat. § 1-567.2(a) reads, in pertinent part, as follows:

> [t]wo or more parties may agree in writing to submit to arbitration *any controversy* existing between them at the time of the agreement. . . . Such agreement . . . shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy. (Emphasis added.)

As noted above, in subsection (b) the legislature made two specific exceptions to the general rule stated in subsection (a), neither of which is applicable to this case. We believe it is significant that the legislature did not see fit to exclude domestic disputes from the Act which provides a comprehensive procedure for the arbitration of "*any controversy*." In its wisdom, the legislature may decide to exclude domestic matters from the Act and may declare domestic issues to be nonarbitrable. But unless and until the legislature takes such action, we must assume that by adopting the broad language of N.C. Gen. Stat. § 1-567.2(a), the legislature intended that *any* controversy, including a controversy concerning the amount of spousal support, is arbitrable.

1. For a discussion of the arbitrability of various issues in domestic law, *see* Comment, *The Enforceability of Arbitration Clauses in North Carolina Separation Agreements*, 15 Wake Forest L. Rev. 487 (1979).

We note, in support of our position, that North Carolina allows spouses, upon the break-up of a marriage, to enter into an agreement determining the right of the wife to support or alimony.[2]

It seems logical to hold that if spouses may contract with regard to this issue, they may contract to have the issue determined by an arbitrator. Thus, based on the broad language of N.C. Gen. Stat. § 1-567.2(a), we conclude that the issue of spousal support is arbitrable in North Carolina. Having reached this conclusion, we must determine whether one party to the agreement to arbitrate may seek a judicial modification of an arbitrator's award concerning this issue.

[2] Again, our decision is governed by North Carolina's Arbitration Act. N.C. Gen. Stat. § 1-567.14 provides that a party may seek a court order modifying the award on specified grounds within ninety days after delivery of a copy of the award to that party. Appellant, in the present case did not attempt to seek a judicial modification of the award within the ninety-day time limit. She, therefore, waived her contention that the award is imperfect in a matter of form N.C. Gen. Stat. § 1-567.14(a)(3).

[3] Appellant also contends that the trial court failed to comply with N.C. Gen. Stat. § 50-16.8(f) in its 1 December 1977 order confirming the arbitrator's award by failing to find facts and make conclusions of law. G.S. 50-16.8(f), however, contemplates a judicial determination of an action for alimony or alimony *pendente lite*, and is inapplicable to the situation where the parties agree to arbitrate the issue of spousal support. Rather, N.C. Gen. Stat. § 1-567.12 controls. That statute provides that unless within the time limits specified in the Arbitration Act, an application to vacate modify or correct the award is made, "[u]pon application of a party, the Court shall confirm an award."

Moreover, N.C. Gen. Stat. § 1-567.18 provides that an appeal taken from an order confirming an arbitrator's award shall be taken in the manner and to the same extent as from orders in a civil action. Without doubt, an appeal taken two and one-half years after entry of the order is not timely.

2. The binding effect of such agreements on the courts is discussed *infra*.

[4] Therefore, the final question to be determined on this appeal is whether the portion of the judicially confirmed arbitrator's award concerning support of plaintiff-appellant may be modified after the statutory time periods for modifying the award and for appealing the confirmation order have expired. We hold it cannot.

The 18 October 1976 order approving the parties' consent to arbitration, quoted previously, was a consent judgment.

> A consent judgment is the contract of the parties entered upon the court records with the approval and sanction of a court of competent jurisdiction. It depends for its validity upon the consent of both parties, without which it is void. "A judgment or decree entered by consent is not a judgment or decree of the court, so much as the judgment or decree of the parties, entered upon its records with the sanction and permission of the court, and being the judgment of the parties which cannot be set aside or entered without their consent." [*Ellis v. Ellis*, 193 N.C. 216, 219, 136 S.E. 350 (1926), quoted in *Holden v. Holden*, 245 N.C. 1, 8, 95 S.E. 2d 118 (1956).]

2 R. Lee, N.C. Family Law § 149 at 217 (4th ed. 1980).

> "A consent judgment must be construed in the same manner as a contract to ascertain the intent of the parties." *Bland v. Bland*, 21 N.C. App. 192, 195, 203 S.E. 2d 639, 641 (1974). This Court is not bound by the "four corners" of a consent judgment, but the judgment should be interpreted in light of the surrounding controversy and purposes intended to be accomplished by it. *Price v. Horn*, 30 N.C. App. 10, 226 S.E. 2d 165 (1976), *cert. denied*, 290 N.C. 663, 228 S.E. 2d 450 (1976).

Roberts v. Roberts, 38 N.C. App. 295, 300, 248 S.E. 2d 85 (1978).

Appellant does not contend that her consent to the agreement to submit the case to arbitration was in any way invalid. The second numbered paragraph of the consent order states the intent of the parties in entering into the agreement as follows: "[i]t is the intent and purpose hereof that the said arbitrator is fully authorized and empowered to bring this controversy to a conclusion and . . . his report shall constitute the final and binding decision with respect to this case." The consent order also states

"[t]he arbitrator's report in this case shall be final and binding on all parties." We believe that a valid agreeement to arbitrate the issue of spousal support should be accorded the same effect as an agreement between spouses setting forth the amount of such support. In North Carolina, by statute, a valid separation agreement providing for the separate support of a spouse, so long as it is fully performed, will bar a subsequent action for alimony, alimony pendente lite and counsel fees. N.C. Gen. Stat. § 50-16.6(b). This was also the rule in North Carolina prior to the enactment of this statute in 1967. 2 R. Lee, N.C. Family Law § 148 (4th ed. 1980). The rationale for this rule is that a dependent spouse's right to support is a property right which may be released by contract. Such a contract may not be ignored or set aside by a court without consent of the parties. *Kiger v. Kiger*, 258 N.C. 126, 128 S.E. 2d 235 (1962); *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963). The same rationale applies to an agreement to arbitrate the issue of spousal support.

For the reasons stated above, we affirm the action of the trial court.

Affirmed.

Judges CLARK and HILL concur.

STATE OF NORTH CAROLINA v. JAMES RUFUS HAMILTON AKA ELIJAH COOLEY

No. 8112SC228

(Filed 15 September 1981)

1. Constitutional Law § 74; Criminal Law § 48— no comment on defendant's exercise of right to remain silent

In describing the circumstances under which an officer discovered the true name of the defendant, who had given officers an alias when arrested, the officer's testimony, "He didn't want to talk to us so we were taking him back to the booking room," did not constitute an improper comment on defendant's exercise of his post-Miranda right to remain silent, since the statement was not manifestly intended and was not of such character that the jury would naturally and necessarily take it to be a comment on defendant's exercise of his right to remain silent. Furthermore, even if the statement constituted an

improper comment on defendant's exercise of his post-Miranda right to remain silent, the admission of the statement constituted harmless error beyond a reasonable doubt since the witness's comment was not extensive, no inference of guilt from silence was stressed to the jury, and the admission of the statement could not have contributed to defendant's conviction.

2. Assault and Battery § 13; Robbery § 3.2— weapon found at crime scene four months later—introduction as harmless error

In a prosecution upon indictments charging armed robbery and assault with a deadly weapon inflicting serious injuries, defendant was not prejudiced by the introduction of testimony concerning the discovery of a sock containing two pieces of concrete at the crime scene some four months after the crimes occurred where the trial court granted defendant's motion to strike the testimony and instructed the jury to disregard it because the State failed to connect such "weapon" with the crimes charged, and where the State thereafter took dismissals on the original charges and proceeded on lesser charges of common law robbery and assault inflicting serious injuries for which the existence of a "weapon" was not a necessary element.

APPEAL by defendant from *Herring, Judge.* Judgment entered 17 October 1980 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 4 September 1981.

Defendant was indicted upon the charges of armed robbery and assault with a deadly weapon inflicting serious injuries. The trial court granted motions for dismissal on both offenses and the case proceeded as to the lesser included offenses of common law robbery and assault inflicting serious injury. Prior to trial defendant moved to exclude from the jury any reference to the defendant's exercising his right to remain silent or to his refusal to make a written statement. This motion was granted. From a verdict of guilty on both counts, the defendant appeals.

The record discloses the following facts:

Shortly after 3 o'clock on the morning of 1 May 1980, a police officer apprehended two black males approximately two and one-half blocks from the Sheraton Motor Inn in downtown Fayetteville. Both males were wearing dark baseball-type caps; one had braided hair. They appeared to have blood on their clothing. While being frisked by a second officer who had arrived on the scene, one male subject was observed tossing an object under the police vehicle. The object was a gold Quartz Timex watch. Also found on one of the subjects was $68 in cash, $48 of which was concealed in a sock. One of the subjects identified himself as Elijah Cooley, the defendant.

At trial William Simmons testified that he had been the victim of a robbery and assault shortly after 2 o'clock on the morning of 1 May 1980. The incident occurred as Mr. Simmons was returning to his room at the Sheraton Motor Inn in downtown Fayetteville. Shortly before he was struck from behind with what felt like a blunt instrument, Mr. Simmons had seen two black males approaching in his direction. One of the men was wearing a baseball-type cap and had braided hair. A gold Quartz Timex watch and five twenty-dollar bills were taken from the victim. An analysis of blood samples obtained from the victim and from clothing worn by the two male suspects gave rise to the conclusion that the blood types matched.

Defendant offered no evidence on his own behalf.

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

Assistant Public Defender, Twelfth Judicial District, Gregory A. Weeks for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant assigns as error the trial court's denial of his motions for mistrial. Giving rise to the motions was the introduction of allegedly inadmissible and prejudicial testimony on two separate occasions during trial.

[1] Defendant first takes exception to the following statement made by the witness, Detective Stankiewicz. The question and his answer were in response to the witness's assertion that it was necessary for the booking officer to change defendant's name on the warrant from Elijah Cooley (an alias) to James Rufus Hamilton.

> Q. Now, when did you learn of the name change Rufus Hamilton, sir, in the course of the investigation?
>
> A. After bringing—on the morning of the 5th, after bringing him down from the jail, we read off the warrant to him and we advised him of his rights. *He didn't want to talk to us* so we were taking him back to the booking room. [Emphasis ours.]

Defendant relies on the Supreme Court decisions in *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed. 2d 91 (1976), and *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), to support the contention that a violation of his constitutionally guaranteed right to remain

silent warrants a new trial. We find the decision in *Doyle* distinguishable on its facts. In the present case there was no attempt to impeach the defendant concerning his post-arrest silence. *State v. Holsclaw*, 42 N.C. App. 696, 257 S.E. 2d 650 (1979). The holding in *Doyle* is significant, however, in that it affords force of law to dictum in *Miranda:*

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

384 U.S. at 468 n.37. *See State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132 (1975).

In order to determine the appropriateness of the trial court's denial of defendant's motion for mistrial based on Detective Stankiewicz's statement, two questions must be answered. (1) Did the statement constitute an improper comment on the defendant's post-*Miranda* right to remain silent? (2) In so allowing the statement to be made in the presence of the jury, was there error of such prejudicial magnitude that defendant's right to a fair trial has been violated?

We have reviewed the North Carolina cases dealing with whether a statement made at trial constitutes an improper comment on the exercise of a defendant's right to remain silent. In so doing we have noted the absence of any definitive test which might provide guidance. In *State v. Taylor*, 289 N.C. 223, 228, 221 S.E. 2d 359, 363 (1976), the Court held a comment not improper, relying on the fact that the remarks made did not "specifically point to" a defendant's failure to testify and that "an average juror would not so interpret them." In *State v. Peplinski*, 290 N.C. 236, 251, 225 S.E. 2d 568, 576 (1976), the Court found no improper comment "so long as no direct reference is made to the right of the defendant to testify and his failure to do so." *See also State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10 (1976).

We find the language in these cases consistent with the test set out in *Knowles v. United States*, 224 F. 2d 168, 170 (10th Cir. 1955), a case which also concerned a comment on the failure of an accused to testify. However, we believe the test is equally applicable to the question presented in this case. In applying the *Knowles* test, we must consider whether "the language used was manifestly intended or was of such character that the jury would

naturally and necessarily take it to be a comment" on a defendant's exercise of his post-*Miranda* right to remain silent. Implicit in the test is an examination of both the prosecutor's intentions and the natural meaning of the statement as perceived by the jury. Taken in context, we cannot find that Detective Stankiewicz manifestly intended his statement to be a comment on defendant's exercise of his right to remain silent. The statement was not obviously motivated by a desire to punish the exercise of defendant's constitutional right to remain silent when arguably there existed a rational non-vindictive purpose—the witness was attempting to describe the circumstances under which he discovered the defendant's true name. Moreover, again viewing Detective Stankiewicz's statement in the context of his other testimony, we cannot conclude that the jury would have naturally and necessarily viewed the statement as a comment on defendant's exercise of his right to remain silent. Unaware that the statement was made in technical violation of defendant's motion *in limine*, and presumably unaware of the legal implications of the statement, a jury would likely treat it as nothing more than an insignificant offhand remark of little consequence.

Assuming, arguendo, that there is a basis for finding Detective Stankiewicz's statement to be an improper comment on defendant's post-*Miranda* right to remain silent, we now consider whether allowing the statement constituted error harmless beyond a reasonable doubt. As a reviewing court we first consider whether such comment is extensive and whether an inference of guilt from silence is stressed to the jury as a basis for conviction. *Anderson v. Nelson*, 390 U.S. 523, 20 L.Ed. 2d 81 (1968) (per curiam). At the outset it should be noted that the defendant in this case offered no testimony on his own behalf. As pointed out in *Lakeside v. Oregon*, 435 U.S. 333, 55 L.Ed. 2d 319 (1978), inference of guilt from silence whether there is comment or not may be inevitable. Thus, defendant's failure to testify at trial could very well have been more damaging to his case than any silence, commented on or not, which he constitutionally exercised before trial. *State v. Peplinski, supra.*

We find that the witness's comment was not extensive. No inference of guilt from silence was stressed to the jury. The defendant was not penalized for exercising his fifth amendment privilege while under police custodial interrogation.

Our second consideration is whether the admission of the statement contributed to defendant's conviction. *Harrington v. California*, 395 U.S. 250, 23 L.Ed. 2d 284 (1969); *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705 (1967). In determining whether violation of a defendant's constitutional right to post-arrest silence met the test of harmless beyond a reasonable doubt, the Court in *State v. Castor*, 285 N.C. 286, 292, 204 S.E. 2d 848, 853 (1974), wrote:

> The fact that, exclusive of the erroneously admitted evidence, there was plenary evidence to support the verdict is not determinative. The test is whether, in the setting of this case, we can declare a belief that the erroneously admitted evidence was harmless beyond a reasonable doubt, that is, that there is no reasonable possibility the admission thereof might have contributed to the conviction.

Viewing the record in its entirety and considering the nature and extent of Detective Stankiewicz's statement, we find there is no reasonable possibility that its admission contributed to the conviction.

It should also be noted that if an improper comment is made during trial, the error may be cured "by a withdrawal of the remark or by a statement of the court that it was improper, followed by an instruction to the jury to disregard it." *State v. Peplinski*, *supra*, at 252, 225 S.E. 2d at 577. *See also State v. McCall*, *supra*; *State v. Taylor*, *supra*.

[2] Defendant next excepts to the introduction of testimony relating to the discovery of a weapon purportedly used in the commission of the robbery and assault. No weapon was discovered during the initial investigation of the crime. On 26 August, nearly four months later, police returned to the area and within minutes found a dirty white sock containing two pieces of concrete. The state offered no explanation of how they were able to locate the "weapon" or what relevance this discovery had to the robbery and assault they had investigated on 1 May. Based on these omissions the trial court granted defendant's motion to strike the testimony, denied defendant's motion for mistrial, and instructed the jury in firm and unequivocal terms to disregard all evidence relating to a sock containing two pieces of concrete. At this point the state took dismissals on the original charges of

armed robbery and assault with a deadly weapon inflicting serious injuries and proceeded as to the lesser included offenses. Thus, the existence of a "weapon" was no longer a necessary element of the offenses. In light of the evidence taken as a whole, we cannot agree that defendant has met his burden in showing any prejudicial effect of this testimony. *State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979); *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969).

No error.

Judges MARTIN (Robert M.) and BECTON concur.

NELLIE HASTY, EXECUTRIX OF THE ESTATE OF MARTHA B. TURNER, PLAINTIFF v. WILLIAM W. TURNER, SR., IVAN DALE DOCKERY, WESLEY DEAN SAUL AND THOMAS EDWARD OLIFF, JR., DEFENDANTS

No. 8011SC960

(Filed 15 September 1981)

1. **Appeal and Error § 48.3; Conspiracy § 2; Evidence § 34.1— admission of testimony concerning admissions of less than all defendants—not prejudicial error**

In a civil case in which plaintiff alleged defendants conspired to murder testatrix and in which plaintiff sought damages as a result of that conspiracy, it was error to admit testimony of an SBI agent concerning admissions of two defendants as to any of defendants other than the makers of the declarations as the declarations were not made in furtherance of the conspiracy. The error was not prejudicial, however, as the guilty plea of each defendant to the conspiracy charge had been admitted without contest.

2. **Trial § 40— issues for jury—no error**

Where the possibility that the other defendants conspired independently of appellant was not raised by the evidence, it was not error to have excluded such a finding through the issues submitted to the jury.

3. **Rules of Civil Procedure § 59— motion to set aside verdict—judge's discretion**

Where plaintiff offered sufficient evidence to justify the award of compensatory damages in her civil action, defendant failed to show abuse of discretion by the trial court's denial of his motion for a new trial.

APPEAL by defendant, William W. Turner, Sr., from *Hobgood (Robert H.), Judge.* Judgment entered 26 March 1980 in Superior

Court, HARNETT County. Heard in the Court of Appeals 8 April 1981.

Plaintiff brought this wrongful death action to recover from defendants, jointly and severally, compensatory and punitive damages resulting from the death of testatrix, Martha B. Turner. The complaint filed 30 October 1975 charged that defendant appellant, Turner (hereinafter appellant), solicited and conspired with the other defendants, or some of them, to murder his wife, Martha B. Turner. Appellant answered the complaint denying all of the material allegations and asking that the complaint be dismissed.

At trial plaintiff presented evidence which tended to show that the testatrix was found dead in her home on 23 January 1974. She died from two gunshot wounds to her head.

Appellant told defendant Saul that he wanted to have his wife killed. Appellant gave Saul $3,000 with which to arrange the killing. Saul contacted defendant Oliff who, in turn, contacted defendant Dockery who agreed to murder the testatrix. Subsequently Oliff and Dockery went to the Turner home and murdered the testatrix. Saul paid Oliff $1,500 before the murder, and another $1,500 after the murder was completed.

Further evidence was presented by plaintiff concerning the issue of damages. This evidence showed that at her death testatrix was 35 and had a life expectancy of 37.76 years. She was not employed at the time of her death. Testatrix was survived by three children from a previous marriage, and one infant from her marriage to appellant.

Defendants did not present any evidence.

The jury found that appellant had solicited and conspired with the other defendants to murder plaintiff's testate, Martha B. Turner. Likewise, the jury found that the other three defendants participated in the murder of Martha B. Turner pursuant to the alleged conspiracy. They awarded plaintiff $150,000 as compensatory damages, plus $75,000 as punitive damages.

Appellant appealed from the judgment entered awarding plaintiff $225,000 in damages.

Love and Wicker, by Jimmy L. Love, and Hoyle and Hoyle, by Kenneth R. Hoyle, for plaintiff appellee.

O. Henry Willis, Jr., for defendant appellant.

MORRIS, Chief Judge.

The trial court allowed William F. Dowdy, a special agent with the S.B.I. to testify for plaintiff at defendant's trial. Dowdy's testimony consisted of his recapitulation of incriminating statements made to him by defendants Oliff and Saul some time subsequent to the murder. These statements concerned the solicitation and formation of the conspiracy to murder the testatrix and the events surrounding the perpetration of the murder. Dowdy testified as to transactions occurring between the conspirators of which he had been told by defendants Oliff and Saul. At the beginning of Dowdy's testimony defendant's objection and motion to strike were sustained by the trial court. Immediately after so ruling, Judge Hobgood sent the jury from the courtroom and heard arguments from opposing counsel on this evidentiary matter. After hearing counsel's arguments, Judge Hobgood reversed his previous ruling, set aside the motion to strike, and allowed Dowdy's evidence to be considered by the jury. Before the jury returned, appellant repeated his objection to the admission of Dowdy's testimony. This time objection was based on the ground that if Oliff and Saul made their statements to Dowdy subsequent to the conspiracy, they should be inadmissible against appellant although they might still be admissible against Oliff and Saul. The trial court also denied this objection and allowed Dowdy to give his testimony without limitation as to its applicability.

[1] In his first assignment of error appellant contends that the trial court committed prejudicial error by allowing plaintiff's witness Dowdy to recapitulate for the jury the content of the post-conspiracy narrative statements given to him by Oliff and Saul. He also alleges that the trial court erred by not limiting the admissibility of these statements to the individuals who made them.

State v. Littlejohn, 264 N.C. 571, 142 S.E. 2d 132 (1965), involved a prosecution for conspiracy to commit larceny. Following the commisson of the larceny and the sale of the stolen property

one of the alleged conspirators made a declaration to the victim of the larceny and the police in which he narrated the events of the conspiracy and the part taken in it by each of the conspirators. The conspirator who made these declarations did not testify at trial. However, the victim and the police officer did testify and they recounted the conspirator's story for the jury. In holding that the declaration of the conspirator as retold by these witnesses was inadmissible and incompetent as against the other conspirators, Justice Moore stated:

> The existence of a conspiracy may not be established by the ex parte declaration of an alleged conspirator made in the absence of his alleged coconspirators. Only evidence of acts committed and declarations made by one of the coconspirators, after the conspiracy is formed is competent against all, and then only when the declarations are made or the acts are committed in furtherance of the conspiracy. *State v. Potter*, 252 N.C. 312, 113 S.E. 2d 573; Stansbury: North Carolina Evidence (2d Ed.), § 173, pp. 442-3; 1 Strong: N.C. Index, Conspiracy, § 5, pp. 509, 510. "A declaration or act of one conspirator, to be admissible against his coconspirators, must have been made when the conspiracy was still in existence or in progress. Hence, the declaration or act of one is not admissible in evidence as against other members of the conspiracy if it was made after the termination of the conspiracy. . . . This is true whether the conspiracy is terminated by the achievement of its purpose or by the failure to achieve it. And a confession or admission by one conspirator, after he has been apprehended, is not in furtherance of the conspiratorial purpose, but in frustration of it, and his confession is not admissible against others in the conspiracy." 16 Am. Jur. 2d, Conspiracy, § 40, p. 148.

State v. Littlejohn, 264 N.C. 571, 573, 142 S.E. 2d 132, 134 (1965). *See State v. Potter*, 252 N.C. 312, 113 S.E. 2d 573 (1960).

In the case *sub judice* a prima facie case of the conspiracy among all of the defendants to murder the testatrix had already been established by the introduction of the guilty pleas of appellant and the other defendants to the criminal charges of conspiracy to commit murder and second degree murder. However, on the authority of *Potter* and *Littlejohn* we think the trial court was in error in allowing the admission of Agent Dowdy's

testimony as to any of defendants other than the makers of those declarations, Oliff and Saul. Specifically, Dowdy's testimony was not admissible with regard to appellant. It is clear that the statements made to Dowdy by Oliff and Saul concerning appellant's solicitation and participation in the conspiracy were not made in furtherance of the conspiracy. These statements were merely narration of appellant's prior acts and statements. *See State v. Potter*, supra.

Despite the erroneous admission of Agent Dowdy's testimony as it applied to appellant, we do not think he is entitled to a new trial. The burden is on the appellant not only to show error, but also to enable the Court to see that he was prejudiced and that a different result would have likely ensued had the error not occurred. *State v. Cross*, 284 N.C. 174, 200 S.E. 2d 27 (1973); *Collins v. Lamb*, 215 N.C. 719, 2 S.E. 2d 863 (1939); *see* G.S. 1A-1, Rule 61.

> The admission of incompetent testimony will not be held prejudicial when its import is abundantly established by other competent testimony, or the testimony is merely cumulative or corroborative. (Citations omitted.)

Board of Education v. Lamm, 276 N.C. 487, 493, 173 S.E. 2d 281, 285 (1970). Plaintiff's exhibits 9, 14, 19 and 24 consisted of copies of the transcript of plea of each defendant which was entered in the criminal action against each in this matter. Each defendant, including appellant, pled guilty to conspiracy to commit murder and second degree murder. Appellant does not contest the admissibility of these documents. We think the evidence of these pleas in the criminal action constituted adequate uncontradicted evidence from which the jury could have arrived at its verdict. Agent Dowdy's testimony as to the incriminating statements of defendants Oliff and Saul was simply cumulative with respect to the evidence of these guilty pleas. Hence, we hold that the trial court's erroneous admission of Agent Dowdy's testimony with respect to appellant was harmless.

[2] In his third assignment of error appellant alleges that the trial court erred in its submission of the issues to the jury. Appellant contends that the issues submitted by the trial court were prejudicial to appellant, because the jury could not answer that the three codefendants, Oliff, Saul and Dockery, conspired to murder the testatrix without also finding that appellant was

likewise part of the same conspiracy due to the manner in which the issues were worded. The following issues, as submitted by the trial court, are pertinent to appellant's argument:

> 1. Did the defendant, William W. Turner, Sr., unlawfully, willfully, and feloniously solicit, hire, agree, plan, conspire and confederate to kill and murder plaintiff's testate, Martha B. Turner, with defendant Dockery, defendant Oliff or defendant Saul, or some of them, of his, and their, malice aforethought?
>
> 2. Did the defendant Ivan Dale Dockery, pursuant to said procurement, solicitation and conspiracy, kill and murder Martha B. Turner of his malice aforethought?
>
> 3. Did the defendant, Thomas Edward Oliff, pursuant to said procurement, solicitation and conspiracy, kill and murder Martha B. Turner of his malice aforethought?
>
> 4. Did the defendant, Wesley Dean Saul, pursuant to said procurement, solicitation and conspiracy, kill and murder Martha B. Turner of his malice aforethought?

Appellant maintains that the phrase "pursuant to said procurement, solicitation and conspiracy" in issues 2, 3 and 4 restrict the jury so that they could not answer issues 2, 3, and 4 "yes" without answering issue 1 "yes". Appellant insists that this amounted to prejudicial error. We disagree.

Generally, the form and number of issues submitted are within the discretion of the trial court. *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971); *Chalmers v. Womack*, 269 N.C. 433, 152 S.E. 2d 505 (1967); *Circuits Co. v. Communications, Inc.*, 26 N.C. App. 536, 216 S.E. 2d 919 (1975). The issues submitted arise from the pleadings and the evidence.

> [t]he issues will not be held for error if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause. (Citations omitted.)

Chalmers v. Womack, 269 N.C. 433, 435-36, 152 S.E. 2d 505, 507 (1967).

Appellant now argues that defendants Oliff, Saul and Dockery may have conspired to murder the testatrix and may

have done so without his participation. He insists that there was an issue as to whether the other defendants conspired completely independently of him. This possibility was not raised during the lawsuit. No evidence was produced by either plaintiff or defendants to suggest that Saul, Dockery and Oliff acted independently of appellant. We think the issues submitted were sufficient to resolve the controversy arising upon the pleadings and evidence.

[3] Finally, appellant argues that the trial court erred by denying his motion for a new trial. Appellant relies upon the grounds that the admission of Agent Dowdy's testimony inflamed the jury causing them to give a large damage award, and that plaintiff failed to offer sufficient evidence to justify the award of compensatory damages.

> A motion to set aside the verdict and order a new trial is addressed to the discretion of the trial judge and "his ruling thereon is irreviewable in the absence of manifest abuse of discretion." *Britt v. Allen*, 291 N.C. 630, 635, 231 S.E. 2d 607, 611 (1977).

Townsend v. Railway Co., 35 N.C. App. 482, 487, 241 S.E. 2d 859, 863, *affirmed*, 296 N.C. 246, 249 S.E. 2d 801 (1978).

The evidence with respect to damages tended to show the following: Testatrix was approximately 35 years old at her death and in excellent health. She had four children, ranging in age from 16 to six months. They had been a close family. At some point testatrix had worked at Spring Mills in South Carolina. Testatrix was a good housekeeper. After her death her children were in shock and they were "torn up" for a long while afterwards.

We hold that appellant has shown no abuse of discretion by the trial court's denial of his motion for a new trial. Appellant's assignments of error are overruled, and the trial court's judgment has

No error.

Judges MARTIN (Harry C.) and HILL concur.

HARTS BOOK STORES, INC. PETITIONER-APPELLANT v. CITY OF RALEIGH, CITY OF RALEIGH BOARD OF ADJUSTMENT, AND DALE BLOSSER, CONRAD MILLER, HOWARD SATISKY, ROBERT L. JONES, DAVID HAYWOOD, AND ROBERT E. CONNELL, JR., MEMBERS OF THE CITY OF RALEIGH BOARD OF ADJUSTMENT, RESPONDENT-APPELLEES AND CLYDE A. DILLON, III, DEBORAH ANN DILLON, JOHN ERIC DILLON, DAVID M. LEWIS, AND ANNIE LEE HANSEN, INTERVENER-RESPONDENTS

No. 8010SC779

(Filed 15 September 1981)

Municipal Corporations § 30.6— special use permit for adult book store

A city board of adjustment exceeded its authority in denying an application for a special use permit for the operation of an adult book store on grounds that the proposed use was incompatible with the use of surrounding buildings, that there was a tavern in the same block which created problems and rowdiness, and that the board "felt" that the proposed use would be a detriment to the neighborhood. Rather, the board of adjustment should have granted the special use permit where petitioner produced substantial evidence that the building in which petitioner proposed to operate the book store met the parking, sign and distance requirements for issuance of the permit and no evidence to the contrary was presented.

APPEAL by petitioner from *Preston, Judge.* Judgment entered 11 June 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 4 March 1981.

Petitioner applied to the Raleigh Board of Adjustment for a special use permit, authorized by Raleigh City Code § 10-2073, to allow the operation of an adult bookstore. After a hearing at which petitioner offered evidence that the location of the proposed bookstore met the requirements for such permits set forth in Raleigh City Code § 10-2073(2)y, the Board denied the application, making the following findings of fact and conclusion of law:

Findings of Fact

1. This property is zoned Business-II.

2. There was opposition to this case.

3. [T]he character and use of buildings in the surrounding area are incompatible with the use of the applicant's business.

4. The neighbors opposed this on both sides of the block.

5. There is a tavern in this same block which creates problems and rowdiness.

Conclusions of Law

The Board felt that the granting of this request would be a detriment to the neighborhood.

Petitioner then filed a petition for writ of certiorari which was granted by the Wake County Superior Court. After a hearing the court entered judgment affirming the Board's denial of the application.

From this judgment, petitioner appeals.

Smith, Patterson, Follin, Curtis, James and Harkavy, by Michael K. Curtis, for petitioner appellant.

Thomas A. McCormick, Jr., for respondent appellee, the City of Raleigh.

Young, Moore, Henderson and Alvis, by J. Clark Brewer, for intervenor-respondent appellees.

HILL, Judge.

Petitioner contends either (1) that the provisions of the Raleigh City Code requiring a special use permit for operation of an adult bookstore, as construed, are unconstitutional; or (2) that the Board of Adjustment and the superior court erred under North Carolina law in denying issuance of the permit. We hold that the Board erred under North Carolina law in denying the permit, and we thus do not reach the constitutional question.

Pursuant to G.S. 160A-382, the Raleigh City Council has enacted ordinances which divide the city into districts or zones regulated according to a comprehensive plan of use and development. Code of Ordinances of the City of Raleigh § 10-2001 *et seq.* (hereinafter cited as Code). Pursuant to G.S. 160A-381, the Council also has enacted an ordinance which provides for issuance by the Board of Adjustment of special use permits. Code § 10-2073. Section 10-2073 provides in pertinent part as follows:

SPECIAL USE EXCEPTIONS APPROVED
BY THE BOARD OF ADJUSTMENT

In order to provide for adjustment in the relative location of uses and buildings, of different classification, and for adjustment at and near district boundary lines, and to permit greater flexibility in the application of this chapter, the board of adjustment, as hereinafter established in section 10-2094, under uniform rules, standards, and regulations, set forth in this section and under general rules in this chapter, may make certain exceptions herein provided. Under this authority, the board shall determine the facts of a particular case and their applicability to the spirit and intent of this chapter and no permit for such uses and buildings shall be issued without the approval of the board. The nature and extent of the facts which the board shall consider and the rules which the city shall set up to guide the discretion herein conferred are not susceptible of precise definition, nor reduceable to any exact or final formula, but must be gathered from this application to the varying facts of actual cases as they arise, in order to promote the usefulness of this chapter as an instrument for fact finding, interpretation, application and adjustment, to supply the necessary elasticity to its efficient operation, and so as to determine the relation of the facts which determined the zone plan, to a particular location and use, as such facts and conditions are found, at the time of the application for the permit.

(1) Facts to be considered by the board. In passing on any case under the authority of this chapter and as a further guide to its decision upon the facts of the case, the board shall consider, among other things, the following facts insofar as they or any of them may relate thereto:

. . . .

b. The character and use of buildings and structures adjoining or in the vicinity of the property mentioned in the application.

. . . .

(2) Specific exceptions. In performing its functions and duties under this chapter, the board is authorized to permit buildings and uses limited as to location in the following cases;

. . . .

y. To permit an adult establishment in shopping center, neighborhood business, business, and industrial districts if the requirements of this section are met:

1. Off-street parking. Each facility shall provide off-street parking as required under section 10-2061.

2. Except for signs permitted under this chapter, advertisements, displays, or other promotional materials shall not be visible to the public from pedestrian sidewalks or walkways.

3. Over-concentration. Adult establishments which, because of their very nature, are recognized as having serious objectionable operational characteristics upon adjacent neighborhoods, particularly when they are concentrated. [*Sic*] Special regulation of these establishments is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. In order to prevent an over-concentration of adult establishments and the creation of a de facto downgrading or blighting of surrounding neighborhoods, no more than one (1) adult establishment in any 1,200 foot radius (determined by a straight line, and not street distance) shall be permitted.

4. Residential proximity. Adult establishments which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when they are located near a residential zoning district. [*Sic*] Special regulation of these establishments is necessary to insure that these adverse effects will not contribute to a downgrading or blighting of surrounding residential districts, no adult establishment shall locate within a 500 foot radius (determined by a straight line and not street distance) of any residential zoning district.

> The board of adjustment shall vary the radius requirements in subparagraphs 3. and 4. above when it finds that:
>
> 1. Practical difficulties or unnecessary hardships would result from the strict enforcement of the radius requirements;
>
> 2. The proposed use will not be injurious to nearby properties;
>
> 3. The proposed use will not enlarge or encourage the development of a "skid row" area;
>
> 4. The permitting of an adult establishment in the area will not be contrary to any governmental program of neighborhood conservation, rehabilitation, improvement or revitalization; and
>
> 5. All other applicable provisions of this chapter will be observed.

An adult bookstore constitutes "an adult establishment" under the Code. *See* Code § 10-2002 and G.S. 14-202.10.

A special use permit "is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist." *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 467, 202 S.E. 2d 129, 135 (1974); *see also In re Application of Ellis*, 277 N.C. 419, 425, 178 S.E. 2d 77, 80 (1970).

> When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

Refining Co., 284 N.C. at 468, 202 S.E. 2d at 136. Petitioner here produced the testimony of a zoning inspector that the building in which petitioner proposed to operate the bookstore met the parking, sign, and distance requirements set out in Code section 10-2073(2)y 1-4. The inspector testified: "This particular location

meets all the criteria as set out in the Code." Petitioner thus produced substantial evidence of the facts and conditions required for issuance of the permit. No evidence to the contrary was presented. There was thus no basis for findings denying the permit, and the permit should have been granted.

The Board found as a fact "[t]hat the character and use of buildings in the surrounding area are incompatible with the use of the applicant's business." Apparently the Board interpreted Code section 10-2073(1)(b), requiring it to consider "[t]he character and use of buildings and structures adjoining or in the vicinity of the property mentioned in the application," as authorizing it to determine compatibility of the proposed use with the existing use of other buildings in the area. This interpretation was improper. " 'The inclusion of [a] particular use in [an] ordinance as one which is permitted under certain conditions, is equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district.' " *Woodhouse v. Board of Commissioners*, 299 N.C. 211, 216, 261 S.E. 2d 882, 886 (1980), *quoting from* A. Rathkopf, 3 *Law of Zoning and Planning*, 54-55 (1979). Thus, designation in the Code of an adult bookstore as a "special use" was the equivalent of a legislative finding that it was compatible with other uses permitted in a Raleigh business district. *See Woodhouse*, 299 N.C. at 211, 261 S.E. 2d at 882.

The Board also found as a fact that "there is a tavern in this . . . block which creates problems and rowdiness." The conditions in the Code for operation of an adult establishment contain no reference to proximity of taverns. Thus, the location of a tavern in the same block as the proposed use had no relevance to whether petitioner was entitled to the permit.

The Board concluded that it "felt that the granting of [petitioner's] request would be a detriment to the neighborhood." To condition the grant of a special use permit on the opinion of a board as to whether the use "would be desirable or undesirable, beneficial to the community or harmful to it," would be "a delegation of the power to make a different rule of law, case by case"; and "[t]his power may not be conferred . . . upon an administrative officer or board." *Jackson v. Board of Adjustment*, 275 N.C. 155, 165, 166 S.E. 2d 78, 85 (1969). The Board's denial of

petitioner's application because it "felt" the bookstore would be "detrimental to the neighborhood" was therefore improper.

The interpretation given the Code by the Board allowed it to deny petitioner's application in its unguided discretion. Such denial constitutes "an unlawful exercise of legislative power by the Board . . . in violation of Article II, Section 1, of the Constitution of North Carolina." *Keiger v. Board of Adjustment*, 278 N.C. 17, 23, 178 S.E. 2d 616, 620 (1971). In basing its decision on findings that the proposed use was incompatible with the use of surrounding buildings and that a tavern was located nearby, and on a conclusion that it "felt" that the proposed use would be a detriment to the neighborhood, the Board exceeded its authority.

The judgment is reversed, and the cause is remanded for entry of judgment directing the Board of Adjustment to issue the special use permit.

Reversed and remanded.

Judges MARTIN (Robert M.) and ARNOLD concur.

ROBERT ERNEST TREADWAY v. THE CLINCHFIELD RAILROAD COMPANY

No. 8128SC63

(Filed 15 September 1981)

Master and Servant § 38.2— F.E.L.A. action—summary judgment proper

Where defendant's evidence tended to show that plaintiff, employed by defendant as a cook, resided in a camp car furnished by defendant; that plaintiff was awakened one morning by an assistant foreman who slept in the same camp car; that the assistant foreman had awakened plaintiff on previous occasions in which the plaintiff had slept late; that on this occasion plaintiff had not slept late but that in the process of arising from his bunk bed, plaintiff struck and injured his back on a portion of the bunk above his; and plaintiff failed to rebut defendant's forecast of evidence, negligence on the part of defendant was not shown, and summary judgment in defendant's favor was proper in an action brought by plaintiff under the Federal Employers' Liability Act.

APPEAL by plaintiff from *Allen, Judge*. Judgment entered 24 October 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 31 August 1981.

This is a negligence (personal injury) action brought by plaintiff under the Federal Employers Liability Act (FELA). The trial court granted defendant's motion for summary judgment and we affirm.

Plaintiff, employed by defendant as a cook, resided in a camp car furnished by defendant. On the morning of 1 December 1976, plaintiff was awakened by Guy Garland, an assistant foreman, who slept in the same camp car. In the process of arising from his bunk bed, plaintiff struck and injured his back on a portion of the bunk above his.

Barnes, Wadford & Carter, P.A., by Steven Kropelnicki, Jr., for plaintiff-appellant.

Dameron & Burgin, by E. P. Dameron, for defendant-appellee.

WELLS, Judge.

The question to be decided in this appeal is whether, at the summary judgment stage, plaintiff's forecast of evidence available to him was sufficient to establish defendant's negligence. Under the Federal Employers Liability Act (FELA),[1] plaintiff need only show that his injury resulted "in whole or in part from the negligence of any of the officers, agents, or employees" of defendant. While the jurisdiction of the State courts is concurrent with that of the Federal courts in FELA actions, what constitutes negligence under FELA is a federal question, governed by federal decisional law. *Urie v. Thompson*, 337 U.S. 163, 93 L.Ed. 1282, 69 S.Ct. 1018 (1948); *Bennett v. Railway Co.*, 245 N.C. 261, 96 S.E. 2d 31 (1956); *cert. denied*, 353 U.S. 958; 1 L.Ed. 2d 909, 77 S.Ct. 865 (1957). *See also Moss v. Railroad Company*, 135 Ga. App. 904, 219 S.E. 2d 593 (1975); *cert. denied* 425 U.S. 907, 47 L.Ed. 2d 758, 96 S.Ct. 1501 (1976); *Hill v. Railroad*, 231 N.C. 499, 57 S.E. 2d 781 (1950), *cert. denied* 340 U.S. 814, 95 L.Ed. 598, 71 S.Ct. 42 (1950); 8 Strong's Index 3d, Master and Servant, § 36. The Federal courts have consistently held that the FELA is to be liberally construed and that if the negligence of an employing railroad played any part, even the slightest, in causing the employee's injury, recovery should be allowed. *See e.g., Rogers v. Missouri Pacific*

1. *See* 45 U.S.C.A. § 51.

Railroad Co., 352 U.S. 500, 1 L.Ed. 2d 493, 77 S.Ct. 443; *reh. denied* 353 U.S. 943, 1 L.Ed. 2d 764, 77 S.Ct. 808 (1957); *Webb v. Illinois Central Railroad Co.*, 352 U.S. 512, 1 L.Ed. 2d 503, 77 S.Ct. 451; *reh. denied* 353 U.S. 943, 1 L.Ed. 2d 764, 77 S.Ct. 809 (1957). While *Rogers* and other pertinent federal court decisions make it clear that the common law defense of contributory negligence is not available to defeat a FELA claim, there must, nevertheless, be a showing of some negligence. The usual common law criteria of negligence, which include reasonble foreseeability that defendant's action or omission might result in injury, must be met. *Bennett, supra.*

Plaintiff's theory of defendant's negligence in this case is found in paragraph 5. of plaintiff's amended complaint, as follows:

> (5) Plaintiff was employed as a cook on a camp car furnished by Defendant, and he slept in that car. On the morning of 1 December 1976, while Plaintiff was asleep in the camp car, one Guy Garland, while acting within the course and scope of his employment as Assistant Foreman for the Defendant called the Plaintiff at 4:30 a.m. and told him that he had overslept and was late. The Defendant, acting through its agent and employee, Guy Garland, was negligent in that:
>
> (a) Garland knew, or should have known, that the Plaintiff was required to be in the kitchen at 5:30 a.m. in order to prepare breakfast and serve it from 6:00 a.m. to 7:00 a.m. and Garland knew that Plaintiff had been advised that tardiness would be grounds for dismissal from Defendant's employ.
>
> (b) Garland knew, or had reason to know, that the bed or bunk in which the Plaintiff was sleeping was so constructed as to make it impossible for the Plaintiff to sit upright and Garland knew or should have known, that if the Plaintiff were awakened suddenly that he would be startled and that he might foreseeably injure himself in attempting to arise and suddenly get out of the bed, due to its confined structure.
>
> (c) Garland knew, or should have known, that the Plaintiff would react suddenly and with possible harmful consequences to himself upon being awakened and falsely advised that he was late for work.

(d) Garland failed to use due care to ascertain the correct time before calling the Plaintiff and advising him that he was late for work.

(e) Garland failed to use due care in awakening the Plaintiff suddenly and in wrongfully telling Plaintiff that he was late for work under the circumstances then and there existing.

Plaintiff contends that for purposes of ruling on the motion for summary judgment, the court is required to assume that the injury occurred under the circumstances alleged by plaintiff. Plaintiff contends that he injured himself when he was awakened suddenly from his sleep an hour before he was scheduled to arise, in a manner which created an apprehension that he had overslept, thus jeopardizing his employment. In *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980) we find a clear and succinct summary of the law of summary judgment in negligence cases. We quote in pertinent part as follows:

> Rule 56, Rules of Civil Procedure, authorizes the rendition of summary judgment upon a showing by the movant that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The rule does not authorize the court to *decide* an issue of fact. It authorizes the court to determine whether a genuine issue of fact exists. Summary judgment is designed to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). "The device used is one whereby a party may in effect force his opponent to produce a forecast of evidence which he has available for presentation at trial to support his claim or defense. A party forces his opponent to give this forecast by moving for summary judgment. Moving involves giving a forecast of his own which is sufficient, if considered alone, to compel a verdict or finding in his favor on the claim or defense. In order to compel the oppponent's forecast, the movant's forecast, considered alone, must be such as to establish his right to judgment as a matter of law." 2 McIntosh, N.C. Practice & Procedure § 1660.5 (2d ed. Phillips Supp. 1970).

Accordingly, the party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court and his entitlement to judgment as a matter of law. *Pitts v. Pizza, Inc.*, 296 N.C. 81, 249 S.E. 2d 375 (1978). "His papers are carefully scrutinized and those of the opposing party are on the whole indulgently regarded." 6 Pt. 2 Moore's Federal Practice, § 56.15[8] at 642 (2d ed. 1980). *Accord, Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). "If the moving party meets this burden, the party who opposes the motion for summary judgment must either assume the burden of showing that a genuine issue of material fact for trial does exist or provide an excuse for not so doing." *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). If the evidentiary materials filed by the parties indicate that a genuine issue of material fact does not exist, the motion for summary judgment must be denied, as "the motion may be granted only where there is no such issue and the moving party is entitled to judgment as a matter of law." Id.

As a general proposition, issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant "but should be resolved by trial in the ordinary manner." 6 Pt. 2 Moore's Federal Practice, § 56.17[42] at 946 (2d ed. 1980). Hence, it is only in exceptional negligence cases that summary judgment is appropriate because the rule of the prudent man, or other applicable standard of care, must be applied, and ordinarily the jury should apply it under appropriate instructions from the court. *Caldwell v. Deese*, supra; Gordon, The New Summary Judgment Rule in North Carolina, 5 Wake Forest Intra. L.Rev. 87, 92 (1969). Nevertheless, if a motion for summary judgment is supported by evidentiary matter showing a lack of negligence on the part of the movant and there is no question as to the credibility of witnesses and no evidence is offered in opposition thereto, no issue is raised for the jury to consider under appropriate instructions and summary judgment for the movant should be allowed. *See Moore v. Fieldcrest Mills, Inc.*, supra; 6 Pt. 2 Moore's Federal Practice, § 56.17[42] at 948-49 (2d ed. 1980).

See also Easter v. Hospital, 303 N.C. 303, 278 S.E. 2d 253 (1981).

The criteria for establishing actionable negligence in a personal injury action were set out by our Supreme Court in *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972), as follows:

> In an action for recovery of damages for injury resulting from actionable negligence of defendant, plaintiff must show (1) that there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed, and (2) that such negligent breach of duty was the proximate cause of the injury, a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which a man of ordinary prudence could have foreseen that such result was probable under the facts as they existed. [Citations omitted.]
>
> Foreseeability of injury is an essential element of proximate cause. [Citation omitted.] It is not required that the injury in the precise form in which it occurred should have been foreseeable but only that, in the exercise of reasonable care, consequences of a generally injurious nature might have been expected. [Citation omitted.] However, the law requires only reasonable prevision and a defendant is not required to foresee events which are merely possible but only those which are reasonably foreseeable. [Citations omitted.]

Applying these well-established rules of summary judgment and negligence law, we find that defendant presented to the trial court a forecast of evidence which showed that defendant's employee Garland committed no act of negligence which was a proximate cause of plaintiff's injury. By deposition and affidavit of defendant's employee Garland, defendant showed to the trial court the following events and circumstances. Plaintiff had been supervised by Garland for "two or three years". Plaintiff and Garland occupied the same sleeping quarters, plaintiff's bunk being directly opposite Garland's bunk. While Garland's job duties did not include awakening plaintiff in the mornings, plaintiff would not always get up when his alarm clock went off and Garland would frequently call him by name and tell him it was time to get up and prepare breakfast. Plaintiff had been previously cautioned or disciplined by other supervisory personnel about

being late for his breakfast duty. On the morning of plaintiff's alleged injury, Garland awakened plaintiff in the same manner that he had used on many other occasions. After plaintiff's alarm clock had sounded and plaintiff had not gotten up, Garland called out to plaintiff and said either "Treadway, that clock's done went off" or "Treadway, it's time to get up."[2] Plaintiff ordinarily arose at 5:30 in the morning and was expected to have breakfast available to the crew from 6:00 to 7:00 a.m. Under these facts, even if Garland owed plaintiff the duty of awakening him in a manner not startling or threatening so as to cause plaintiff to suddenly arise from his confined lower bunk, Garland neither did nor said anything to startle or threaten plaintiff. Neither could Garland have reasonably foreseen that upon calling out to plaintiff on this particular morning, plaintiff would suddenly arise in a manner which would result in an injury to his person.[3]

Plaintiff's response to defendant's evidence did not rebut defendant's forecast. By deposition and affidavit, plaintiff was only able to show that on the morning of his alleged injury he did not hear his alarm go off, that in fact it had not gone off when Garland called him to get up, and that after the two of them arrived in the kitchen, they discovered Garland had called plaintiff at 4:30 a.m., an hour earlier than the time plaintiff was expected to arise. Plaintiff did not recall what Garland said to him on that morning; he only heard Garland's voice. Plaintiff's version of these events as set out in his affidavit and deposition is radically and fatally different from the version contained in his unverified amended complaint. On a motion for summary judgment, G.S. 1A-1, Rule 56(e) provides, *inter alia*, that "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 . . . of his pleadings, but his response . . . must set forth specific facts showing that there is a genuine issue for trial." Thus, plaintiff having failed to carry the burden thrust upon him by defendant's evidence, *Vassey*, supra, the judgment of the trial court must be and is

2. Garland's deposition version differed from his affidavit version.

3. We recognize, as stated by our Supreme Court in the quoted portion of *McNair*, supra, that it is not required that the injury in the precise form it occurred should have been foreseeable.

Affirmed.

Chief Judge MORRIS and Judge CLARK concur.

VIRGINIA L. CURTIS CHANDLER, WIDOW AND GUARDIAN AD LITEM FOR ELIZABETH ANN CURTIS, MINOR DAUGHTER, AND WALTER MASON CURTIS, IV, MINOR SON, AND WALTER MASON CURTIS, III, DECEASED EMPLOYEE, PLAINTIFFS v. NELLO L. TEER COMPANY, EMPLOYER AND UNITED STATES FIDELITY AND GUARANTY INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8010IC1170

(Filed 15 September 1981)

Master and Servant § 62.1— workers' compensation—death while returning to sleeping quarters

The death of an employee arose out of and in the course of his employment with defendant employer where decedent was sent by his employer to its road-building project in Malawi, Africa; decedent was staying at a camp provided by defendant employer which contained sleeping, eating and recreational facilities; decedent went with another employee of defendant to a nearby sugar plantation so that the other employee could schedule a softball game between the sugar plantation personnel and defendant's employees; and decedent was killed in a collision on a road within the confines of defendant's road project while returning to the sleeping quarters provided by defendant employer.

Judge ARNOLD dissenting.

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission entered 29 August 1980. Heard in the Court of Appeals 26 May 1981.

Plaintiff's deceased husband, Walter Mason Curtis, III, was employed as an accountant with defendant Nello L. Teer Company (Teer), of Durham, North Carolina. Curtis was sent by Teer to its road-building projects in Malawi, Africa to conduct an audit of Teer's African operation and to plan the moving of all Teer's African accounting operations to Malawi. Curtis arrived in Africa on 26 May 1976, and, after making stops at several Teer projects, arrived at Teer's Chicwaawaa road project in Ngabu, Malawi on 14 June 1976.

Because of the isolated location of the Chicwaawaa road project, Teer built a camp at Ngabu for its employees which included living accommodations, a dining hall and recreational facilities. Curtis was staying at the camp while conducting his audit. On 16 June 1976, the electricity failed at the Ngabu camp, and shortly thereafter, Curtis and Thomas P. Smith, an employee of a consulting engineering firm hired by Teer, left the camp and traveled to a nearby sugar plantation. The two men traveled to the sugar plantation in a truck owned and maintained by Teer, but which Teer had leased to the consulting engineering firm. Evidence in the record indicates that Smith wanted to go to the sugar plantation in order to schedule a softball game between the sugar plantation personnel and the Teer employees. Curtis went along for the ride.

While at the sugar plantation, the men had two drinks each, played darts and visited with some of the sugar plantation employees. Some time after midnight, Smith and Curtis headed back to the Ngabu camp. In route, but on a road within the confines of Teer's Chicwaawaa road project, the truck driven by Smith was involved in a head-on collision with another truck. Both Smith and Curtis were killed instantly.

Curtis was survived by his wife, the plaintiff in this action, and his two children. A Notice of Accident was filed with the North Carolina Industrial Commission (Commission) in July, 1977. In an opinion and award dated 30 May 1980, a deputy commissioner of the Commission found that Curtis' accident arose out of and in the course of his employment with Teer and awarded benefits to his wife and children. On appeal by Teer, the full Commission reversed the deputy commissioner and denied benefits, finding that Curtis was not acting within the course and scope of his employment at the time of the accident. The plaintiff-wife subsequently brought this appeal.

Maxwell, Freeman & Beason, P.A., by James B. Maxwell, and Mark R. Morano, for plaintiff appellant.

Walter L. Horton, Jr., for defendant appellees.

BECTON, Judge.

The question raised in this appeal is whether the Commission erred in denying workers' compensation benefits to Curtis' family.

Appellant specifically excepts to the Commission's finding of fact and conclusion of law that Curtis' death did not arise out of or in the course of his employment with the defendant, Teer. Based on the evidence in the record, we hold that Curtis was acting within the course and scope of his employment when he was killed within the confines of Teer's Chicwaawaa road project and while returning to Teer-provided sleeping quarters. Consequently, we reverse the opinion and award of the Commission.

In appeals from the Commission, the scope of our review under the Workers' Compensation Act is (1) to determine if the Commission's findings of fact are supported by competent evidence in the record, and (2) to determine if the findings of fact reasonably support the conclusions of law. *Byers v. Highway Commission*, 275 N.C. 229, 166 S.E. 2d 649 (1969); G.S. 97-86. Moreover, it should be noted that our courts construe the Workers' Compensation Act liberally in favor of compensability. *Hewett v. Garrett*, 274 N.C. 356, 163 S.E. 2d 372 (1968); *Thomas v. Gas Co.*, 218 N.C. 429, 11 S.E. 2d 297 (1940).

Appellant contends that the uncontradicted evidence in the record is that Curtis was killed in a truck owned by his employer, on a road within the confines of Teer's Chicwaawaa road project, and while away from his home on a company business trip. Teer argues, however, that the accident was not on premises controlled by Teer and that the truck, although owned by Teer, was on lease to one of Teer's consulting engineering firms. Moreover, Teer argues that Curtis was on personal business at the time of the accident and by virtue of this deviation was acting outside the scope of his employment.

North Carolina adheres to the general rule that:

> "[e]mployees whose work entails travel away from the employer's premises are held . . . to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown."

Brewer v. Trucking Co., 256 N.C. 175, 179, 123 S.E. 2d 608, 611 (1962), *quoting* 1 Larson, Workmen's Compensation, § 25.00. The rule's rationale is that an employee on a business trip for his employer must "eat and sleep in various places in order to further the business of his employer; . . . [Moreover], [w]hile lodging

in a hotel or preparing to eat, or while going to or returning from a meal, he is performing an act incident to his employment. . . ." *Martin v. Georgia Pacific Corp.*, 5 N.C. App. 37, 42, 167 S.E. 2d 790, 793-94 (1969), *quoting Thornton v. Hartford Acc. & Indem. Co.*, 198 Ga. 786, 32 S.E. 2d 816 (1945). This rule of continuous employment seems particularly applicable when, as in this case, Curtis was not only on a business trip in Africa at the direction of his employer, but was also working, eating, sleeping and engaging in recreational activities at projects owned and operated by his employer for the benefit of the employees.

Significantly, North Carolina has also adopted the rule that an employee injured while traveling to and from his employment *on the employer's premises* is covered by the Act. *Bass v. Mecklenburg*, 258 N.C. 226, 128 S.E. 2d 570 (1962). *See also Barham v. Food World*, 300 N.C. 329, 332, 266 S.E. 2d 676, 679 (1980). It is clear that if Curtis had been injured while sleeping in the camp, walking to the dining hall, inspecting one of Teer's completed roads, or participating in a Teer-organized softball game, his injuries would be compensable. *See Bass v. Mecklenburg County*, wherein a nurse who was furnished room and maintenance at her employer's nursing home facilities received benefits as a result of an accident occurring between buildings on her employer's premises.

In this case, Teer contends that Curtis was on a personal detour when he visited the nearby sugar plantation. While this contention is disputed by the appellant, it is undisputed that Curtis was back within the confines of the Chicwaawaa road project when the accident occurred. Mr. Fredrich, Vice President in Charge of Teer's African Operations, testified by way of deposition that:

> Q. From my understanding, this accident took place between two project sites.
>
> A. No, that's not right; no, the accident occurred *within the limits* of the Chicwaawaa, Gangula [sic] project at a point south of a small town named Enchaloh but it was *within the limits* of the Chicwaawaa, Bangula project.
>
> Q. Was it between two work camps or something of that nature then?

A. No, no really; we have on that project only one work camp where our office, workshops, warehouse and living accommodations are all located. (Emphasis added.)

Moreover, Richard Elder's (Teer's Equipment Superintendent) testimony that the accident occurred five miles north of the camp is not inconsistent with the evidence that the accident was still within the confines of the Chicwaawaa road project. The Ngabu camp is located in an area surrounded by the Chicwaawaa road project. Given the rule that an employee's employment status is continuous while on a trip for his employer, including time spent getting to and time spent in hotels and restaurants, Curtis was continuously in his employment while within the confines of the Chicwaawaa road project, and not on a personal frolic. Curtis' personal frolic to the sugar plantation, if indeed one, ended when he returned to the Chicwaawaa road project. It is undisputed that Curtis was in the process of returning to his place of employment and the sleeping accommodations provided for him by his employer at the time of the accident. In *Martin*, the employee was attending a one-week training program out-of-town. After walking several blocks from his hotel to see yachts on the river, the employee then proceeded to a restaurant to eat dinner and was struck and killed by a car. Benefits were allowed. This Court concluded that although going to see the yachts was a personal detour, once he began to proceed to dinner he "had abandoned his personal sight-seeing mission" and was back within the scope of his employment. 5 N.C. App. at 43, 167 S.E. 2d at 794. We do not believe that workers' compensation would have been denied had Martin eaten first, gone to the yacht basin second, and then been killed on his trip back to his hotel. This case, then, is indistinguishable from *Martin* and from the other worker compensation cases in which the traveling employee is compensated for injuries received while returning to his hotel, while going to a restaurant or while returning to work after having made a detour for his own personal pleasure. *Clark v. Burton Lines*, 272 N.C. 433, 158 S.E. 2d 569 (1968); *Kiger v. Service Co.; Brewer v. Trucking Co.; Hardy v. Small*, 246 N.C. 581, 99 S.E. 2d 862 (1957); *Michaux v. Bottling Co.*, 205 N.C. 786, 172 S.E. 406 (1934); *Parrish v. Armour & Co.*, 200 N.C. 654, 158 S.E. 188 (1931); *Williams v. Board of Education*, 1 N.C. App. 89, 160 S.E. 2d 102 (1968). Although on a private mission prior to an accident, an employee who is injured while returning to his employment should be com-

pensated under the Workers' Compensation Act. In order for Curtis' death to be compensable, then, he need not have returned all the way to his sleeping quarters, just as an employee injured while returning to work on the employer's premises need not be in his exact assembly-line position or in his own office at the time of his injury in order to be compensated.

It is clear from the evidence that Teer sent Curtis on a business trip to an isolated part of Africa, and provided Curtis and other Teer employees with sleeping, eating and recreational facilities within the various Teer project areas. While within the project areas, employees of Teer are continuously in an employment situation and are protected by the provisions of the Workers' Compensation Act.

The Commission's finding of fact that Curtis was not acting within the scope of his employment at the time of his death is not supported by the evidence in the record. Likewise, the Commission's conclusion of law is also not supported by its findings. Therefore, we reverse the opinion and award of the Commission and order the deputy commissioner's opinion and award reinstated.

Reversed.

Judge VAUGHN concurs.

Judge ARNOLD dissents.

Judge ARNOLD, dissenting.

I dissent. The Commission's finding that Curtis was not acting within the scope and course of his employment at the time of the accident is supported by the evidence. Therefore, I would affirm the Commission.

STATE OF NORTH CAROLINA v. CLARENCE CORNELL SHAW

No. 8118SC162

(Filed 15 September 1981)

1. **Narcotics § 3.1— witnesses' testimony of past drug experiences—relevancy**

In light of charges against defendant of (1) possession of cocaine with intent to sell or deliver, (2) sale of cocaine, and (3) conspiracy to sell or deliver cocaine, it was relevant for the State to offer evidence of a State witness's drug habit and his need to support that habit by dealing in drugs with defendant, of the relationship between the State's witness and defendant within a reasonable time before the date of the crimes charged, and of their *modus operandi* in drug dealing.

2. **Criminal Law § 88— cross-examination of defendant—permissible questions**

Questions by the State on cross-examination concerning defendant's connection with and use of other drug dealers, the presence of plastic bags in the car when defendant was arrested, and the proximity of schools to defendant's store were relevant to the issues in the case, were based upon sufficient information and were asked in good faith; therefore, objections to the questions were properly overruled.

3. **Criminal Law § 162— necessity for motion to strike or request for instruction**

In the absence of a motion to strike or a request for an instruction to the jury to disregard certain testimony, defendant is not entitled to be heard to complain of error in the admission of the testimony.

4. **Criminal Law § 107.2; Narcotics § 4— State's proof concerning date of offense—no variance**

Where three officers testified as to the date of certain drug transactions and the date corresponded with the date on the indictment, another witness's uncertainty about the exact date did not constitute a variance between *allegata* and *probata*.

APPEAL by defendant from *Wood, Judge*. Judgments entered 12 June 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 31 August 1981.

Defendant was convicted, as charged, of (1) possession of cocaine with intent to sell or deliver, (2) sale of cocaine, and (3) conspiracy to sell or deliver cocaine all on 30 August 1979. Defendant appeals from judgments imposing concurrent prison terms of not less than 5 nor more than 10 years.

STATE'S EVIDENCE

Larry Ledbetter testified for the State and admitted having a drug habit at the time in question. He obtained drugs from

defendant and also, to support his habit, beginning in July 1979, sold and tested drugs for defendant. According to Ledbetter, several other individuals also sold drugs for the defendant. In August, he met undercover agent Timothy Samuels at Shaw's Curb Market and sold to him cocaine, which he had bought from defendant, for $50.00. Several hours later Samuels returned and wanted to buy more cocaine. He gave $100.00 to Ledbetter, who went inside the market operated by defendant, paid him the $100.00, got the cocaine, and gave it to Samuels.

Agent Samuels testified that on 30 August 1979, at about 5:00 p.m. he met Ledbetter near Shaw's Curb Market and gave him $50.00. Several hours later he again met Ledbetter at the market and gave him $100.00 for cocaine. He saw Ledbetter then go into defendant's convenience store and hand the money to the defendant. Shortly thereafter, Ledbetter and the defendant came out of the store, and Ledbetter gave Samuels a package later identified as cocaine. Police detectives Baulding and Williams also personally observed portions of the transaction described by Samuels.

In January of 1980, defendant was arrested, and a large number of small plastic bags were found inside his car. Several larger plastic bags also found in the car contained white powder residue, later identified as cocaine.

DEFENDANT'S EVIDENCE

Defendant testified in his own behalf that he was aware of dealings in controlled substances taking place outside his curb market. Defendant acknowledged that he knew Ledbetter, but denied any involvement in illicit drugs or in any drug dealings with Ledbetter. He did not sell cocaine to Ledbetter on 30 August 1979, or at any other time.

On cross-examination, defendant admitted knowing Dennis Alexander, from whom Ledbetter had testified he had bought drugs, but defendant denied that Alexander sold drugs for him. Defendant stated that he did not know whether Alexander had lived in a house owned by defendant. He admitted there were small plastic bags in his car when he was arrested, but denied there were larger bags containing white residue. Defendant stated that there were several schools near his market and that

students from those schools were regular customers at his market, but he did not know if any students participated in illegal transactions occurring at his curb market.

On rebuttal, the State presented evidence that tended to show that defendant's general reputation in the community in which he did business was that of a supplier of drugs.

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

E. L. Alston, Jr., for defendant appellant.

CLARK, Judge.

Defendant presents over 100 exceptions to admitted evidence at trial which he argues was irrelevant and prejudicial. We group these assignments of error into evidence offered by State's witnesses, by defendant upon cross-examination, and by character witnesses in rebuttal by the State.

The exceptions to the evidence offered by the State raise the following question: Does the questioned evidence tend to prove any of the elements of the three offenses charged? Evidence 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). In criminal cases, every circumstance calculated to throw any light on the crime charged is admissible. The weight to be given such evidence is for the jury to determine. *State v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506 (1965), *cert. denied*, 384 U.S. 1020, 16 L.Ed. 2d 1044, 86 S.Ct. 1936 (1966).

[1] Defendant's objections relate primarily to Ledbetter's testimony about his past drug experiences, his drug dealings with others, and past dealings with defendant. The crimes of conspiracy to sell drugs and sale of drugs necessarily involve the relationship between two or more persons, the conspirators and the buyer and seller. And the charge of possession with intent to sell involves guilty knowledge, which in drug cases ordinarily must be shown by circumstantial evidence indicating involvement in drug traffic. In light of these charges against the defendant we find it relevant for the State to offer evidence of Ledbetter's drug habit and his need to support that habit by dealing in drugs with

defendant, of the relationship between Ledbetter and defendant within a reasonable time before the date of the crimes charged, and their *modus operandi* in drug dealing.

[2] Defendant's argument of prejudicial error in the State's cross-examination of him relates chiefly to questions concerning defendant's connection with and use of other drug dealers, the presence of plastic bags in the car when defendant was arrested, and the proximity of schools to defendant's store. The scope of cross-examination of a criminal defendant is broad, may concern any subject which is relevant to the issues in the case; and, for impeachment purposes, specific bad acts may be brought out on cross-examination to show defendant's character, provided the questions are asked in good faith and are based on information. This wide scope of cross-examination is subject to the witness's privilege against self-incrimination and the discretion of the trial judge. The witness's answer is conclusive and cannot be contradicted by other testimony. *State v. McLean*, 294 N.C. 623, 242 S.E. 2d 814 (1978); 1 Stansbury's N.C. Evidence § 111 (Brandis Rev. 1973). The questions to which defendant objected concerned facts previously testified to by State's witnesses. Therefore, these questions were based upon sufficient information and asked in good faith.

[3] Defendant also assigns as error the reputation testimony given by Officer Williams in rebuttal. Although Williams was asked about defendant's general reputation in the community, he responded that defendant had a reputation as a supplier of drugs. The record does not reveal that after the objection was overruled, defendant made either a motion to strike or a request for an instruction to the jury to disregard the testimony. In the absence of such motion or request, defendant is not entitled to be heard to complain of error in the admission of testimony. *State v. Huggins*, 35 N.C. App. 597, 242 S.E. 2d 187, *cert. denied*, 295 N.C. 262, 245 S.E. 2d 779 (1978); *Highway Comm. v. Black*, 239 N.C. 198, 79 S.E. 2d 778 (1954).

[4] In his final argument defendant contends that there was a fatal variance between the indictments and the State's proof concerning the date the offense occurred. The sufficiency of the indictments is not challenged. Defendant's argument is without merit since Officers Samuels, Baulding, and Williams testified

that the $100 drug transaction occurred on 30 August 1979, the date charged in the indictments; and both Samuels and Ledbetter testified that the $50.00 and $100.00 buys occurred on the same day. Under the circumstances Ledbetter's uncertainty about the exact date did not constitute a variance between *allegata* and *probata*.

We conclude that the defendant had a fair trial free from prejudicial error, there being no "reasonable possibility that, had the error in question not been committed, a different result would have been reached. . . ." G.S. 15A-1443.

No error.

Chief Judge MORRIS and Judge WELLS concur.

CITY OF RALEIGH v. JAMES M. STELL AND RALEIGH CIVIL SERVICE COMMISSION

No. 8110SC17

(Filed 15 September 1981)

Municipal Corporations § 9.1— Civil Service Commission—no authority to appoint respondent as police major

The Civil Service Commission of the City of Raleigh had no authority to entertain an appeal from a decision of the chief of police not to appoint respondent to the rank of major in the police department since a police major is a "division head" whose position is exempt from the provisions of the Civil Service Act.

APPEAL by respondent James M. Stell from *Clark, Judge.* Order filed 21 August 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 3 June 1981.

Captain James M. Stell of the Police Department of the City of Raleigh instituted this proceeding by appealing the decision of Raleigh Police Chief Heineman not to promote him to the rank of Major. Captain Stell first appealed to Chief Heineman and, thereafter, he proceeded with his review efforts through administrative channels, until, pursuant to the Civil Service Act [hereinafter "Act"] of the City of Raleigh (1971 N.C. Sess. Laws,

Chapter 1154), he took his appeal to the Raleigh Civil Service Commission [hereinafter "Commission"]. In his letter requesting review of Chief Heineman's decision not to promote him, Captain Stell stated that by education, experience, tenure, and time in grade as captain, he was qualified for promotion and that his not being promoted was the result of his application for the position of police chief, his innovative police procedures, and a systematic effort by his immediate supervisor to harass him and to pursue a personal vendetta against him.

During nine days of hearings held from 19 November 1979 through 19 May 1980, the Commission heard testimony of various witnesses and received written reports and documents concerning Captain Stell's complaint. On 19 May, the Commission adopted an Order (later signed on 4 June 1980) which contained, *inter alia*, the following findings of fact: that on 1 July 1976, Captain Stell, an officer in good standing since 1951, was given additional duties which essentially comprise those presently being performed by now-Major Haley, the major promoted over Captain Stell; that since 1978, Tom Justice and John V. Haley had been promoted to the rank of major without formal solicitation made of Captain Stell as required by City Policy, 100-6; that Captain Stell testified, under oath and without refutation, that his education, command experience in the Investigative Platoon, and length of service qualified him above Haley for the position of major; that Captain Stell's allegations of violations of the merit principle were unrefuted; and that Captain Stell's appeal for promotion and back pay were timely under the applicable provisions of City Personnel Policies and Procedure.

From these findings, the Commission concluded that John Haley's promotion was in violation of the merit principle; that, from July 1976 until early 1979, Stell had served, for compensation as a captain, in a position previously and subsequently held by a major; that Stell was the victim of reprisal for his proper processing of grievances; and that Stell was better qualified than Haley for the position of major. The Commission ordered that Stell be promoted to the rank of major upon the next vacancy and that he be reimbursed, with interest, the difference between major's pay and the pay he received from July 1976 through the date of the Commission's order.

From this order, the City of Raleigh, acting pursuant to the provisions of G.S. 7A-250, petitioned the Wake County Superior Court for a writ of certiorari to review the decision of the Commission. After having reviewed the petition, the briefs of the parties, the record of the Commission's hearing, and arguments of counsel, the court struck down several of the Commission's findings of fact as not supported by substantial evidence from the record or as having no probative value. The court also struck all four of the Commission's conclusions of law as erroneous and not based upon any competent evidentiary findings of fact. After concluding that the orders of the Commission were not supported by competent findings of fact or conclusions of law, the court made the following conclusions:

> (9) That the position of police major is that of a Division Head as defined by applicable Personnel and Policy Procedures of the City of Raleigh. The Raleigh Civil Service Act does not apply to said position and by necessary implication appointments to the position of police major are exempt from the Civil Service Act. The Civil Service Commission is without jurisdiction or authority to order the appointment of anyone to the position of police major. Order Number 1 of the Commission directing the appointment of the respondent to that position exceeds the authority and powers deligated [sic] to the Commission by the Legislature and is in error. Further, said order is erroneous in that it no way [sic] affirms, modifies, or reverses the action of the City which appointed John V. Haley to the position of police major;
>
> (10) The Commission erred in failing to dismiss respondent's claim for back pay and in entering order Numbers 2 and 3 directing that the respondent be reimbursed the difference between the major's pay and the pay which he did receive for the period from July, 1976, to May 19, 1980, and interest thereon. The Commission has no jurisdiction or authority to entertain an appeal regarding said matter as the same exceeds the power, authority and duty conferred upon the Commission by Ch. 1154 S.L. 1951(f). Further, in the absence of finding or showing that the respondent had filed a grievance regarding said matter and exhausted available administrative remedies, the Commission was without jurisdiction to determine said matter or enter orders thereon.

The Court thereafter reversed and set aside the decision of the Raleigh Civil Service Commission. From this order, respondent Stell appealed.

Police Attorney Kurt C. Stakeman for petitioner-appellee.

Lake & Nelson, by Broxie J. Nelson, for respondent-appellant.

HILL, Judge.

Respondent presents numerous assignments of error for this Court's consideration. Because of this Court's interpretation of the Civil Service Act of the City of Raleigh, as reported in the opinion, *In the Matter of: Hubert Y. Altman,* 52 N.C. App. 291, 278 S.E. 2d 297 (1981), we deem it necessary to discuss only one issue raised by respondent.

In the *Altman* case, this Court reviewed the Raleigh Civil Service Act as it related to the promotion of Captain Altman to Fire Marshal of Raleigh. The Court held that since the position of Fire Marshal is exempt from the provisions of the Act, the Commission had no authority to entertain Altman's appeal of the City's refusal to promote him to that position.

After reviewing the record in the instant case, we find that the position of major is exempt from the Civil Service Act and that the Commission had no jurisdiction to hear Captain Stell's appeal. Section 1 of Chapter 1154 of the 1971 North Carolina Session Laws stated in pertinent part:

> (b) *Merit Principle.* All appointments and promotions of the City officers and employees shall be made solely on the basis of merit and fitness demonstrated by examination or other evidence of competence. However, any employee who contends that he was not promoted because of bias or for reasons not related to merit, fitness or availability of positions, shall have the right, after exhausting all administrative remedies, to appeal his cause to the Civil Service Commission.
>
> (c) *Employees Subject to Act.* This act shall apply to all officers and employees of the City except the following:
>
> (1) Officials elected by the people.

(2) Employees or officials appointed by the City Council or appointed by the City Manager and approved by the City Council and their immediate secretaries.

(3) Department heads, Division heads, and their immediate secretaries.

(4) Part-time or non-permanent officers or employees.

(5) Employees serving their probationary periods before becoming permanent employees not to exceed eight months.

* * *

(f) *Appeal Board.* The Civil Service Commission shall act as an appeal board to hear all appeals of employees regarding violation of City policy, suspensions, layoff, removal, promotions, forfeiture of pay or loss of time; but the Board shall have no jurisdiction to hear an appeal until all administrative remedies have been exhausted pursuant to the City's established grievance procedure.

The Civil Service Commission shall have the authority to affirm, modify or reverse, as it deems necessary, those actions over which it has jurisdiction.

The record shows that the position of major in the Raleigh Police Department is described as "administrative and managerial work in the direction and control of the activities of a major police division." There are three majors in the department, and those majors fill top command positions, second only to the Police Chief. Under Section 1(c)(3) of the Act, the position to which Captain Stell sought promotion was exempted from the Act. The Commission therefore had no jurisdiction over Captain Stell's complaint concerning his promotion. It follows that since the position of major is exempt from the Act, the Commission had no jurisdiction to hear an appeal in which Captain Stell sought major's pay for a period of time during which he, as a captain, allegedly performed the tasks of a major.

For the reasons set forth above, the Commission's order of 4 June 1980 was properly vacated. The order of the superior court, to the extent that it held the Commission had no jurisdiction over Captain Stell's appeal, is

Affirmed.

Judges MARTIN (Robert M.) and CLARK concur.

STATE OF NORTH CAROLINA v. STANLEY LEE CAMPBELL

No. 8121SC169

(Filed 15 September 1981)

1. **Criminal Law § 87.2— leading questions—no abuse of discretion**

The trial court did not abuse its discretion in the allowance of leading questions which either sought to have a witness clarify her previous testimony or describe how she picked out a photograph during a photographic identification procedure.

2. **Criminal Law § 169.6— exclusion of testimony—failure to show prejudicial error**

Where the record does not contain what the witness would have testified had she been allowed to do so, the Appellate Court is unable to determine whether defendant is prejudiced by the exclusion of the witness's testimony.

3. **Criminal Law § 66— testimony corroborating identification of defendant—relevancy**

In a prosecution for uttering a forged check, testimony that two witnesses identified a picture of defendant's brother as the person with defendant at the time of the crime was relevant to corroborate the witnesses' testimony regarding their identifications of defendant and to show the events and circumstances surrounding such identifications. Further, defendant could not have been prejudiced by this testimony as other testimony had already proved identification.

4. **Criminal Law § 66.16— in-court identification—sufficiency of evidence to support**

The court's conclusion that the in-court identification of defendant by State's witnesses was independent of any previous photographic identification procedure was supported by the evidence and findings.

APPEAL by defendant from *Collier, Judge.* Judgment entered 24 September 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 1 September 1981.

Defendant was charged in a proper bill of indictment with uttering a forged check, and in a "criminal summons" with the misdemeanor larceny of a pocketbook and its contents from

Lucille M. Gwynn having a total value of $50. The charges were consolidated for trial. The State presented evidence tending to show that defendant and another man had been seen leaving a local school the same day that Lucille M. Gwynn, a teacher at the school, had reported the theft of her purse and that defendant and another man entered the First Union National Bank on 20 February 1980 and again on 21 February 1980 and attempted to cash a check drawn on the bank and bearing the forged signature of Mrs. Gwynn. Defendant presented evidence tending to show he had not been in the bank on the days in question, and that he was at the school with a friend who was trying to sell a CB radio. The jury found defendant guilty on both charges, and from a judgment entered on both charges imposing a prison sentence of not more than ten years nor less than ten years, defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney R. Darrell Hancock, for the State.

Powell, Yeager and Fischer, by Harrell Powell, Jr., and J. Clark Fischer, for the defendant appellant.

HEDRICK, Judge.

[1] Defendant's first, second, fourth, and fifth assignments of error relate to the admission and exclusion of evidence. First, defendant contends the court erred in allowing the district attorney to ask leading questions on direct examination. This assignment of error is based upon five exceptions noted in the record. Assuming arguendo that the questions to which defendant objected, forming the basis for these exceptions, were in fact leading questions, the court's ruling upon them will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973). In the present case, the questions challenged either sought to have the witness clarify her previous testimony or describe, as in the case of the State's witness Molly Ferrell Twine, how she picked out a photograph during a photographic identification procedure conducted by Officer R. V. Venable of the Winston-Salem Police Department. Defendant has shown no prejudice by the allowance of these questions and we hold the court did not abuse its discretion in its ruling upon them. This assignment of error is without merit.

[2] Defendant's second assignment of error is based upon Exceptions Nos. 2 and 14. Exception No. 2 is set out in the record as follows:

> Q. Could it not be that your seeing him in District Court down there when he was called around is not the reason that you can so well identify him at this point, is that not possible?
>
> MR. COLE: Objection to what is possible, Your Honor.
>
> THE COURT: Sustained.
>
> DEFENDANT'S EXCEPTION NO. 2.

Defendant contends that because the witness "could have been mistaken" as to her identification of defendant, the court's sustaining the State's objection unduly restricted defendant's "constitutional right of confrontation." The record, however, does not contain what the witness would have testified had she been allowed to do so and thus we are unable to determine whether defendant has been prejudiced as a result. *See State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980). Moreover, the witness thereafter testified on redirect that "I am basing my identity right now on when I seen him in the bank." This assignment of error is without merit.

[3] After testifying that they had picked out a photograph of defendant during a photographic identification procedure conducted by Officer Venable, State's witnesses Twine and Deborah Roberts, both employees of First Union National Bank who observed defendant at the bank on the days in question, were allowed to testify, over defendant's objection, that they picked out another photograph labeled State's Exhibit 1(b), as being of the man accompanying defendant in the bank on 20 February and 21 February 1980. Officer Venable was thereafter allowed to testify, again over defendant's objection, that State's Exhibit 1(b) was a photograph of defendant's brother, Roy George Campbell. Defendant's exceptions to this testimony constitute the basis for his fourth and fifth assignments of error. He contends that such testimony was irrelevant and "highly prejudicial." We do not agree. The challenged testimony tends to corroborate the witnesses' testimony regarding their identification of defendant

and further sets forth the events and circumstances surrounding such identification. Defendant could not have been prejudiced by this testimony since he had already been identified in the first photograph picked out by the witnesses. These assignments of error are meritless.

[4] Based on his third assignment of error, defendant contends that the court improperly denied his motion to suppress the in-court identification of defendant by the State's witnesses Twine, Roberts, and Michael Lee Rabb, a custodian at the local school where defendant was observed on 20 February 1980. In his brief, defendant argues that "[b]ecause of the errors cited in Questions Presented 1 through 3, *supra* [Assignments of Error Nos. 1, 2, 4, and 5] the Court did not have an adequate basis to rule on the motion to suppress," and that the "Trial Judge, by virtue of his rulings on the State's evidence, denied the defendant's counsel the opportunity to show the totality of circumstances." We disagree. We have already determined that the court did not err in its rulings assigned as error by defendant under his "Questions Presented 1 through 3." Moreover, the record contains nothing to suggest that the court did not follow the proper procedures for determining the admissibility of identification testimony. *See* 1 Stansbury's N. C. Evidence § 57 (Brandis rev. 1973). The Court conducted an extensive *voir dire* hearing, after which it made detailed findings of fact as to the circumstances of the witnesses' observation of defendant on 20 February and 21 February 1980. The Court's findings were amply supported by the evidence adduced at the hearing and in turn support the court's conclusions that the in-court identification of defendant by the three State's witnesses was independent of any previous photographic identification procedure, and that their identification of defendant was based upon what they observed on 20 February and 21 February 1980. Defendant's argument borders on the frivolous and the assignment of error is meritless.

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

No error.

Judges HILL and WHICHARD concur.

SOUTHERN SPINDLE AND FLYER CO., INC. v. MILLIKEN & COMPANY

No. 8026SC642

(Filed 15 September 1981)

1. **Appeal and Error § 6.3— adverse ruling as to personal jurisdiction—right of immediate appeal**

Defendant had the right of immediate appeal from an adverse ruling on its motion to dismiss for want of personal jurisdiction based on an alleged agreement to submit all disputes to arbitration.

2. **Arbitration and Award § 1— no binding agreement to arbitrate**

The trial court properly found that there was no agreement between the parties to submit all disputes to arbitration where the record shows that the parties entered into an oral contract by which plaintiff would perform specified services for defendant; after plaintiff had performed a substantial portion of its services, it received from defendant an unsolicited form document entitled "Purchase Order" on which defendant had typed a description of the services plaintiff had agreed to perform; the form contained numerous printed terms and conditions, including a provision regarding submission of all disputes to arbitration; by letter, plaintiff acknowledged receipt of the purchase order form and returned it to defendant; and the record failed to establish execution by anyone on behalf of plaintiff of the form containing the agreement to arbitrate and failed to establish plaintiff's assent by any other method, since defendant's "purchase order" constituted an offer to alter the existing contract by adding certain terms and conditions, and the record failed to disclose that plaintiff accepted defendant's offer to add to the original contract.

APPEAL by defendant from *Burroughs, Judge.* Order entered 1 April 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 January 1981.

Defendant appeals from denial of its motion to dismiss for want of personal and subject matter jurisdiction and failure to state a claim upon which relief can be granted, and to stay the action, pursuant to the Uniform Arbitration Act, and compel plaintiff to arbitrate in New York.

Caudle, Underwood & Kinsey, P.A., by Lloyd C. Caudle and John H. Northey, III, for plaintiff appellee.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Mark R. Bernstein and Fred T. Lowrance, for defendant appellant.

WHICHARD, Judge.

[1] Defendant has the right of immediate appeal from the adverse ruling as to personal jurisdiction. G.S. 1-277(b). The contention on which the personal jurisdiction element of its motion is founded, the alleged existence of an agreement to arbitrate, also underlies the remaining elements.[1] We therefore treat the appeal as to those elements as a petition for a writ of certiorari, and we allow the writ in order to dispose of the matter in its entirety on the merits.

[2] The issue is whether the court properly determined there was no agreement to arbitrate. The record fails to establish that plaintiff agreed to arbitrate, and the court thus properly denied defendant's motion.

Parties "may include in a written contract a provision for settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof." G.S. 1-567.2(a) (Cum. Supp. 1979). On application of a party showing (1) such an agreement and (2) the opposing party's refusal to arbitrate, the court must order the parties to proceed with arbitration, unless the opposing party denies the existence of the agreement. If the opposing party denies existence of the agreement, the court must determine the issue and grant or deny the application accordingly. G.S. 1-567.3(a) (Cum. Supp. 1979). General contract law governs the issue of the existence of an agreement to arbitrate. *See Coach Lines v. Brotherhood*, 254 N.C. 60, 67, 118 S.E. 2d 37, 43 (1961).

The amended complaint here alleges the following: Plaintiff contracted with defendant for "the rigging, loading and transportation" of certain machines. After plaintiff had performed a substantial portion of its services, it received from defendant an unsolicited form document entitled "Purchase Order," on which defendant had typed a description of the services plaintiff had agreed to perform. The form contained numerous printed terms and conditions, including a provision regarding submission of all disputes to arbitration.

1. The alleged existence of an agreement to arbitrate was the sole basis for the motion. It was stipulated that service of process on defendant was sufficient.

Plaintiff assumed the document "was sent merely for billing purposes as plaintiff was not selling any merchandise to defendant." By letter, plaintiff acknowledged receipt of the purchase order form and returned it to defendant. Plaintiff did not intend thereby, however, "to indicate any compliance, assent or agreement to any of the terms and conditions printed on it, or on its reverse side." Prior to completion of plaintiff's services, defendant cancelled the remainder of the contract. After credit for unperformed services, defendant owes plaintiff $7,500 plus interest for services performed pursuant to this agreement. It also owes plaintiff $2,275 for additional services performed pursuant to a contract subsequently entered.

Defendant's motion to dismiss, and to stay the action and compel arbitration, is based on the following provisions of its form "purchase order": (1) "We hereby order the merchandise herein described subject to the terms and conditions set forth . . . including the provisions for arbitration of all disputes, all of which are accepted by Seller"; and (2)

> 16. ARBITRATION. Any controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration in the City of New York . . . . The parties consent to the jurisdiction of the Supreme Court of the State of New York or the United States District Court for the Southern District of New York for all purposes including enforcement of the arbitration agreement and proceedings for entry of any judgment on any award.

Defendant contends the purchase order constituted a written contract which included an agreement by the parties to submit all disputes to arbitration as provided for by G.S. 1-567.2(a), and therefore that its motion should have been granted pursuant to G.S. 1-567.3(a). Plaintiff's president, however, denied by affidavit any recollection that either he or anyone else signed the purchase order on behalf of plaintiff. He further averred that if the purchase order was signed, it was signed "simply to acknowledge receipt . . . and was not intended to, and did not, indicate any compliance, assent or agreement . . . to any of the terms and conditions therein, the actual terms and conditions . . . having been established prior to the commencement of plaintiff's performance."

The record indicates that the parties entered into an oral contract by which plaintiff would perform specified services for defendant and that plaintiff had performed a portion of those services prior to the time defendant submitted its "purchase order." Thus, defendant's "purchase order" constituted an offer to alter the existing contract by adding certain terms and conditions. Parties to a contract may agree to change its terms; but the new agreement, to be effective, must contain the elements necessary to the formation of a contract. *Peaseley v. Coke Co.*, 12 N.C. App. 226, 231, 182 S.E. 2d 810, 814 *disc. rev. denied* 279 N.C. 512, 183 S.E. 2d 688 (1971).

The record does not disclose that plaintiff accepted defendant's offer to add to the original contract. Mere acknowledgment of receipt of the purchase order form did not constitute assent to its terms. Plaintiff's president sufficiently denied signing the form. The purported signature on the record exhibits is illegible. No other evidence establishes that a representative of plaintiff signed the form. The record thus fails to establish execution by anyone on behalf of plaintiff of the form containing the agreement to arbitrate. It equally fails to establish plaintiff's assent by any other method. On the contrary, the record indicates that upon receipt of the form plaintiff's president wrote to defendant's representative describing the services to be performed but not mentioning the terms and conditions proposed by defendant.

Because the record demonstrates sufficient basis for denial of defendant's motion, the order of denial is

Affirmed.

Judges WEBB and MARTIN (Harry C.) concur.

Combs v. Woodie

R. J. COMBS v. A. J. WOODIE AND WIFE, ELLA MAE WOODIE, AND GRACE MILLER

No. 8023SC749

(Filed 15 September 1981)

1. **Boundaries § 14; Evidence § 41— surveyor's testimony—error to give opinion on boundary**

The court committed reversible error when it allowed the court appointed surveyor and another surveyor who had surveyed the land in question to state their opinions as to the true boundary line between plaintiff and each of the defendants since the true boundary is a question of fact for the jury.

2. **Boundaries § 8— processioning proceeding—jury's duty to locate boundary**

In a processioning proceeding the court committed prejudicial error in instructing the jury that they must find either the plaintiff's contention or defendants' contention to be the true boundary line. In a processioning proceeding it is the duty of the jury to locate the boundary, and the jury may locate the boundary wherever it feels the evidence requires.

APPEAL by plaintiff from *Griffin, Judge.* Judgment entered 13 December 1979, Superior Court, ASHE County. Heard in the Court of Appeals 25 May 1981.

This processioning proceeding was instituted by plaintiff to establish the true boundary between his property and that of Ella Mae Woodie on the south side of his tract and between his property and that of Grace Miller on the north side of his tract. Answers of the defendants denied plaintiff's title to the land described in his petition (his contention as to the boundaries), alleged ownership of the tract adjoining and described the tract as claimed by each defendant, and described the boundary line in accordance with the answering defendants' contentions. Each defendant also averred that if plaintiff's contention should be adjudged to be correct with respect to the boundary line, the answering defendants had acquired title to the property by adverse possession.

The jury found for defendants in each instance, and plaintiff appeals.

Pfefferkorn and Cooley, by David C. Pishko, for plaintiff appellant.

Johnston, Johnston and Worth, by Thomas S. Johnston, for defendant appellees.

MORRIS, Chief Judge.

[1] Plaintiff, by assignments of error Nos. 1 and 2, contends the court committed reversible error when it allowed the court appointed surveyor and another surveyor who had surveyed the land in the past to state their opinions as to the true boundary line between plaintiff and defendants Woodie and between plaintiff and defendant Miller. We agree that this constituted error sufficiently prejudicial to require a new trial.

Where the true boundary is is a question of fact for the jury. What the boundary is is a question of law for the court. *Benton v. Lumber Co.*, 195 N.C. 363, 142 S.E. 229 (1928); *McDaris v. "T" Corporation*, 265 N.C. 298, 144 S.E. 2d 59 (1965) [where the boundaries are is a conclusion the jury might draw from competent evidence, but the witness is not permitted to do so]; *Huffman v. Pearson*, 222 N.C. 193, 22 S.E. 2d 440 (1942); *Lumber Co. v. Bernhardt*, 162 N.C. 460, 78 S.E. 485 (1913) ["*What* are the termini or boundary of grant or deed is matter of law; *where* these termini are is matter of fact. The court must determine the first, and to the jury it belongs to ascertain the second"], at 464 *quoting Tatem v. Paine*, 11 N.C. 64 (1825); *see also Beal v. Dellin*, 38 N.C. App. 732, 248 S.E. 2d 775 (1978).

That the surveyor may not give his opinion as to where the boundary is was early declared to be the rule in this jurisdiction in *Stevens v. West*, 51 N.C. 49, 53 (1858). With respect to the testimony of a surveyor, the Court said:

> We think that the question upon which General McRae was asked to give his opinion, was not one of science, or skill, as to which, as an expert, he could be interrogated. The enquiry was as to the beginning corner of the Watson grant, and that was a simple question of fact, to be proved like any other fact. He might have been asked with propriety, had it been necessary, whether from the marks on the pine tree which he found buried in the mud, he believed that it had been marked as a corner, and was the corner tree of some tract of land. The ascertainment of the marks, on the tree, and the purpose for which they were put there were matters of science and skill appertaining to the business of a surveyor, but whether the tree was the corner of the Watson grant, or of some other grant or conveyance, was not at all a question requir-

> ing the peculiar knowledge of an engineer or surveyor. Thus, we find it stated that a "practical surveyor may express his opinion, whether the marks or trees, piles of stones, &c., were intended as monuments of boundaries; but he cannot be asked whether, in his opinion, from the objects and appearances which he saw on the ground, the tract he surveyed was identical with the tract marked on a certain diagram." See 1st Greenf. on Ev. section 440, and the cases there cited.

See also Clegg v. Fields, 52 N.C. 37 (1859), where the Court, following *Stevens*, held that the opinion of a surveyor, qualified as an expert, was competent to show that certain marks on a tree claimed as a corner "were corner or linemarks, but it was not admitted to show, as a question of science, that this was the corner or those the lines of the Bettis grant."

The limitations upon a surveyor's testimony were clearly delineated by the Court in *Norwood v. Crawford*, 114 N.C. 513, 524, 19 S.E. 349 (1894):

> It was not contemplated that the surveyor should be treated in any sense as a referee, or should in his report give the court the benefit of his conclusions of law. He is required to survey the lines according to the contention of each of the parties and to make a map in which shall be designated, by lines and letters or figures, the boundaries as claimed by each. His report should show by what deed or deeds he surveyed, at the request of either, and the successive calls surveyed, with detailed accounts of the measurement by course and distance, also of the marked trees or corners claimed as such, and what was the nature and appearance of the marks, whether course and distance were disregarded in running any given line, whether any steps were taken to ascertain the age of the marks on line trees and corners, and all other facts developed by such survey as would tend to enlighten a court or jury in the trial of a controversy as to boundary.

The reason for the rule is advanced in 1 Stansbury, N.C. Evidence § 130 (Brandis rev. 1973):

> Obviously a nonexpert may not testify to the legal effect of a transaction or other fact, although he may testify to the fact

itself if within his knowledge. It is on this principle that a surveyor is allowed to give evidence as to the boundaries of land described in a deed when his testimony relates only to facts within his knowledge, but not when it embodies a mixed question of law and fact.

See cases cited.

We are aware that other jurisdictions have allowed a surveyor, testifying as an expert, to give his opinion with respect to where the true boundary line is. We are also aware that the line of cases applying the rule in this State has evoked some criticism. Wigmore on Evidence, 3d Ed. § 1956. However, the rule is firmly ensconsed in the law in this State, and the Supreme Court has not seen fit to change it.

[2] We feel a discussion of one other assignment of error might be helpful at retrial. Appellant argues that the court committed prejudicial error in instructing the jury that they must find either the plaintiff's contention or defendants' contention to be the true boundary line and by submitting issues in accordance with this instruction. While on this appeal appellant's objection to the issues comes too late, the point he makes is well taken. In a processioning proceeding, it is, of course, the duty of the jury to locate the boundary. Petitioner has the burden of proof. If petitioner fails to carry that burden, the jury in the absence of an agreement that one or the other is the true line need not fix the boundary according to respondent's contentions but may locate the line wherever the jury feels the evidence requires. *Beal v. Dellinger*, 38 N.C. App. 732, 248 S.E. 2d 775 (1978). *Cornelison v. Hammond*, 225 N.C. 535, 35 S.E. 2d 633 (1945); *McCanless v. Ballard*, 222 N.C. 701, 24 S.E. 2d 525 (1943). In the case before us, the court submitted two issues; one, the petitioner's contention; and the other, the respondents' contention, and instructed the jury that a unanimous verdict was required as to one or the other. The jury was instructed to circle petitioner's contention if they found that he had carried his burden of proof. If the jury determined he had not carried his burden of proof, the respondents' contention would be circled. There was no agreement that either petitioner's contentions or respondents' contentions would be the true line. As suggested by Justice Barnhill in *Greer v. Hayes*, 216 N.C. 396, 5 S.E. 2d 169 (1939), the better practice would be to submit one issue,

substantially similar to the following: "Where is the true dividing line between the lands of the plaintiff and the lands of the defendant?" *Welborn v. Lumber Co.*, 238 N.C. 238, 77 S.E. 2d 612 (1953).

Plaintiff's contention that the court erroneously instructed on adverse possession is without merit. The jury did not reach this issue in either case, and no prejudice to plaintiff can be shown.

New trial.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. LARRY MICHAEL PARNELL

No. 8127SC123

(Filed 15 September 1981)

Criminal Law § 91— Speedy Trial Act—limited court sessions—case not tried at scheduled session—exclusion of time of continuance

The trial court's finding that defendant's trial for felonious escape was not reached at the scheduled session "because of the press of other criminal cases being heard by the Court during such session" provided a sufficient factual basis for a determination that the case could not reasonably have been tried during the scheduled session, and a 46-day continuance ordered at the scheduled session was properly excluded from the 120-day speedy trial period pursuant to G.S. 15A-701(b)(8).

APPEAL by defendant from *Howell, Judge.* Judgment entered 18 November 1980 in Superior Court, LINCOLN County. Heard in the Court of Appeals 29 May 1981.

Defendant was indicted on 16 June 1980 for felonious escape, G.S. 148-45(b). The next session of Superior Court for trial of criminal cases for Lincoln County was a two-week session commencing 25 August 1980. On 4 September 1980, the following order was entered:

"ORDER

This matter coming on to be heard before the undersigned Judge Presiding over the SEPTEMBER 2, 1980, Session of the SUPERIOR Court of LINCOLN County and it appearing to the Court and the Court finding the following facts:

1. The above numbered criminal case against the above captioned defendant was calendared for SUPERIOR Court trial at this session; that the case was not reached for trial because of the press of other criminal cases being heard by the Court during such session;

2. That a limited number of Court sessions for trial of criminal cases are scheduled for LINCOLN County and it is necessary for this matter to be continued to the next session of SUPERIOR Court; that a failure to continue the case would be likely to result in a miscarriage of justice and a granting of a continuance in this cause outweighs the best interest of the public and the defendant in a speedy trial.

Upon the foregoing findings of fact, the Court CONCLUDES as a matter of law that any period of delay caused by the continuation of this case is occasioned by the venue of same being within a County where due to the limited number of Court sessions scheduled for the County the time limitations of G.S. 15A-701 cannot reasonably be met.

THEREFORE, it is ORDERED that this cause be, and the same is hereby, continued until the next session of Criminal SUPERIOR Court in the aforesaid County and the period of time between the date of this order and the first day of the next session of Criminal SUPERIOR Court in said County shall be excluded in computing the time within which the trial of the matter must begin.

This 4TH day of SEPTEMBER, 1980.

s/ CHARLES LAMM
JUDGE PRESIDING"

The next scheduled term of Superior Court for the trial of criminal cases for Lincoln County commenced 20 October 1980. On 22 October, defendant's counsel withdrew due to a conflict of interest. New counsel was appointed on 22 October 1980 and defendant's case was continued until the next criminal session. On 11 November 1980, defendant was tried, convicted, and sentenced to a term of one year to be served at the expiration of his present term of imprisonment.

Defendant appeals the denial of his motion to dismiss for the State's failure to bring him to trial within 120 days of indictment as required by G.S. 15A-701(a1)(1).

Attorney General Edmisten by Assistant Attorney General Robert R. Reilly for the State.

Robert C. Powell for defendant appellant.

ARNOLD, Judge.

Since 11 November was more than 120 days after 16 June, the burden is upon the State to establish periods of exclusion from the computation of the 120-day period set out in G.S. 15A-701. *See* G.S. 15A-703. The only period significant to this appeal is the 46-day continuance order on 4 September 1980. If this period was properly excluded, then the defendant was tried within the 120-day period. If not, the 120 days elapsed before defendant's counsel withdrew on 22 October.

G.S. 15A-701 provides:

> "(b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:
>
> * * * *
>
> (8) Any 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; . . ."

We hold that the order set out above fully complies with the requirements of G.S. 15A-701(b)(8). The order contained a finding that due to the press of other criminal cases defendant's case was not reached. We believe this finding provided a "factual basis . . . for a determination that the case could not reasonably have been tried during the scheduled session . . ." as required in *State v. Edwards*, 49 N.C. App. 426, 428, 271 S.E. 2d 533, 535 (1980). The period from 4 September to 20 October was properly excluded and defendant was thus tried within the required 120 days, excluding the 46 days between sessions.

We note that defendant had a remedy if he were dissatisfied with the continuance of his case to the next session. G.S. 15A-702 provides that a defendant can move for a prompt trial any time after 120 days have elapsed, in which case a trial may be ordered within 30 days of the filing of the motion. *See State v. Cornell*, 51 N.C. App. 108, 275 S.E. 2d 857 (1981). That defendant made no such motion indicates to us his acquiescence in the initial continuance. He may not now complain that the continuance prejudiced him.

No error.

Judges MARTIN (Robert M.) and HILL concur.

MABLE J. SHAW, ADMINISTRATRIX OF THE ESTATE OF NATHANIEL SHAW, DECEASED v. JAMES R. PEDERSEN AND REPUBLIC VAN STORAGE CO., INC.

No. 8018SC1070

(Filed 15 September 1981)

Appeal and Error § 6.2— order setting aside default judgment—order not appealable

An order of a trial court allowing a motion pursuant to G.S. 1A-1, Rule 60(b) to set aside a default judgment is interlocutory and not appealable.

APPEAL by plaintiff from *Washington, Judge.* Order entered 31 July 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals on 4 May 1981.

Plaintiff instituted this wrongful death action against the individual and corporate defendants on 19 December 1979. The complaint charged defendant Pedersen with negligently striking the deceased, Nathaniel Shaw, with the International truck he was driving on I-85 as the deceased was crossing said highway on foot. Defendant Pedersen was allegedly acting as the agent of the corporate defendant Republic Van Storage Co., Inc., at the time this incident occurred. Summons and complaint were duly served upon defendants by registered mail directed to their last known addresses, both being out of state, and by service of process upon the Commissioner of Motor Vehicles as provided by law.

On 27 February 1980, entry of default as provided by G.S. 1A-1, Rule 55(a) was made in this action. Judge James M. Long entered judgment of default against defendants on 29 February 1980. In this judgment Judge Long found that although defendants were not under disability, they had failed to appear or plead in this matter within the time provided by law. The court ordered that the case be calendared for trial for the determination of damages.

Subsequently, on 7 April 1980, Judge Long conducted a hearing without a jury on the issues of damages. On 17 April 1980, he entered a judgment in which he made findings of fact and concluded as a matter of law that the injuries and death of Nathaniel Shaw resulted from the negligence of defendants, and awarded plaintiff $26,464 as damages for the wrongful death of Nathaniel Shaw.

On 3 June 1980, defendants made a motion pursuant to G.S. 1A-1, Rule 60(b) to set aside the judgment entered against them. Defendants averred in this motion that defendant Pedersen did not receive a copy of the summons and complaint and was unaware of the filing of the action against him. The process supposedly served upon defendant Pedersen had been returned to plaintiff with the notation that Pedersen had moved from the address to which it had been mailed and that Pedersen had moved from said address without leaving a forwardable address. Defendant Republic Van Storage Co., Inc., averred that at the time it had received the summons and complaint by registered mail it was itself in foreclosure proceedings, and that plaintiff's pleading had not been answered due to inadvertence resulting therefrom. The corporate defendant moved to set aside the judgments of default and the previous entry of default on the ground of excusable neglect.

By order filed 31 July 1980, Judge Edward K. Washington concluded that defendants' failure to answer the summons and complaint was the result of circumstances justifying relief from the operation of judgment as contemplated by G.S. 1A-1, Rule 60(b)(6). The court granted defendants' motion to set aside the judgment, and ordered that the final judgment of 17 April 1980 and preceding entry of default of 29 February 1980 be vacated and set aside. Defendants were allowed to file answer to the com-

plaint within twenty days of the entry of this order. Plaintiff appealed from the order setting aside the judgment of default.

Benjamin S. Marks, Jr., and R. Horace Swizzett, Jr., for plaintiff appellant.

Smith, Moore, Smith, Schell and Hunter, by Richmond G. Bernhardt, Jr., and Peter J. Covington, for defendant appellees.

MORRIS, Chief Judge.

The judgment is interlocutory and not appealable. In the recent case of *Bailey v. Gooding*, 301 N.C. 205, 270 S.E. 2d 431 (1980), our Supreme Court held that an order of a trial court allowing a motion pursuant to G.S. 1A-1, Rule 60(b) to set aside a default judgment was interlocutory and not appealable. In so holding, the Court stated, per Justice Carlton:

> While final judgments are always appealable, interlocutory decrees are immediately appealable only when they affect some substantial right to the appellant and will work an injury to him if not corrected before an appeal from final judgment. *Id.* at 362, 57 S.E. 2d at 381; G.S. 1-277 (Cum. Supp. 1979). "A nonappealable interlocutory order . . . which involves the merits and necessarily affects the judgment, is reviewable . . . on appropriate exception upon an appeal from the final judgment in the cause." *Veazey v. Durham*, 231 N.C. at 362, 57 S.E. 2d at 381.
>
> . . .
>
> Unquestionably, the order of Judge Stevens setting aside the default judgment is interlocutory; it does not finally dispose of the case and requires further action by the trial court. Because the order is interlocutory we will not review it unless it "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Veazey v. Durham*, 231 N.C. at 362, 57 S.E. 2d at 381; *see* G.S. 1-277.
>
> . . .
>
> If the ultimate result of a trial on the merits goes against plaintiffs, they will then be able to appeal and assign as error

> the order setting aside their default judgment. No right of plaintiffs will be lost by delaying their appeal until after final judgment; their exception fully and adequately preserves their challenges to Judge Stevens' order. The absence of a right of immediate appeal will force plaintiffs to undergo a full trial on the merits instead of a trial solely on the issue of damages. Although this is a much greater burden than the necessity of a rehearing of a motion, we do not think it so difficult a burden, on the facts of this case, to elevate the order to the status of affecting a "substantial right." Avoidance of a trial, in this context, is not a "substantial right." *See Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978); *cf. Accoustical Co. v. Cisne and Associates, Inc.*, 25 N.C. App. 114, 212 S.E. 2d 402 (1975) (order setting aside entry of default not appealable.)

301 N.C. at 209-10, 270 S.E. 2d at 433-34. In this case plaintiff has adequately preserved the question of the appropriateness of the trial court's order setting aside the entry and judgment of default by taking exception thereto. That question may be subsequently raised, if necessary, upon an appeal from the final judgment following the trial of this action on its merits. Accordingly, plaintiff's appeal is

Dismissed.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. ROBERT ANTHONY LAMBERT

No. 8116SC216

(Filed 15 September 1981)

Bastards § 9.1— willful failure to support illegitimate child—finding of paternity but no willful failure—appeal to superior court—erroneous dismissal of case

Where defendant was charged with willful nonsupport of his illegitimate child, the district court found that defendant was the father of the illegitimate child but that defendant was not guilty of willful nonsupport, and defendant appealed to the superior court from the district court's finding of paternity, the jurisdiction of the superior court was to give defendant a trial *de novo* on

the issue of paternity, and the superior court erred in dismissing the "charges and proceedings" against defendant on the ground that defendant had been acquitted in the district court, since defendant had not been acquitted on the issue of paternity. G.S. 49-7.

APPEAL by the State from *Brewer, Judge.* Orders entered 5 January 1981 in Superior Court, ROBESON County. Heard in the Court of Appeals 3 September 1981.

Defendant was charged with willful non-support of his illegitimate child, a violation of G.S. § 49-2. After trial in the district court, that court found and concluded that defendant was the father of the illegitimate child, but found defendant not guilty of willful non-support, and entered judgment accordingly on 12 December 1980. Defendant appealed to the superior court "as to being found by the Court to be the father of the child" and thereafter, on 5 January 1980, filed a pre-trial "motion to dismiss" in the superior court, alleging as "grounds" that defendant had previously been charged with the same offense in the district court based on the same conduct, and the trial in the district court had ended in acquittal. After a hearing, the superior court entered two orders allowing defendant's motion and dismissing "the charges and proceedings" against defendant. The State appealed pursuant to G.S. § 15A-1445.

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

Lee and Lee, by J. Stanley Carmical, for the defendant appellee.

HEDRICK, Judge.

The sole question presented by this appeal is whether the superior court erred in dismissing the proceeding against defendant.

The offense of willful non-support of one's illegitimate child, G.S. § 49-2, involves the following two issues: (1) Is defendant the parent of the illegitimate minor child in question? and (2) If so, has defendant willfully neglected or refused to support and maintain such illegitimate child? *State v. Soloman,* 40 N.C. App. 600, 253 S.E. 2d 270 (1979). Even though defendant may be found not guilty of willfully neglecting or refusing to support the il-

legitimate child, he may nevertheless appeal an adverse finding and conclusion that he is the parent of such illegitimate child. G.S. § 49-7. *State v. Brown*, 49 N.C. App. 194, 270 S.E. 2d 534 (1980); *State v. Garner*, 34 N.C. App. 498, 238 S.E. 2d 653 (1977).

In the present case, the district court found defendant to be the father of the illegitimate child, but found defendant not guilty of willfully neglecting or refusing to support the illegitimate child. Defendant appealed to the superior court from the district court's finding and conclusion that he was the father of the illegitimate child. Obviously defendant did not appeal from the finding that he was not guilty of willful non-support.

The jurisdiction of the superior court, therefore, was to give defendant a trial *de novo* on the issue of paternity. G.S. §§ 7A-271, 49-2, 49-7; *State v. Coffey*, 3 N.C. App. 133, 164 S.E. 2d 39 (1968). Under the circumstances here presented, the superior court had no jurisdiction to make any order with respect to whether defendant had willfully neglected or refused to support the illegitimate child. It did have, however, authority to entertain and rule on any pre-trial motion with respect to the issue of paternity. Defendant in his pre-trial "motion to dismiss" stated that the motion was on the grounds that "[t]he defendant previously has been charged with the same offense in the [district court] based upon the same conduct, which trial ended in the acquittal of the defendant." Clearly, defendant's pre-trial motion is one to dismiss pursuant to G.S. § 15A-954(a)(5) on the grounds that "[t]he defendant has previously been placed in jeopardy of the same offense." While the comments of the judge of the superior court as set out in the record indicate that the judge was treating defendant's motion as one to withdraw the appeal from the district court, the two orders entered by the superior court clearly dismiss the "charges and proceedings" against defendant. In substance, the court allowed defendant's pre-trial motion. This was error. Obviously, defendant had not been acquitted of the part of the charge against him that he was the father of the illegitimate child. If defendant had not appealed from the judgment of the district court declaring him to be the father of the illegitimate child, that judgment would stand and could serve as the basis for future prosecution of defendant under G.S. § 49-2 for subsequent conduct constituting willful non-support of the illegitimate child. *State v. Coffey, supra.*

For the reasons stated, the two orders dated 5 January 1981 dismissing the "charges and proceedings" against defendant are reversed and the cause is remanded to the superior court for a trial *de novo* on the issue of paternity, unless defendant chooses to make a motion to have the appeal from the district court on that issue voluntarily dismissed or withdrawn.

Reversed and remanded.

Judges HILL and WHICHARD concur.

BETTIE L. PATTERSON v. JOE GLENN PHILLIPS

No. 8125DC73

(Filed 15 September 1981)

1. **Constitutional Law § 26— full faith and credit—paternity determined in another state**

Where a court in another state held that the defendant was the father of three minors and no attack was made on the jurisdiction of the court in the other state, full faith and credit must be given to that state's decree.

2. **Bastards § 10; Parent and Child § 10— support action—admissibility of documents establishing paternity**

In an action for support, where plaintiff, in her pleadings, stated that the defendant was the father of three minors, she was entitled to show this by introducing documents from another jurisdiction establishing paternity conclusively.

APPEAL by defendant from *Tate, Judge.* Judgment entered 6 August 1980 in District Court, CALDWELL County. Heard in the Court of Appeals 1 September 1981.

This is an action commenced in Monroe County, Michigan, under the Uniform Reciprocal Enforcement of Support Act, in which the plaintiff seeks support for three minor children. The action was transmitted to the District Court of Caldwell County where the defendant was served with process. He filed an answer in which he denied paternity and requested a jury trial.

A hearing was held in the District Court of Caldwell County at which the plaintiff introduced into evidence properly authen-

ticated copies of proceedings of the Circuit Court of Monroe County, Michigan, which showed that the respondent accepted service on 13 October 1970 of a summons, and copy of a complaint in which it was alleged that he was the father of the three minors. On 12 March 1971 a judgment was entered in the Circuit Court of Monroe County holding that the defendant was the father of the three minors and ordering him to make payments for their support.

At the conclusion of the hearing in the District Court of Caldwell County, the court entered an order requiring the defendant to pay $150.00 per month for the support of the three children. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Henry H. Burgwyn, for plaintiff appellee.

Wilson, Palmer and Cannon, by Bruce L. Cannon, for defendant appellant.

WEBB, Judge.

[1] The defendant's first assignment of error is to the court's refusal to submit the paternity issue to a jury. This assignment of error is overruled. Article IV § 1 of the United States Constitution provides:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

A court in the State of Michigan has held that the defendant is the father of the three minors. No attack has been made on the jurisdiction of the court in Michigan and under the United States Constitution we are required to give full faith and credit to its decree. *See Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 56 S.Ct. 229, 80 L.Ed. 220 (1935).

The defendant, relying on *Brondum v. Cox*, 292 N.C. 192, 232 S.E. 2d 687 (1977) argues the defendant is entitled to have the jury pass on the paternity issue. We believe our holding in this case is consistent with *Brondum*. In that case a court in Hawaii had adjudicated the paternity issue without personal service on the defendant. Our Supreme Court held that without jurisdiction

over the person of the defendant the Hawaiian decree was not entitled to full faith and credit in North Carolina. In this case there was personal service on the defendant before the decree was entered by the Circuit Court of Monroe County.

[2] The defendant next assigns error to the admission into evidence of the documents from the Circuit Court of Monroe County. The defendant contends that the plaintiff was attempting to estop him from denying paternity; that estoppel is an affirmative defense and must be pleaded under G.S. 1A-1, Rule 8(c) before the plaintiff could introduce the documents. The difficulty with the defendant's argument is that the plaintiff was stating a claim and she was not pleading a defense. The plaintiff in her pleadings stated that the defendant was the father of the minors. She was entitled to show this by introducing the documents from the Circuit Court of Monroe County which established it conclusively. This assignment of error is overruled.

Affirmed.

Judges VAUGHN and ARNOLD concur.

SOUTHERN ATHLETIC/BIKE v. HOUSE OF SPORTS, INC. AND A. C. BURGESS, JR.

No. 8127SC77

(Filed 15 September 1981)

Courts § 2.1 — lack of personal jurisdiction — "show cause" order insufficient to obtain jurisdiction

Where a judgment by default was obtained against a corporation and no reference was made in the complaint to the alleged liability of a personal defendant, plaintiff could not later acquire jurisdiction over a personal defendant by filing a motion in the cause requesting an order directing the personal defendant "to appear and show cause why judgment. . . should not be entered against him individually."

APPEAL by plaintiff from *Ferrell, Judge.* Order entered 2 October 1980 in Superior Court, GASTON County. Heard in the Court of Appeals 1 September 1981.

Horace M. DuBose III, for plaintiff appellant.

Steven P. Pixley, for defendant appellee.

VAUGHN, Judge.

The appeal is from an order, entered pursuant to Rule 60, relieving defendant from a judgment entered by Judge Kirby on 1 December 1978.

On 4 October 1978, plaintiff obtained a judgment by default for $8,136.77 against House of Sports, Inc., a corporation operating and doing business in North Carolina. The complaint made no reference to the alleged liability of any other person, either jointly or severally.

On 14 November 1978, plaintiff's attorney signed and filed a motion in the cause in which he asserted, in effect, that A. C. Burgess, Jr., was personally liable for the debt for which the judgment had been obtained against House of Sports, Inc. In the motion, plaintiff's attorney asked for an "order directing A. C. Burgess, Jr., to appear and show cause why judgment in the above captioned matter should not be entered against him individually." On the same day, an order was issued by Judge Kirby directing A. C. Burgess, Jr., to appear at 9:30 a.m. on 27 November 1978 ". . . and show cause, if any there may be why judgment should not be entered against him individually in the amount of Eight Thousand One Hundred Thirty-six and 77/100 ($8,136.77). . . ." The motion and order were served on Burgess on the date of their issuance. Burgess did not respond or appear. On 1 December 1978, the judge found facts substantially as set out in the motion signed by plaintiff's attorney and entered judgment "against A. C. Burgess, Jr., as guarantor of the debt of House of Sports, Inc. in the amount of Eight Thousand One Hundred Thirty-six and 77/100 ($8,136.77)." On 9 July 1980, Burgess moved to set the judgment aside as being void for failure to obtain service of process on him. On 2 October 1980, an order was entered declaring the judgment void and relieving Burgess from the judgment.

We hold that Judge Kirby's judgment of 1 December 1978 was void for lack of personal jurisdiction over defendant and affirm the order from which plaintiff appeals. Burgess was not a party to the action and the "show cause" order did not make him

one. *Skinner v. Coward*, 197 N.C. 466, 149 S.E. 682 (1929). In order to render a valid judgment against a defendant, it is essential that jurisdiction be obtained by the court in some way allowed by law. When a court has no authority to act, its acts are void. *Russell v. Manufacturing Co.*, 266 N.C. 531, 146 S.E. 2d 459 (1966).* One cannot be brought into a lawsuit without his consent ". . . either expressed or by entering a general appearance, except by causing summons to be served upon. . ." him. *McLean v. Matheny*, 240 N.C. 785, 787, 84 S.E. 2d 190, 192 (1954); *Plemmons v. Improvement Co.*, 108 N.C. 614, 13 S.E. 188 (1891);* *Ready Mix Concrete v. Sales Corp.*, 30 N.C. App. 526, 227 S.E. 2d 301 (1976).* Moreover, the "show cause" order does not even allow defendant the statutory time to answer any allegations that might have been made against him and, in other respects, deprives him of statutory and constitutional rights to due process of law. The judgment entered against him is a nullity.

Affirmed.

Judges ARNOLD and WEBB concur.

LEM YOUNG AND WIFE, LORA E. YOUNG v. KUEHNE CHEMICAL COMPANY, INC., PETER KUEHNE AND JANE KUEHNE

No. 8129DC104

(Filed 15 September 1981)

Rules of Civil Procedure § 41— nonjury trial—involuntary dismissal—failure to find facts

The trial court in a nonjury trial erred in failing to make findings of fact to support the entry of judgment granting defendants' motion for involuntary dismissal at the close of plaintiffs' evidence. G.S. 1A-1, Rule 41(b).

APPEAL by plaintiffs from *Hix, Judge*. Judgment entered 7 August 1980 in District Court, TRANSYLVANIA County. Heard in the Court of Appeals 3 September 1981.

Plaintiffs appeal from a judgment which (1) involuntarily dismissed their action pursuant to G.S. 1A-1, Rule 41(b), and

* The cases marked with an asterisk have been overruled on grounds that are not material here.

(2) declared defendants owners of property free and clear of any claim of plaintiffs.

Jack H. Potts and Paul B. Welch, III, for plaintiff appellants.

Boyd B. Massagee, Jr., for defendant appellees.

WHICHARD, Judge.

Plaintiffs alleged that defendants, by constructing and maintaining a padlocked gate on the only road providing access to plaintiffs' property, obstructed travel to and from their property; and that such obstruction caused depreciation of the property and jeopardy to plaintiffs' health, happiness, and well being. They sought restraint of this impediment and "other and further relief . . . to which they may [have been] entitled." Defendants denied plaintiffs' essential allegations and counterclaimed for a judgment declaring their property free and clear of any claim by plaintiffs.

The court, sitting without a jury, granted defendants' motion at the close of plaintiffs' evidence for involuntary dismissal pursuant to G.S. 1A-1, Rule 41(b). Rule 41(b) provides that a court trying an action without a jury must, when rendering judgment on the merits against the plaintiff, make findings of fact as provided in G.S. 1A-1, Rule 52(a)(1). The judgment here contains no findings.

Defendants contend that findings of fact were not necessary because the court ruled as a matter of law that the evidence could not support a judgment for plaintiffs. The basis of the court's ruling cannot be determined from the judgment, however. Rule 41(b) and cases construing it provide no exception to the requirement that the court make findings of fact. G.S. 1A-1, Rule 41(b); *Graphics, Inc. v. Hamby*, 48 N.C. App. 82, 268 S.E. 2d 567 (1980); *Joyner v. Thomas*, 40 N.C. App. 63, 251 S.E. 2d 906 (1979); *Hospital Corp. v. Manning*, 18 N.C. App. 298, 196 S.E. 2d 538 (1973). "The requirement that findings of fact be made is mandatory, and the failure to do so is reversible error." *Graphics, Inc.*, 48 N.C. App. at 89, 268 S.E. 2d at 571.

The judgment thus is vacated, and the cause is remanded for a

New trial.

Judges HEDRICK and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 SEPTEMBER 1981

DEMENT v. POOLE MUSIC No. 8010SC1064	Wake (80CVS1448)	Reversed & Remanded
IN RE COCKRELL No. 8112DC199	Cumberland (80SP1180)	Affirmed
IN RE LILLY No. 8112DC180	Cumberland (78J482)	Reversed
IN RE MOORE No. 8118DC72	Guilford (73J1072) (73J1073)	Appeal Dismissed
LEASCO COMPUTER v. COLVARD No. 8024SC1138	Watauga (79CVS8)	Affirmed
MCCANLESS v. MCCANLESS No. 8118DC101	Guilford (77CVC0585)	Affirmed
SIVILS v. SIVILS No. 8024DC996	Watauga (77CVD114)	Order finding the defendant not to be in contempt is Affirmed. Order directing an increase in child support payments is Affirmed.
STATE v. ARTHUR No. 813SC219	Craven (80CRS1062)	No Error
STATE v. BEYAH No. 8114SC185	Durham (79CRS21223)	No Error
STATE v. BURNS No. 8121SC103	Forsyth (80CR27777)	No Error
STATE v. COVINGTON No. 8120SC186	Union (80CRS7250)	New Trial
STATE v. DARK No. 8114SC134	Durham (80CR6041) (80CR6042) (80CR6043) (80CR6044) (80CR6045) (80CR6046) (80CR6047) (80CR6048) (80CR6049) (80CR6050)	No Error

STATE v. MOSS No. 8126SC164	Mecklenburg (78CRS132676)	No Error
STATE v. REDFERN No. 8120SC182	Union (80CRS1825)	No Error
STATE v. SMITH No. 8117SC12	Rockingham (79CR13006)	No Error
STATE v. STURDIVANT No. 8120SC181	Union (80CRS1568) (80CRS1793)	No Error
STATE v. SUMMERLIN No. 818SC172	Wayne (79CR19281)	No Error
STATE v. TALLEY No. 8118SC224	Guilford (80CRS31462) (80CRS33053)	No Error
STATE v. WILLIAMS No. 815SC106	New Hanover (80CRS11608)	No Error
VALDESE v. STARNES No. 8125SC21	Burke (79CVS853)	New Trial

APPENDIXES

AMENDMENTS TO RULES OF
APPELLATE PROCEDURE

ADDITIONS TO GENERAL RULES OF PRACTICE
FOR SUPERIOR AND DISTRICT COURTS

AMENDMENTS TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 21 of the North Carolina Rules of Appellate Procedure entitled "CERTIORARI" is hereby amended as follows:

By rewriting subsection (a) to read as follows:

"(a) *Scope of the Writ.*

(1) *Review of the Judgments and Orders of Trial Tribunals.* The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

(2) *Review of the Judgments and Orders of the Court of Appeals.* The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action; or for review of decisions of the Court of Appeals in cases appealed from the North Carolina Utilities Commission, the North Carolina Industrial Commission, the North Carolina State Bar, the Property Tax Commission, or the Commissioner of Insurance."

Rule 21 of the North Carolina Rules of Appellate Procedure entitled "CERTIORARI" is hereby amended as follows:

By adding a new subsection (e) as follows:

"(e) *Petition for Writ in Post Conviction Matters; to Which Appellate Court Addressed.* Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in G.S. 15A-1415(b) by persons who have been sentenced to life imprisonment or death shall be filed in and determined by the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases."

Rule 15 of the North Carolina Rules of Appellate Procedure entitled "DISCRETIONARY REVIEW ON CERTIFICATION BY SUPREME COURT UNDER G.S. § 7A-31" is hereby amended as follows:

First, by inserting after the words "Utilities Commission," in the first sentence of subsection (a) entitled "Petition of Party" the following:

"the North Carolina State Bar, the Property Tax Commission,"

Second, by amending the citation to "G.S. Chap. 15, Art. 22" in the same subsection (a) to read:

"G.S. Chap. 15A, Art. 89."

By Order of the Court in Conference, this 18th day of November, 1981.

MEYER, J.
For the Court

ADDITIONS TO GENERAL RULES OF PRACTICE FOR SUPERIOR AND DISTRICT COURTS

RULE 21

Jury Instruction Conference. At the close of the evidence (or at such earlier time as the judge may reasonably direct) in every jury trial, civil and criminal, in the superior and district courts, the trial judge shall conduct a conference on instructions with the attorneys of record (or party, if not represented by counsel). Such conference shall be out of the presence of the jury, and shall be held for the purpose of discussing the proposed instructions to be given to the jury. An opportunity must be given to the attorneys (or party if not represented by counsel) to request any additional instructions or to object to any of those instructions proposed by the judge. Such requests, objections and the rulings of the court thereon shall be placed in the record. If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference.

At the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

The court may recall the jury after they have retired and give them additional instructions in order: (i) to correct or withdraw an erroneous instruction; or (ii) to inform the jury on a point of law which should have been covered in the original instructions. The provisions of the first two paragraphs of this Rule 21 also apply to the giving of all additional instructions, except that the court in its discretion shall decide whether additional argument will be permitted.

Adopted by the Supreme Court in conference the 15th day of September 1981.

MEYER, J.
For the Court

RULE 22

Local Court Rules. In order to insure general uniformity throughout each respective judicial district, all trial judges shall observe and enforce the local rules in effect in any judicial district where they are assigned to hold court. The senior resident judge shall see that each judge *assigned to hold a session of court in his district* is furnished with a copy of the local court rules at or before the commencement of his assignment.

Adopted by the Supreme Court in conference the 21st day of September 1981.

MEYER, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ACCOUNTS

§ 2. Accounts Stated

In an action to recover damages for defendants' failure to pay plaintiff a commission for negotiation of a lease between defendants and a third party, evidence was insufficient to require submission to the jury of an issue as to an account stated. *Greene v. Murdock*, 552.

ADMINISTRATIVE LAW

§ 4. Procedure, Hearings and Orders of Administrative Boards and Agencies

A vote by the Savings and Loan Commission which failed to adopt a recommendation that an application for a charter be approved was not the final agency decision since no written decision was ever entered in accordance with the vote, and the Commission could thereafter properly reconsider and approve the application for a charter. *In re Savings and Loan Assoc.*, 326.

§ 8. Scope and Effect of Judicial Review

The superior court erred in failing to apply the whole record test in determining the propriety of a decision by the Environmental Management Commission. *In re Appeal from Environmental Management Comm.*, 135.

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability

Trial court's grant of partial summary judgment ordering specific performance of a contract by defendants was immediately appealable. *Atkins v. Beasley*, 33.

Where plaintiff's first claim alleged that defendant breached its contract to provide severance pay and their second claim alleged that defendant made fraudulent inducements and misrepresentations concerning severance pay, plaintiffs could appeal immediately the trial court's entry of summary judgment for defendant on their second claim. *Briggs v. Mid-State Oil Co.*, 203.

Plaintiffs had no right to an immediate appeal from summary judgment granted to defendant attorney where plaintiffs sought to recover against defendant attorney only if they were unable to recover against the other defendants on their primary claims. *Sportcycle Co. v. Schroader*, 354.

Where defendant's property had been sold pursuant to a judgment which was thereafter reversed on appeal and the proceeds disbursed in partial payment of the judgment, an immediate appeal did not lie from the denial of defendant's motion to compel restitution "pending ultimate determination of plaintiff's claims and defendant's counterclaims." *Harris v. Racing, Inc. and Hyde v. Racing, Inc.*, 597.

An order of a trial court allowing a motion pursuant to Rule 60(b) to set aside a default judgment is interlocutory and not appealable. *Shaw v. Pedersen*, 796.

§ 6.3. Appeals Based on Jurisdiction, Venue, and Related Matters

An appeal lies immediately from the denial of a motion to dismiss for want of jurisdiction. *Eller v. Coca-Cola Co.*, 500.

Defendant had the right of immediate appeal from an adverse ruling on its motion to dismiss for want of personal jurisdiction based on an alleged agreement to submit disputes to arbitration. *Southern Spindle v. Milliken & Co.*, 785.

APPEAL AND ERROR — Continued

§ 48.3. Necessity that Evidence be Probative for Erroneous Admission to be Prejudicial

In a civil conspiracy action it was error to admit testimony concerning admissions of two defendants as to any of defendants other than the makers of the declarations as the declarations were not made in furtherance of the conspiracy. *Hasty v. Turner*, 746.

§ 57.2. Conclusiveness of Findings

Where, even disregarding several erroneous factual findings, there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed. *Wachovia Bank v. Bounous*, 700.

§ 64. Affirmance or Reversal

Where defendant's property was sold pursuant to a judgment, and the judgment was subsequently reversed on appeal, defendant was not entitled to compel restitution from parties and entities, other than plaintiff, who were not parties to the record. *Harris v. Racing, Inc. and Hyde v. Racing, Inc.*, 597.

§ 68. Law of the Case and Subsequent Proceedings

The mandate of a Court of Appeals decision was binding on the trial court although the decision was subsequently overruled by another decision of the Court of Appeals. *Heidler v. Heidler*, 363.

§ 68.2. Sufficiency of Evidence and Law of the Case

A prior reversal of a grant of summary judgment for defendant bank on the same claim did not render directed verdict for the bank improper under the "law of the case" doctrine. *Edwards v. Northwestern Bank*, 492.

ARBITRATION AND AWARD

§ 1. Arbitration Agreements

The trial court properly found that there was no agreement between the parties to submit all disputes to arbitration. *Southern Spindle v. Milliken & Co.*, 785.

§ 5. Scope of Inquiry by Arbitration

Disputes concerning spousal support are arbitrable in North Carolina. *Crutchley v. Crutchley*, 732.

Plaintiff waived her ability to contend that an arbitration award was imperfect where she filed a motion requesting modification more than ninety days after delivery of a copy of the arbitration award. *Ibid.*

§ 9. Attack of Award

G.S. 50-16.8(f) requiring a trial judge to find facts from the evidence presented is inapplicable to the situation where the parties agreed to arbitrate the issue of spousal support. *Crutchley v. Crutchley*, 732.

The portion of a judicially confirmed arbitrator's award concerning support of plaintiff may not be modified after the statutory time periods for modifying an award and for appealing a confirmation order have expired. *Ibid.*

ARREST AND BAIL

§ 4. Territory in Which Officer May Arrest

Arrest of defendant, a suspect in an armed robbery case, 1.6 miles outside an officer's territory while the officer was giving chase came under the "immediate and continuous" flight exception of G.S. 15A-402(b). *S. v. Melvin*, 421.

ASSAULT AND BATTERY

§ 5.2. What Constitutes a Deadly Weapon

Circumstantial evidence was sufficient to create a reasonable inference that defendant, charged with armed robbery and assault, struck the victim on the head with a lamp. *S. v. Shelton*, 632.

§ 13. Competency of Evidence

Defendant was not prejudiced by the introduction of testimony concerning the discovery of a sock containing two pieces of concrete at the crime scene some four months after the crimes occurred. *S. v. Hamilton*, 740.

ASSIGNMENTS

§ 1. Rights and Interests Assignable and Transactions Constituting Assignments

Where plaintiffs paid an amount allegedly embezzled by a relative and then sought restitution for such amount, the trial court erred in directing verdict for defendant school which benefited from the alleged embezzlement. *Huff v. Trent Academy*, 113.

ATTORNEYS AT LAW

§ 6. Withdrawal of Attorney from Case

Notice by local counsel to counsel in defendants' home state constituted reasonable notice to defendants that local counsel would move to withdraw as attorney of record. *Hensgen v. Hensgen*, 331.

§ 7. Compensation and Fees

In an action for reformation of a deed where the court ordered the action dismissed, and the plaintiff gave notice of appeal, the trial court erred in ordering plaintiff to pay $500 to defendant's attorney to help defray the expense of the appeal. *Dorsey v. Dorsey*, 622.

§ 7.2. Fees in Cases Involving Indigent Criminal Defendants

The amount required of an indigent defendant as restitution for the cost of her court-appointed attorney was proper. *S. v. Bass*, 40.

§ 7.4. Fees Based on Provisions of Notes or Other Instruments

Plaintiff's notice to defendant of his intention to collect attorney fees pursuant to the provisions of a note was timely although it was not received by defendant until four days after plaintiff's action on the note was initiated. *Gillespie v. DeWitt*, 252.

Expressly providing in a deed of trust for attorney's fees and expenses upon foreclosure is authorized by statute, and recovery of such fees and expenses does not represent a deficiency in violation of the Anti-Deficiency Judgment statute. *Reavis v. Ecological Development, Inc.*, 496.

AUTOMOBILES

§ 6.5. Liability for Fraud in Sale of Motor Vehicles

An automobile purchased by plaintiff, who thought it had never been wrecked when in fact it had suffered substantial damage in a collision, was not a "salvage vehicle" where defendant insurer paid a "constructive total loss" on the automobile, and defendant insurer was not required to surrender evidence of title to the State so that a reissued certificate of title might reflect that the automobile had been previously wrecked. *Allen v. American Security Ins. Co.*, 239.

§ 11.5. Accidents Involving Vehicles Parked Directly on Road

Trial court erred in failing to instruct the jury that plaintiff had the burden of proving that defendant violated G.S. 20-161(a) by parking or leaving standing his vehicle on the paved portion of the highway when he had an opportunity to park the vehicle on the shoulder of the highway, and that the burden was on defendant to prove that he was excused from such parking because it was not reasonably practical under the circumstances to avoid stopping on the paved portion of the highway. *Williams v. Jones*, 171.

§ 56.2. Rear-end Collisions Caused by Defendant's Stopping on Highway

Even though defendant's violation of G.S. 20-161(a) constituted negligence per se in an action to recover damages for personal injuries sustained by plaintiffs in a rear end collision with a fire truck parked by the individual defendant in the highway, whether defendant's negligence was a proximate cause of plaintiffs' injuries was a question for the jury. *Furr v. Pinoca Volunteer Fire Dept.*, 458.

§ 76.2. Following too Closely; Hitting Parked Vehicle

Plaintiff was not contributorily negligent as a matter of law in striking a fire truck which was parked at night in her lane of travel. *Furr v. Pinoca Volunteer Fire Dept.*, 458.

§ 90. Failure of Instructions to Apply Law to Facts

In an action to recover damages for personal injuries sustained in a rear end collision, the trial court erred in failing to declare and explain the law of concurring negligence as requested and to apply it to the evidence presented. *Furr v. Pinoca Volunteer Fire Dept.*, 458.

§ 90.11. Sudden Emergency and Unavoidable Accident

Trial court erred in failing to charge on the doctrine of sudden emergency in an action to recover damages suffered by plaintiff when his vehicle collided with that of defendant which was stopped at night in the outside traffic lane of a four-lane highway. *Williams v. Jones*, 171.

AVIATION

§ 2. Liabilities in Operation of Airport

In an inverse condemnation action, the frequency of overflights subsequent to the alleged date of taking was pertinent to the issue of plaintiffs' damages. *Cochran v. City of Charlotte*, 390.

Admission of witnesses' opinions as to the value of plaintiffs' properties on the date of an alleged taking (1) without overflights and (2) with overflights was not error in an inverse condemnation action. *Ibid.*

In an inverse condemnation action expert witnesses may offer their opinions regarding the adverse effect on plaintiffs' properties of extension of an airport runway. *Ibid.*

CONSTITUTIONAL LAW — Continued

§ 30. Discovery; Access to Evidence

Trial court did not err in admitting a statement written by a witness though the district attorney failed to disclose this evidence prior to trial in response to defendant's discovery request. *S. v. Conner*, 87.

§ 31. Affording the Accused the Basic Essentials for Defense

The trial court did not err in failing to require the State to disclose the identity of a confidential informant during a hearing on a motion to suppress seized evidence where the search was based on a warrant and the informant did not actively participate in the crimes charged. *S. v. Caldwell and S. v. Maddox*, 1.

§ 40. Right to Counsel

An indigent defendant in a paternity suit instituted by the State has a constitutional right to court-appointed counsel. *Carrington v. Townes*, 649.

§ 52. Requirement that Delay in Trial be Negligent or Wilful and Prejudicial

Where defendant alleges that, due to the delay in his trial, he was prejudiced by the death of a potential witness, but he failed to include in the record an indication of what the witness's testimony would have been, the court cannot find prejudice. *S. v. Shelton*, 632.

§ 53. Delay in Trial Caused by Defendant

Where defendant failed to object to a consolidation of his case with that of his codefendant and further failed to object to codefendant's request for a continuance, more was needed to show a valid effort to assert his right to a speedy trial than a motion to dismiss made seven days prior to trial. *S. v. Shelton*, 632.

§ 56. Trial by Jury

In a prosecution for possession and sale of narcotics, defendant's right to a fair trial by an impartial jury was not violated by the denial of his motion for continuance made on the ground that the jury venire was present when the State's chief witness against defendant testified to establish the factual basis for guilty pleas entered two days prior to defendant's trial by three other defendants charged with various drug offenses. *S. v. Brown*, 82.

§ 74. Self-Incrimination

In describing the circumstances under which an officer discovered the true name of the defendant, who had given officers an alias when arrested, the officer's testimony, "He didn't want to talk to us so we were taking him back to the booking room," did not constitute an improper comment on defendant's exercise of his post-Miranda right to remain silent. *S. v. Hamilton*, 740.

§ 76. Nontestimonial Disclosures by Defendant

Defendant had the right to refuse to answer interrogatories and requests for admissions on the ground that to answer might tend to incriminate him; however, the trial court could nevertheless impose sanctions provided by G.S. 1A-1, Rule 37(b) for defendant's failure to obey an order to permit discovery. *Stone v. Martin*, 600.

CONTRACTS

§ 20. Excuse for Nonperformance

A breach of a separation agreement by one party did not excuse performance by the other party where the language of the agreement implied that the promises contained therein were intended to be mutually independent. *Coleman v. Shirlen*, 573.

§ 21.3. Anticipatory Breach

Defendants did not make an anticipatory breach of a contract to pay plaintiff a yearly commission from the "net profit" from a lease by placing a second deed of trust on the leased property. *Greene v. Murdock*, 552.

§ 27.2. Sufficiency of Evidence of Breach of Contract

In an action to recover damages for defendants' failure to pay plaintiff a commission, there was no merit to defendants' contention that the trial court erred in accepting the verdict as to the third issue, whether defendant had violated a legal duty to plaintiff by obtaining secondary financing, after the jury had answered the second issue, whether there was an agreement between the parties that secondary financing was to be financed in such a way as to allow the payment of a commission to the plaintiff, in favor of defendant, since the two issues were not inconsistent. *Greene v. Murdock*, 552.

CONVICTS AND PRISONERS

§ 2. Discipline and Management

Plaintiff, as widow and next of kin of a prisoner who took his own life, did not have standing to seek to invalidate the Secretary of Correction's regulation limiting access to inmates' psychiatric and psychological evaluations. *Carnahan v. Reed*, 589.

CORPORATIONS

§ 1. Incorporation and Corporate Existence

Defendant's general denial of plaintiff's allegations failed to place plaintiff corporation's legal existence in issue, and headings on bills submitted to defendant and testimony of plaintiff's employees was evidence of plaintiff's corporate status. *Truck Service v. Hill*, 443.

§ 25. Contracts and Notes

A corporation ratified its agent's authority to execute notes to a bank on its behalf by accepting the proceeds of the bank loans and making payments on the notes. *Gillespie v. DeWitt*, 252.

COUNTIES

§ 5.1. Validity of Zoning Ordinances

Provisions of a county zoning ordinance requiring junkyards or automobile graveyards to be surrounded by an opaque fence or by a wire fence with vegetation are not unconstitutionally vague and are not unconstitutional because they regulate for aesthetic purposes only. *S. v. Jones*, 466.

COURTS

§ 2.1. Requirements for Jurisdiction

Where a judgment by default was obtained against a corporation and no reference was made in the complaint to the alleged liability of a personal defendant, plaintiff could not later acquire jurisdiction over a personal defendant by filing a motion requesting the personal defendant to show cause why judgment should not be entered against him individually. *Southern Athletic/Bike v. House of Sports, Inc.*, 804.

§ 3. Original Jurisdiction of Superior Court

Jurisdiction in an action to recover for breach of fiduciary duties, negligence and fraud arising from administration of an estate was not required to be exercised initially by the clerk. *Ingle v. Allen*, 627.

§ 6. Jurisdiction on Appeals from Clerk

Superior court had no jurisdiction of a special proceeding brought by judgment creditors to determine the ownership of surplus funds remaining after a foreclosure sale where there was no appeal from an order of the clerk by an aggrieved party. *Journeys International v. Corbett*, 124.

CRIMINAL LAW

§ 9.3. Sufficiency of Evidence of Principal in Second Degree

Defendant was properly convicted of aiding and abetting another in an assault on defendant's one year old child in a trial in which the evidence for the State tended to show that, during the assault, defendant did absolutely nothing. *S. v. Walden*, 196.

§ 9.4. Instructions Concerning Principal in Second Degree

In a prosecution for aiding and abetting in an assault on defendant's one year old child, the trial court erred in instructing the jury that it could convict defendant if it found "that she was present with the reasonable opportunity and duty to prevent the crime and failed to take reasonable steps to do so." *S. v. Walden*, 196.

§ 26.5. Former Jeopardy; Same Acts or Transactions Violating Different Statutes

Acquittal of defendant on a charge of misdemeanor assault inflicting serious injury did not bar his subsequent prosecution on a charge of common law robbery. *S. v. Malloy*, 369.

§ 34.1. Evidence of Guilt of Other Offenses to Show Defendant's Character and Disposition to Commit Offense

In a prosecution for felonious larceny of a trailer and tobacco, the trial court erred in admitting testimony tending to show that defendant was guilty of insurance fraud. *S. v. Currie*, 485.

§ 34.4. Admissibility of Evidence of Other Offenses

Testimony elicited on redirect that a witness first met defendant when the witness was "on the chain gang" was admissible even though it incidentally bore on defendant's character as it was relevant for a purpose other than proving character. *S. v. Letterlough*, 693.

§ 34.7. Admissibility of Evidence of Other Offenses to Show Knowledge or Intent

Testimony of the prosecuting witness which indicated that defendant had threatened him on a previous occasion was relevant and competent to show defendant's quo animo, or state of mind or motive toward the victim. *S. v. Conner*, 87.

CRIMINAL LAW — Continued

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

Where a witness had an opportunity to observe defendant from a short distance under good lighting conditions for a period of from two to three minutes, the witness's in-court identification was not tainted by any pretrial identification procedures. *S. v. Melvin*, 421.

The court's conclusion that the in-court identification of defendant by State's witnesses was independent of any previous photographic identification procedure was supported by the evidence and findings. *S. v. Campbell*, 781.

§ 73.1. Admission of Hearsay Statement as Prejudicial or Harmless Error

The admission of testimony by a detective as to what defendant's accomplice told him in regard to defendant's participation in the alleged crimes was hearsay testimony, and its admission was prejudicial error. *S. v. Knight*, 513.

§ 84. Evidence Obtained by Unlawful Means

Evidence obtained in the search and seizure of an automobile was properly admitted even though the arresting officers were outside their territorial jurisdiction and defendant's arrest may have been unlawful. *S. v. Melvin*, 421.

§ 86.8. Credibility of State's Witnesses

Trial court should have permitted cross-examination of a State's witness as to whether he had been charged in the present case for the purpose of showing bias. *S. v. Letterlough*, 693.

§ 87.2. Leading Questions

The court did not abuse its discretion in allowing leading questions where defendant showed no prejudice. *S. v. Campbell*, 781.

§ 90. Rule that Party is Bound By and May Not Discredit His Own Witness

Where a State's witness, prior to recess, was not specific about what she heard defendant and a homicide victim say, but the witness, after recess, testified on direct examination to the exact words of defendant and the homicide victim, there was no merit to defendant's contention that the trial judge erred by permitting the State to impeach its own witness. *S. v. Charles*, 567.

§ 91. Nature and Time of Trial; Speedy Trial

Defendant's trial complied with the Speedy Trial Act where a warrant charging defendant with misdemeanor child abuse on 8 December 1979 was dismissed, defendant was indicted on 28 April 1980 for assault upon the child on 9 December 1979, the evidence was uncontradicted that there were two separate assaults, and defendant's trial began within 120 days after the indictment of defendant for assault. *S. v. Walden*, 196.

G.S. 15A-701(a1)(1) reflects the clear intent of the General Assembly that it is the last occurring of either arrest or indictment which triggers the running of the 120 day period within which trial must begin. *S. v. Charles*, 567.

The Appellate Court had no basis for determining that the trial court erred in concluding defendant's return to N.C. was not procured pursuant to the Interstate Agreement on Detainers and that the 120 day trial provision of that Act was thus inapplicable. *S. v. Rose*, 608.

A 46-day continuance ordered on the ground that defendant's trial could not be reached at the scheduled session "because of the press of other criminal cases being

CRIMINAL LAW — Continued

heard by the Court during such session" was properly excluded from the 120-day statutory speedy trial period. *S. v. Parnell*, 793.

The period of delay caused by a codefendant's request for continuance to receive a psychiatric examination is excluded when computing defendant's, as well as the codefendant's, statutorily prescribed time limit for trial. *S. v. Shelton*, 632.

Time delays in trial caused by (1) a 20-day continuance requested by the State to prepare for trial, (2) a mental examination for defendant, and (3) appointment and preparation of new counsel for defendant were properly excluded from computation of the statutory speedy trial period. *S. v. Letterlough*, 693.

§ 91.2. Continuance on Ground of Proceedings Occurring in Presence of Jurors

In a prosecution for possession and sale of narcotics, defendant's right to a fair trial by an impartial jury was not violated by the denial of his motion for continuance made on the ground that the jury venire was present when the State's chief witness against defendant testified to establish the factual basis for guilty pleas entered two days prior to defendant's trial by three other defendants charged with various drug offenses. *S. v. Brown*, 82.

§ 91.7. Continuance on Ground of Absence of Witness

Trial court's denial of defendant's motion to continue because of the unavailability of three unsubpoenaed defense witnesses was not an abuse of discretion or a denial of defendant's constitutional rights. *S. v. Chambers*, 358.

§ 93. Order of Proof

The trial court may permit introduction of evidence that depends for its admissibility upon some preliminary showing which has not yet been made upon counsel's assurance that such showing will be made later. *S. v. Shelton*, 632.

§ 97.2. No Abuse of Discretion in Not Permitting Additional Evidence

The decision to reopen a case and hear further evidence is within the trial court's discretion. *S. v. Shelton*, 632.

§ 99. Conduct of Court

The failure of the trial judge to inform prospective jurors they could find the defendant not guilty was rendered harmless by repeated instructions to the jury chosen that they could return a verdict of not guilty. *S. v. Bizzell*, 450.

§ 101. Conduct or Misconduct Affecting Jurors

Defendant was prejudiced when four jurors in a murder trial read a newspaper article which quoted the trial judge as stating "too many shots" in denying defendant's motion for nonsuit. *S. v. Reid*, 130.

§ 111. Form of and Manner of Giving Instructions

Trial court did not err in reducing a part of its instructions to writing and in allowing the jury to take the instructions into the jury room during its deliberations. *S. v. Bass*, 40.

§ 111.1. Form and Sufficiency of Instructions

The trial court can refer to and summarize an indictment when explaining to the jury the circumstances under which the defendant was being tried. *S. v. Shelton*, 632.

CRIMINAL LAW — Continued

§ 114.2. No Expression of Opinion in Statement of Evidence or Contentions in Instructions

The trial judge did not improperly express an opinion during instructions to the jury where he declined to repeat profanity to which witnesses had testified and then explained his omission. *S. v. Charles*, 567.

§ 122.2. Additional Instructions Upon Failure to Reach Verdict

Defendant is entitled to a new trial where the trial court gave improper additional instructions after the jury announced that it was deadlocked. *S. v. Mack*, 127.

§ 126.1. Manner of Polling Jury

The procedure used to poll the jury in an embezzlement case substantially complied with the requirements of G.S. 15A-1238. *S. v. Sutton*, 281.

§ 134.2. Time and Procedure for Imposition of Sentence

Trial court did not err in sentencing defendant without first asking him if he wished personally to address the court where defendant's counsel was given the opportunity to speak in defendant's behalf. *S. v. Martin*, 297.

§ 142.4. Conditions of Probation Held Proper

The amount of restitution required as a condition of defendant's probation for food stamp fraud was improper. *S. v. Bass*, 40.

§ 161.2. Assignments of Error

Failure to refer to assignments of error or exceptions following statement of the questions presented could result in abandonment of all of appellant's questions on appeal. *S. v. Shelton*, 632.

§ 169.6. Harmless Error in Exclusion of Evidence

Where the record does not contain what the witness would have testified had she been allowed to do so, the Court is unable to determine whether defendant was prejudiced. *S. v. Campbell*, 781.

DAMAGES

§ 9. Mitigation of Damages

In an action for breach of contract to purchase real property, admission of testimony as to the mortgage payments by plaintiff from the time defendants breached the contract until plaintiff ultimately sold the property was not error, and whether plaintiff failed to minimize his damages by renting an apartment rather than living in the house was for the jury's consideration. *Taefi v. Stevens*, 579.

§ 14. Competency of Evidence of Punitive Damages

Evidence as to the assets, liabilities, income tax returns and net worth of defendant employer was competent on the issue of punitive damages. *Carawan v. Tate*, 161.

§ 16. Sufficiency of Evidence

Trial court erred in setting aside as excessive verdicts for plaintiffs of $175,000 and $150,000 in an action to recover damages for personal injuries sustained in an automobile accident. *Worthington v. Bynum and Cogdell v. Bynum*, 409.

DAMAGES — *Continued*

§ 17. Instructions

It was error to charge a jury that they would have to find there had been a justifiable revocation and "cover" to award damages for breach of contract in the sale of latches to plaintiff. *Manufacturing Co. v. Logan Tontz Co.*, 625.

§ 17.7. Punitive Damages

An issue of punitive damages was properly submitted to the jury in an action to recover for assault on plaintiff by defendant parking lot attendant. *Carawan v. Tate*, 161.

DEDICATION

§ 4. Withdrawal and Revocation of Dedication

There was no abandonment of an easement in a dedicated street when the land on which the street was located was eroded and submerged by waters of an inlet. *Ward v. Sunset Beach & Twin Lakes, Inc.*, 59.

DEEDS

§ 20.7. Restrictive Covenant Enforcement Proceedings

Trial court erred in refusing to grant a mandatory injunction requiring defendant to remove the existing incomplete foundation of a residence in a subdivision after the court properly entered an order permanently enjoining defendant from constructing the residence. *Buie v. Johnston*, 97.

DIVORCE AND ALIMONY

§ 16. Alimony Without Divorce

The evidence supported the trial court's finding that payments which a divorce judgment required decedent to make to plaintiff constituted alimony and not a property settlement, and plaintiff's right to receive the payments terminated upon decedent's death. *Markham v. Markham*, 18.

§ 16.8. Finding; Ability to Pay

Trial court was required to enter an order for alimony which would enable the defendant spouse to live as the wife of a man with a large estate was entitled to live. *Quick v. Quick*, 248.

There was no merit to defendant husband's contention that the trial court erred in failing to consider the value of plaintiff wife's estate in determining the amount of alimony to which she was entitled. *Ibid.*

Evidence of the financial status of a corporation in which defendant husband owned more than 96% of stock was relevant in determining the size of his estate for the purpose of setting the amount of alimony to which plaintiff was entitled. *Ibid.*

G.S. 50-16.8(f) requiring a trial judge to find facts from the evidence presented is inapplicable to the situation where the parties agreed to arbitrate the issue of spousal support. *Crutchley v. Crutchley*, 732.

§ 18.10 Alimony Pendente Lite; Findings

Findings of fact are not required when the only issue for the court is the amount of alimony. *Quick v. Quick*, 248.

DIVORCE AND ALIMONY — Continued

§ 18.16 Attorney's Fees and Costs

Trial court properly entered summary judgment for defendant in plaintiff's action to recover under an agreement that defendant would reimburse plaintiff for any additional federal or state income tax she might have to pay should the taxing authorities disallow her deduction of attorneys' fees which had been reimbursed by defendant. *Stanback v. Stanback*, 243.

Trial court properly awarded counsel fees to plaintiff wife in her action for permanent alimony. *Quick v. Quick*, 248.

Trial court properly awarded to the defendant spouse attorney fees for services of the attorney performed on appeal. *Fungaroli v. Fungaroli*, 270

§ 19.1. Jurisdiction to Modify Decree

The portion of a judicially confirmed arbitrator's award concerning support of plaintiff may not be modified after the statutory time periods for modifying an award and for appealing a confirmation order have expired. *Crutchley v. Crutchley*, 732.

§ 24. Support

A father is not entitled to an accounting from the mother for sums paid to her for support of children pursuant to a separation agreement. *Glenn v. Glenn*, 515.

§ 24.1. Determining Amount of Support

Trial court's order directing child support payments was erroneous where the court failed to make findings as to the actual needs of the child or the expenses of the parties. *Ingle v. Ingle*, 227.

§ 24.2. Effect of Separation Agreements

Evidence of a change in the circumstances and needs of the parties' children was sufficient to support the trial court's order directing defendant to make child support payments greater than those provided for in the parties' separation agreement. *Minges v. Minges*, 507.

§ 25. Custody

Trial court erred in ordering that defendant father claim a child as a dependent for income tax purposes because plaintiff's payments would not constitute one-half the amount required to support the child. *Ingle v. Ingle*, 227.

§ 25.3. Consideration of Child's Preference

A trial judge may not question a child privately in a custody proceeding except by consent of the parties. *Williams v. Richardson*, 663.

§ 25.4. Custody with Father; Preferential Rights

Trial court did not err in awarding child custody to the father. *Ingle v. Ingle*, 227.

§ 25.12. Visitation Privileges

Trial court could not rule on the husband's motion to hold the wife in contempt for failure to abide by a Massachusetts child visitation order which had been filed in North Carolina where the court had no jurisdiction of the action in which the motion was made. *Nabors v. Farrell and Farrell v. Farrell*, 345.

§ 26. Modification of Foreign Orders

A North Carolina court was not required by statute to decline jurisdiction of a proceeding to modify a Virginia child custody decree because the mother had ab-

DIVORCE AND ALIMONY — Continued

EASEMENTS

EMBEZZLEMENT

§ 5. Evidence in Prosecution for Embezzlement

Evidence of defendant's monthly payments which tended to show that defendant was living far above the standard to be expected of one with his earnings was relevant in an embezzlement case to establish motive. *S. v. Sutton*, 281.

Three large cash transactions by defendant in April were not too remote to be relevant to establish his guilt of embezzlement in the preceding November, December, and January. *Ibid.*

§ 6. Sufficiency of Evidence

The State's evidence was sufficient to support the conviction of the assistant manager of a fast food restaurant of embezzlement of money and uniform and meal maintenance coupons from the restaurant. *S. v. Sutton*, 281.

EMINENT DOMAIN

§ 3. Necessity of Public Purpose

Appellants' claim that the State acted arbitrarily and capriciously in condemning their land was meritless where the evidence showed acquisition of appellants' land was for a proper public purpose and the State complied with procedural requirements for condemnation. *S. v. Williams and Hessee*, 674.

§ 3.4. Taking for Other Purposes

The State has the right to condemn property to expand a State Park in order to protect a historic "Swimming hole" and to assure the public of continued access to the site. *S. v. Williams and Hessee*, 674.

§ 5.1. Amount of Compensation Where Only Part of Land is Taken

In determining unity of ownership, the significant factor is that the party who owns an interest and estate in the parcel he seeks to include in the whole for purposes of computing damages in a condemnation action must also own an interest and estate in the tract taken, although the two intersts and estates need not be of the same quality of quantity. *City of Winston-Salem v. Tickle*, 516.

The evidence in a condemnation action was sufficient to support a finding by the trial court that the land taken by plaintiff was a portion of a unified tract for the purpose of assessing damages. *Ibid.*

§ 6.5. Testimony of Witness as to Value

An expert witness may testify with regard to a City Planning Department plan used by him in arriving at his opinion as to the value of land condemned. *Board of Transportation v. Lyckan Development Co.*, 511.

§ 7.7. Answer by Landowner in Condemnation Proceedings

The requirement of the State to file a negative declaration may be waived by the failure of a landowner party in a condemnation proceeding to assert a violation of the Environmental Policy Act as a defense in his responsive pleading as required by G.S. 1A-1, Rule 12(b). *S. v. Williams and Hessee*, 674.

EQUITY

§ 2.2. Applicability of Doctrine of Laches to Particular Proceedings

The doctrine of laches did not prevent the issuance of an injunction prohibiting the practice of podiatry by a defendant who opened a foot clinic some thirty years earlier. *Costin v. Shell*, 117.

ESCAPE

§ 9. Instructions

In a prosecution for felonious escape pursuant to G.S. 148-45, the trial court need not instruct the jury that one of the essential elements of the offense is that the failure to remain in or return to confinement must be willful. *S. v. Rose*, 608.

ESTOPPEL

§ 4.7. Sufficiency of evidence of Equitable Estoppel

Defendant was estopped from denying plaintiff disability retirement benefits where plaintiff relied on one of defendant's publications for the proper procedure to otbain disability retirement benefits, and plaintiff followed the procedures established by defendant. *Fike v. Bd. of Trustees*, 78.

EVIDENCE

§ 15.1. Remoteness of Evidence

An "admission" in an inverse condemnation action by an assistant airport manager regarding purchase of homes near the airport in 1979 had no relevance to takings which occurred in 1965. *Cochran v. City of Charlotte*, 390.

§ 22.2. Evidence of Conviction or Acquittal in Prior Criminal Prosecution

Trial court in a civil assault case erred in permitting plaintiff and a police officer to testify that defendant was convicted in district court of assaulting plaintiff. *Carawan v. Tate*, 161.

§ 25. Photographs, X-rays and Maps

In a proceeding to terminate parental rights, respondents failed to show prejudicial error in the admission of photographs of their child where there was no testimony for the photographs to illustrate. *In re Peirce*, 373.

§ 29.2. Business Records

Plaintiff's exhibit which consisted of itemized statements of account for materials supplied and labor performed by plaintiff in repairing defendant's truck was not admissible pursuant to G.S. 8-45 because it was not verified; however, the exhibit was admissible under the business records exception to the hearsay rule. *Truck Service v. Hill*, 443.

§ 33. Hearsay Evidence

In a proceeding to terminate parental rights, letters from respondents' counsel informing respondents of the progress in efforts to transfer their child from N.C. to a foster home in Florida were admissible to establish the state of mind of respondents, but exclusion of the letters was harmless error. *In re Peirce*, 373.

In an action by plaintiff to recover a real estate commission allegedly owed him by defendants, it was not error to admit testimony by a witness that he and his wife were ready, willing, and able to purchase the property in question. *Morgan v. Oates*, 593.

§ 34.1. Admissions and Declarations; Admissions Against Interest

In a civil conspiracy action it was error to admit testimony concerning admissions of two defendants as to any of defendants other than the makers of the declarations as the declarations were not made in furtherance of the conspiracy. *Hasty v. Turner*, 746.

EVIDENCE — Continued

§ 41. Invasion of Province of Jury

The jury is as qualified as an expert to express an opinion as to the effect of a taped noise of airplanes upon humans. *Cochran v. City of Charlotte*, 390.

The court committed reversible error when it allowed surveyors to state their opinions as to the true boundary line between plaintiff and each of several defendants as the true boundary line is a question of fact for the jury. *Combs v. Woodie*, 789.

§ 44. Evidence as to Physical Condition and General Health

Plaintiff and his wife could testify concerning the mental anguish plaintiff suffered as a result of an alleged assault by defendant. *Carawan v. Tate*, 161.

§ 45. Evidence as to Value

In an inverse condemnation action expert witnesses may offer their opinions regarding the adverse effect on plaintiffs' properties of extension of an airport runway. *Cochran v. City of Charlotte*, 390.

§ 48.1. Failure to Prove Qualification of Expert

In a proceeding to terminate parental rights, the trial court did not err in permitting a social worker to state her opinion concerning respondents' parenting skills. *In re Peirce*, 373.

§ 51. Testimony as to Blood Tests

Trial court properly denied defendant's motion for a blood test pursuant to G.S. 80-50.1 and properly determined that defendant's paternity had been previously adjudicated by the court. *Withrow v. Webb*, 67.

EXECUTION

§ 1. Property Subject to Execution

Under G.S. 1-359 a bank voluntarily can pay to the sheriff the amount in a judgment debtor's bank account when it is notified that there is an outstanding writ of execution against its depositor. *Faught v. Branch Banking & Trust Co.*, 132.

EXECUTORS AND ADMINISTRATORS

§ 5.3. Grounds for Revocation of Appointment; Conflict of Interest

No conflict of interest is created by the mere fact that the executor of the estate also occupied the status of creditor. *Tyson v. N.C.N.B.*, 189.

§ 6.1. Property Constituting Assets

Decedent's automobile liability insurance policy was an undistributed asset of the estate within the meaning of G.S. 28A-14-3. *Carethers v. Blair*, 233.

§ 19.1. Time for Filing Claim Against Estate

Plaintiff's claim for damages arising out of a collision with decedent's automobile, though not presented to the administrator within six months of the publication of general notice to creditors, was not barred since the administrator did not mail plaintiff a personal notice concerning the presentment of claims. *Carethers v. Blair*, 233.

§ 39. Actions Against Personal Representative and the Sureties on His Bond

Trial court properly entered summary judgment for defendant in an action to recover for defendant's alleged breach of fiduciary duties as executor of the estate

GUARANTY — Continued

any one of the principal debtor's notes to the bank or call all of them without discharging defendant's liability as guarantor. *Ibid.*

§ 2. Actions to Enforce

Plaintiff did not extinguish defendant's liability on a guaranty of payment of a corporation's notes to a bank by giving his personal note to the bank in return for the bank's assignment to him of the notes and the guaranty of payment. *Gillespie v. DeWitt*, 252.

HIGHWAYS AND CARTWAYS

§ 7.3. Sufficiency of Evidence in Suits Against Contractors

Evidence was sufficient for the jury on the issue of negligence by a subdivision developer in terminating the pavement of a street just over the crest of a hill and failing to give adequate warning thereof. *Ridge v. Grimes*, 619.

HOMICIDE

§ 28. Self-Defense

Defendant is entitled to a new trial because of the court's failure to include not guilty by reason of self-defense in its final mandate to the jury. *S. v. Reid*, 130.

HOSPITALS

§ 3.2. Liability of Noncharitable Hospital for Negligence of Employees

Plaintiff's evidence was insufficient for the jury on the issue of defendant hospital's negligence in an action to recover for personal injuries received by an epileptic patient when she suffered seizures after her physician discontinued her use of an anti-seizure medicine. *Howard v. Piver*, 46.

HUSBAND AND WIFE

§ 11.2. Construction of Separation Agreements

Where a separation agreement required the husband to pay the wife $25,000 per year in alimony for the first three years, payable in equal monthly installments, and during the fourth year to pay in equal monthly installments an amount equivalent to 30% of the husband's "then gross income," the phrase "then gross income" meant the husband's gross income for the previous year rather than current monthly earnings. *Heater v. Heater*, 101.

§ 12.1. Revocation and Rescission; Fraud, Want of Consideration

In an action for breach of a separation agreement in which defendant sought rescission of the agreement on the ground of duress, the trial court properly excluded testimony by defendant's witness that plaintiff was "jubilant," "well-pleased," "happy" and "boastful" over the separation agreement and that the witness had commented to plaintiff's daughter that plaintiff was going to take everything the defendant had and "break him." *Delp v. Delp*, 72.

Trial court did not err in refusing to submit an issue as to whether a valid separation agreement supported by consideration existed between the parties prior to the issue of whether defendant signed the separation agreement and deeds executed pursuant thereto under duress. *Ibid.*

INDEMNITY

§ 2.1. Losses, Damages, and Liabilities Covered

An indemnity clause in the parties' contract covered an accident in which a worker was electrocuted in connection with the roofing work defendant contracted to perform, and plaintiff's admission of negligence did not bar its claim for recovery upon the indemnity clause, nor was plaintiff barred by the fact that defendant was released and discharged by the deceased worker's estate from liability resulting from his death. *Kirkpatrick & Assoc. v. Wickes Corp.*, 306.

INFANTS

§ 6.4. Child's Wishes as Material to Custody

A trial judge may not question a child privately in a custody proceeding except by consent of the parties. *Williams v. Richardson*, 663.

INJUNCTIONS

§ 12.1. Hearing on Issuance and Continuance of Temporary Orders

Any error in the trial court's entry of a final judgment on the merits in a hearing on a motion to show cause was harmless where the judgment was entered on an issue solely of law. *In re Savings and Loan Assoc.*, 326.

INSURANCE

§ 143. Liability Insurance

A cause of action on an insurance policy on a yacht accrued at the time the physical damage occurred rather than when the insurer received written proof of loss and refused to pay the loss, and a policy provision requiring an action on the policy to be commenced "within twelve months next following the physical loss or damage" was not in conflict with statutory provisions prohibiting insurance policies from limiting the time within which suit may be brought to less than one year after the cause of action accrues. *F & D Co. v. Insurance Co.*, 92.

JUDGMENTS

§ 21.1. Consent Judgments; Want of Consent

Absent circumstances to put the court on notice that one of the parties to a consent judgment does not actually consent, a judge may properly rely upon the signatures of the parties as evidence of consent. *Wachovia Bank v. Bounous*, 700.

JURY

§ 7.1. Racial Discrimination as Ground for Challenge

Defendants failed to make out a prima facie case of arbitrary or systematic exclusion of blacks from the jury where they showed eight of the State's eleven challenges were of black jurors and the petit jury was all white. *S. v. Shelton*, 632.

KIDNAPPING

§ 1. Elements of Offense

Neither the misspelling of defendant's name nor the failure to allege the age of the victim made an indictment charging defendant with kidnapping defective;

MASTER AND SERVANT — Continued

The Industrial Commission did not err in requiring defendant to pay for the deposition of a physician selected by the Industrial Commission. *Ibid.*

§ 94.2. Award and Judgment of Commission

Industrial Commission award was not contrary to the purpose of the Workers' Compensation Act because it contained a statement that the hearing commissioner's decision was "another example in which the Workers' Compensation Act is being used, not for compensating a working man or woman while they are disabled . . . but to provide a supplemental source of income to a retired person who is receiving social security and possibly other benefits." *Goodman v. Linn-Corriher Corp.*, 612.

MORTGAGES AND DEEDS OF TRUST

§ 32.1. Restriction of Deficiency Judgments Respecting Purchase—Money Mortgages and Deeds of Trust

Expressly providing in a deed of trust for attorney's fees and expenses upon foreclosure is authorized by statute, and recovery of such fees and expenses does not represent a deficiency in violation of the Anti-Deficiency Judgment statute. *Reavis v. Ecological Development, Inc.*, 496.

MUNICIPAL CORPORATIONS

§ 4.4. Public Utilities and Services

Where the cost of new facilities constructed to serve a municipality's customers are known or predictable, rates calculated to begin recoupment of those costs are not unlawful merely because the new facilities have not yet been put into actual use. *Town of Spring Hope v. Bissette*, 210.

§ 9.1. Police Officers and Chief of Police

The Civil Service Commission of the City of Raleigh had no authority to entertain an appeal from a decision of the chief of police not to appoint respondent to the rank of major in the police department. *City of Raleigh v. Stell*, 776.

§ 11. Discharge of Municipal Employees

Plaintiff's complaint for wrongful discharge from employment as a city police chief was properly dismissed as the applicable section of the city code provided the chief of police was "to serve at the pleasure of the city manager." *Harrell v. Whisenant*, 615.

§ 30.3. Validity of Ordinances

Provisions of a county zoning ordinance requiring junkyards or automobile graveyards to be surrounded by an opaque fence or by a wire fence with vegetation are not unconstitutionally vague. *S. v. Jones*, 466.

An amendment to a town zoning ordinance which prohibited restaurants with drive-in service and which arbitrarily singled out plaintiff's restaurant was unconstitutional. *Wenco Management Co. v. Town of Carrboro*, 480.

§ 30.4. General Principals Favoring Validity of Ordinances

Ordinance which prohibited left turns into and out of plaintiff's property was valid. *Wenco Management Co. v. Town of Carrboro*, 480.

MUNICIPAL CORPORATIONS — Continued

§ 30.6. Special Permits and Variances

Where use of an apartment complex for multi-family housing was permitted as a prior nonconforming use, the owner was not required to obtain a special use permit from a municipality in order to convert the apartments into condominiums. *Graham Court Assoc. v. Town of Chapel Hill*, 543.

A city board of adjustment erred in denying an application for a special use permit for the operation of an adult book store. *Book Stores v. City of Raleigh*, 753.

§ 30.15. Nonconforming Uses

A zoning board of adjustment had no authority to grant Class A nonconforming status to uses and structures added to an agricultural supply business where the new uses and structures were not lawful at their inception because they were begun after the effective date of the zoning ordinance and because no building permit was issued. *Atkins v. Zoning Board of Adjustment*, 723.

Use of property for storage and transportation of sand, gravel and lumber was not incidental to proper nonconforming uses of storage and sale of grain, fertilizer and lime and was not permitted under the Doctrine of Accessory Uses. *Ibid.*

§ 45. Mandamus Against Municipal Corporations

Letters received by cities are considered public record subject to disclosure pursuant to G.S. 132.1. *Advance Publications, Inc. v. City of Elizabeth City*, 504.

NARCOTICS

§ 3.1. Competency and Relevancy of Evidence

In light of charges against defendant, it was relevant for the State to offer testimony of a State witness's drug habit and his need to support that habit by dealing in drugs with defendant, of the relationship between the State's witness and defendant within a reasonable time before the date of the crimes charged, and of their *modus operandi* in drug dealing. *S. v. Shaw*, 772.

§ 4. Sufficiency of Evidence

Where three officers testified as to the date of certain drug transactions and the date corresponded with the date on the indictment, another witness's uncertainty about the exact date did not constitute a variance between *allegata* and *probata*. *S. v. Shaw*, 772.

NEGLIGENCE

§ 29.2. Duty of Care; Warnings

Plaintiff's evidence was sufficient for the jury to find that the operator of a crane was negligent in failing to take the slack out of the cables of the crane, thus allowing a spreader bar to be balanced precariously and to fall on plaintiff. *Beatty v. Owsley & Sons, Inc.*, 178.

§ 35.2. Cases Where Contributory Negligence Is Not Shown as a Matter of Law

The evidence did not disclose that plaintiff was contributorily negligent as a matter of law when he was injured by a spreader bar on a crane rented to plaintiff's employer and operated by defendant's agent. *Beatty v. Owsley & Sons, Inc.*, 178.

PARENT AND CHILD

§ 1. Creation and Termination of Relationship

The statutorily established procedure for the termination of parental rights does not include the right to file a counterclaim. *In re Peirce*, 373.

Where the parties stipulated to the use of recording machines for the taking of evidence, they were estopped from complaining as to the quality of the equipment used, and respondents failed to show prejudice by the loss of portions of testimony as they did not show in the record what the lost testimony was. *Ibid.*

Judgment terminating parental rights showed that the trial court conducted a preliminary hearing with due notice. *Ibid.*

In a proceeding to terminate parental rights the trial court did not err in permitting a social worker to state her opinion concerning respondents' parenting skills. *Ibid.*

Letters from respondents' counsel informing respondents of the progress in efforts to transfer their child from N.C. to a foster home in Florida were admissible to establish the state of mind of respondents, but exclusion of the letters was harmless error. *Ibid.*

In a proceeding to terminate parental rights respondents failed to show prejudicial error in the admission of photographs of their child where there was no testimony for the photographs to illustrate. *Ibid.*

Where the trial judge inadvertently omitted to state that the best interest of the child in question would be served by the termination of parental rights, it was not error under G.S. 1A-1, Rule 60(a) for the trial judge to amend the judgment to conform to his original intention. *Ibid.*

§ 1.1. Presumption of Legitimacy

In a civil paternity action a plaintiff is not required to show that the husband could not have had access to the wife, but that he did not have access, and where the spouses are living apart, the presumption of legitimacy will be rebutted unless there is a fair and reasonable basis in light of experience and reason to find that they have engaged in sexual relations. *Wake County v. Green*, 26.

§ 1.2. Competency and Relevancy of Evidence

In a civil paternity action a husband and wife may testify concerning nonaccess to each other. *Wake County v. Green*, 26.

Trial court properly denied defendant's motion for a blood test pursuant to G.S. 80-50.1 and properly determined that defendant's paternity had been previously adjudicated by the court. *Withrow v. Webb*, 67.

§ 2.2. Child Abuse

Defendant was properly convicted of aiding and abetting another in an assault on defendant's one year old child in a trial in which the evidence for the State tended to show that, during the assault, defendant did absolutely nothing. *S. v. Walden*, 196.

§ 10. Uniform Reciprocal Enforcement of Support Act

In an action for support, where plaintiff pled that defendant was the father of three minors, she was entitled to show this by introducing documents from another jurisdiction establishing paternity conclusively. *Patterson v. Phillips*, 802.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 1. Prosecutions for Practicing Without a License

The trial court properly granted summary judgment for the Board of Podiatry Examiners in its action for an injunction prohibiting defendant from practicing podiatry, holding himself out as a podiatrist or describing his occupation by the use of any words or letters calculated to represent that he is a podiatrist. *Costin v. Shell*, 117.

Neither the doctrine of laches nor the ten-year statute of limitations of G.S. 1-56 barred the issuance of an injunction prohibiting the practice of podiatry by a defendant who opened a foot clinic some thirty years earlier. *Ibid.*

§ 11.2. Malpractice; Cure Not Guaranteed

A dentist may enlarge his responsibility to the patient and contract to fulfill specific assurances, but such assurances must be in writing to be enforceable. *Preston v. Thompson*, 290.

A dentist's providing of dentures for plaintiff did not constitute a sale of goods within the meaning of the UCC, the dentist was not a merchant, and the transaction was thus not covered by an implied warranty. *Ibid.*

§ 15.2. Who May Testify as Experts

The trial court erred in excluding testimony by a faculty member of the U.N.C. School of Medicine that defendant physician's discontinuance of an anti-seizure medication for an epileptic patient did not conform with the standard of care for physicians and surgeons in Jacksonville, N.C. *Howard v. Piver*, 46.

§ 17.1. Failure to Inform Patient of Risks of Treatment

The trial court was correct in charging the jury as to whether the standard of medical care in Asheville required defendant to inform plaintiff of the possibility of paralysis resulting from an arteriogram. *McPherson v. Ellis*, 476.

In a medical malpractice action the trial court did not err in charging the jury that, even if defendants failed to inform plaintiff of the risks of an arteriogram, she would not be entitled to recover were they to find that, had she been so informed, she would have consented to the procedure in any event. *Ibid.*

PRINCIPAL AND AGENT

§ 1. Creation and Existence of Relationship

Defendant husband did not act as agent of defendant wife in agreeing to pay commissions to plaintiff for a lease from defendants to a third party. *Greene v. Murdock*, 552.

§ 6.1. Proof of Ratification

A corporation ratified its agent's authority to execute notes to a bank on its behalf by accepting the proceeds of the bank loans and making payments on the notes. *Gillespie v. DeWitt*, 252.

PUBLIC RECORDS

§ 1. Generally

A letter received by the manager of defendant-city from a consulting engineer whom defendant-city employed to inspect construction work on additions and modifications to its water treatment plant is a public record subject to disclosure pursuant to G.S. 132-1. *Advance Publications, Inc. v. City of Elizabeth City*, 504.

QUASI CONTRACTS AND RESTITUTION

§ 5. Recovery of Payments

Where plaintiffs paid an amount allegedly embezzled by a relative and then sought restitution for such amount, the trial court, erred in directing verdict for defendant school which benefited from the alleged embezzlement. *Huff v. Trent Academy*, 113.

QUIETING TITLE

§ 1. Nature of Remedy; Matters Constituting Cloud

Plaintiffs' action to remove their homeplace from a deed of trust was one to reform an instrument on the basis of a unilateral mistake based upon misrepresentation rather than an action to quiet title, and the trial court had no jurisdiction to hear the action. *Simmons v. Farmers Home Administration*, 216.

RECEIVING STOLEN GOODS

§ 5. Sufficiency of Evidence

In a prosecution for nonfelonious possession of stolen goods, the State failed to meet its burden of proving that defendant knew or should have known the goods were stolen. *S. v. Bizzell*, 450.

REFORMATION OF INSTRUMENTS

§ 1.1. Mutual or Unilateral Mistake

Plaintiffs' action to remove their homeplace from a deed of trust was one to reform an instrument on the basis of a unilateral mistake based upon misrepresentation rather than an action to quiet title, and the trial court had no jurisdiction to hear the action. *Simmons v. Farmers Home Administration*, 216.

§ 7. Sufficiency of Evidence

In plaintiff's action to have a deed reformed on the basis of fraud by defendant, evidence was sufficient for the jury to find that defendant made a false representation to plaintiff as to marital status at the time she married plaintiff which she knew was false; however, the evidence was insufficient to show that the misrepresentation by defendant was intended to induce plaintiff to have her name put on the deed. *Dorsey v. Dorsey*, 622.

RETIREMENT SYSTEMS

§ 5. Claims of Members

Defendant was estopped from denying plaintiff disability retirement benefits where plaintiff relied on one of defendant's publications for the proper procedure to obtain disability retirement benefits, and plaintiff followed the procedures established by defendant. *Fike v. Bd. of Trustees*, 78.

ROBBERY

§ 1.1. Armed Robbery

Evidence that the witness was robbed while defendant held a pistol in his hand is sufficient on the element of endangering or threatening the life of a person in an armed robbery case. *S. v. Melvin*, 421.

ROBBERY — Continued

§ 3. Competency of Evidence

In a prosecution for attempted armed robbery, trial court did not err in allowing the State's expert witness to testify that in his opinion the nunchuckas allegedly used by defendant was a lethal weapon. *S. v. Mullen*, 106.

§ 3.2. Physical Objects and Documentary Evidence

Defendant was not prejudiced by the introduction of testimony concerning the discovery of a sock containing two pieces of concrete at the crime scene some four months after the crimes occurred. *S. v. Hamilton*, 740.

§ 4.4. Attempted Robbery Cases Where Evidence Held Sufficient

Evidence was sufficient for the jury in a prosecution for attempted armed robbery of a restaurant employee. *S. v. Mullen*, 106.

§ 5.4. Instructions on Lesser Included Offenses and Degrees

Trial court in an armed robbery case did not err in failing to instruct on the lesser included offense of common law robbery. *S. v. Chambers*, 358.

RULES OF CIVIL PROCEDURE

§ 1. Scope of Rules

G.S. Ch. 7A, Art. 24B exclusively controls the procedure to be followed in the termination of parental rights, and the Rules of Civil Procedure are inapplicable to such a proceeding. *In re Peirce*, 373.

§ 9. Pleading Special Matters

Defendant's general denial of plaintiff's allegations failed to place plaintiff corporation's legal existence in issue as G.S. 1A-1, Rule 9(a) requires a defendant to plead specifically lack of capacity to sue. *Truck Service v. Hill*, 443.

§ 12.1. Defenses and Objections; When and How Presented

Where defendants' motion was a motion to dismiss for failure to state a claim upon which relief could be granted, and the effect of the trial court's judgment was to treat it as such, the label "judgment on the pleadings" which was inadvertently entered in the notice of hearing to plaintiff and the trial court's judgment could not have prejudiced plaintiff. *Harrell v. Whisenant*, 615.

§ 15. Amended and Supplemental Pleadings

Plaintiff's original complaint alleging that defendant was driving an automobile involved in an accident and an amendment thereto alternatively naming another person as either the owner or the driver of the automobile did not give defendant notice of the transactions or occurrences potentially giving rise to defendant's liability under plaintiff's second complaint alleging that defendant was the owner of the automobile driven by another person who was acting as defendant's agent, and the second complaint did not relate back to the first complaint and was barred by the three-year statute of limitations. *Cranford v. Helms*, 337.

§ 23. Class Actions

Plaintiff, as widow and next of kin of a prisoner who took his own life, did not have standing to seek to invalidate the Secretary of Correction's regulation limiting access to inmates' psychiatric and psychological evaluations. *Carnahan v. Reed*, 589.

RULES OF CIVIL PROCEDURE — Continued

§ 33. Interrogatories to Parties

Trial court erred in excluding defendant's answers to interrogatories where plaintiff was not seeking by their admission to prove the truth of the matters asserted therein but was seeking to prove that defendant had knowledge or notice of the facts declared. *Beatty v. Owsley & Sons, Inc.*, 178.

Defendant waived objection to plaintiff's unsigned and unverified answers to interrogatories by failing to make a motion to strike or a motion for an order compelling proper answers. *Thelen v. Thelen*, 684.

§ 37. Failure to Make Discovery; Consequences

Defendant had the right to refuse to answer interrogatories and requests for admission on the ground that to answer might tend to incriminate him; however, the trial court could nevertheless impose sanctions provided by G.S. 1A-1, Rule 37(b) for defendant's failure to obey an order to permit discovery. *Stone v. Martin*, 600.

§ 41. Dismissal of Actions

Trial court in a nonjury trial erred in failing to make findings of fact to support entry of judgment granting defendants' motion for involuntary dismissal at the close of plaintiffs' evidence. *Young v. Chemical Co.*, 806.

§ 44. Proof of Official Record

An order of a Maryland court was not sufficiently authenticated for admission into evidence. *Thelen v. Thelen*, 684.

§ 50. Motions for Directed Verdicts and Judgments Notwithstanding Verdicts

Where plaintiff did not object at trial to the failure of defendants' motions for directed verdict and judgment n.o.v. to state specific grounds therefore, plaintiff cannot raise such issue on appeal. *Johnson v. Dunlap*, 312.

Defendant waived the right to complain on appeal about the denial of his motion for directed verdict at the close of plaintiff's evidence by offering evidence at trial. *Truck Service v. Hill*, 443.

§ 59. New Trials; Amendment of Judgments

The trial judge did not abuse his discretion in denying defendants' motions for a new trial where defendants were informed through counsel in their home state of local counsel's intention to withdraw as attorney of record and the date for which trial was scheduled, defendants made no attempt to contact anyone other than counsel in their home state, and defendants did not appear when their case was called for trial. *Hensgen v. Hensgen*, 331.

Trial court did not abuse its discretion in setting aside a jury verdict and ordering a new trial on the ground the verdict was contrary to the evidence. *Johnson v. Dunlap*, 312.

Trial court erred in setting aside as excessive verdicts for plaintiffs of $175,000 and $150,000 in an action to recover damages for personal injuries sustained in an automobile accident. *Worthington v. Bynum and Cogdell v. Bynum*, 409.

Defendant failed to show abuse of discretion by the trial court's denial of his motion for a new trial where plaintiff offered sufficient evidence to justify the award of compensatory damages. *Hasty v. Turner*, 746.

§ 60. Relief from Judgment or Order

Where the trial judge inadvertently omitted to state that the best interest of the child in question would be served by the termination of parental rights, it was

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1. Generally

Evidence was sufficient for the jury in a prosecution of defendant for felonious welfare fraud and felonious food stamp fraud. *S. v. Bass*, 40.

SPECIFIC PERFORMANCE

§ 1. Principles and Equitable Considerations Governing Granting Relief

Trial court erred in entering partial summary judgment ordering three defendants to perform specifically a contract which required the defendants to bear the expense of installing drain tile through a subdivision lot under certain circumstances. *Atkins v. Beasley*, 33.

TORTS

§ 7. Release from Liability and Covenants Not to Sue

Plaintiff's release of an owner of a dog from liability did not release the veterinarian for whom she worked where she alleged the veterinarian was severally liable in negligently failing to warn plaintiff of potential dangers associated with his directive. *Macklin v. Dowler*, 488.

§ 7.2. Avoidance of Release; Effect of Fraud, Duress or Mistake

Trial court in a personal injury action erred in entering summary judgment for defendants where a genuine issue of material fact was raised as to whether plaintiff and an insurance adjuster intended to release only the driver of the car in which plaintiff was a passenger and the company which insured the driver, and thus made a mutual mistake of fact in executing a release which, by its terms, released all joint tortfeasors. *Peede v. General Motors Corp.*, 10.

Defendants waived their rights under a release from liability when they presented to and had plaintiff execute a second release and paid him the sum of $1500 as provided therein. *Johnson v. Dunlap*, 312.

TRIAL

§ 3.2. Particular Grounds for Continuance

Trial court in a protracted domestic dispute did not abuse its discretion in denying plaintiff's motion for continuance of a hearing on defendant's motion for attorney fees made on the ground that plaintiff wanted to cross-examine the absent defendant about her assets and income. *Fungaroli v. Fungaroli*, 270.

§ 6. Stipulations

Where the parties stipulated to the use of recording machines for the taking of evidence, they were estopped from complaining as to the quality of the equipment used, and respondents failed to show prejudice by the loss of portions of testimony as they did not show in the record what the lost testimony was. *In re Peirce*, 373.

§ 8. Consolidation of Actions for Trial

Where the statute abolishing parent-child immunity in motor vehicle cases had not been enacted, it would have been better to try a personal injury action brought by a mother and son separately as consolidation of the minor's case with the mother's case created a trial setting in which the jury could easily be confused as to the parties from whom the minor plaintiff could recover. *Furr v. Pinoca Volunteer Fire Dept.*, 458.

TRIAL — Continued

§ 40. Sufficiency of Issues

An issue not supported by the evidence is properly excluded from the issues submitted to a jury. *Hasty v. Turner*, 746.

§ 45. Acceptance or Rejection of the Verdict by the Court

Where the jury in a complicated case deliberated for some time, returned to the courtroom and requested further instructions on the fourth issue, the jury, upon request by the court, replied that they had answered the first three issues, the court took the verdict as to the first three issues, and the court allowed the attorneys to argue the fourth issue, the trial court did not abuse its discretion in following this procedure. *Greene v. Murdock*, 552.

§ 51. Setting Aside Verdict as Contrary to Weight of Evidence

Trial court did not abuse its discretion in setting aside a jury verdict and ordering a new trial on the ground the verdict was contrary to the evidence. *Johnson v. Dunlap*, 312.

UNIFORM COMMERCIAL CODE

§ 6. Sales; Construction, Definition and Subject Matter

A dentist's providing of dentures for plaintiff did not constitute a sale of goods within the meaning of the UCC, the dentist was not a merchant, and the transaction was thus not covered by an implied warranty. *Preston v. Thompson*, 290.

§ 16. Title or Interest in Goods

Plaintiff's failure to notify defendant of the shipment of wine from a foreign country until after the sailing of the ship and the ensuing loss was not "prompt notice" within the meaning of G.S. 25-2-504, and the risk of loss therefore did not pass to defendant upon delivery of the wine to the carrier pursuant to the provisions of G.S. 25-2-509(1)(a). *Rheinberg-Kellerei GMBH v. Vineyard Wine Co.*, 560.

§ 24. Buyer's Remedies

It was error to charge a jury that they would have to find there had been a justifiable revocation and "cover" to award damages for breach of contract in the sale of latches to plaintiff. *Manufacturing Co. v. Logan Tontz Co.*, 625.

§ 28. Commercial Paper, Definitions

An agreement signed by defendant which guaranteed the payment of "any and all indebtedness, liabilities and obligations of every nature and kind of said Debtor . . . to the extent of $30,000" was not a negotiable instrument. *Gillespie v. DeWitt*, 252.

VENDOR AND PURCHASER

§ 1.4. Exercise of Option

Defendant optionor did not waive the written notice requirement of an option to purchase by informing plaintiff optionee prior to the date the notice of intent to exercise the option had to be given that it did not intend to comply with the terms of the option. *Catawba Athletics v. Newton Car Wash*, 708.

§ 2. Time of Performance

A lease and option to purchase required the tenant's notice of intent to exercise the option to be given at least 30 days before the termination date of the lease. *Catawba Athletics v. Newton Car Wash*, 708.

VENDOR AND PURCHASER — Continued

§ 3.1. Sufficiency of Description of Land

The description of property as "5532 Providence Road" is latently ambiguous and can be made definite by extrinsic evidence; therefore it complies with the Statute of Frauds. *Taefi v. Stevens*, 579.

§ 8. Purchaser's Right to Damages for Vendor's Breach

In an action for breach of contract to purchase real property, admission of testimony as to the mortgage payments by plaintiff from the time defendants breached the contract until plaintiff ultimately sold the property was not error, and whether plaintiff failed to minimize his damages by renting an apartment rather than living in the house was for the jury's consideration. *Taefi v. Stevens*, 579.

WAIVER

§ 2. Nature and Elements of Waiver

Defendants waived their rights under a release from liability when they presented to and had plaintiff execute a second release and paid him the sum of $1500 as provided therein. *Johnson v. Dunlap*, 312.

WATERS AND WATERCOURSES

§ 4. Dams

An environmental impact statement was required before the Environmental Management Commission could issue a certificate authorizing acquisition of land for the construction of a reservoir. *In re Appeal from Environmental Management Comm.*, 135.

§ 6.2. Accretion and Avulsion

Where land in a beach development, including two lots owned by plaintiff and an abutting street which had been dedicated to public use, was eroded and submerged by the waters of an inlet, and such land was subsequently reclaimed by defendant by the deposit of fill material thereon, plaintiff once again became the fee simple owner of the two lots and was entitled to her easement in the abutting street. *Ward v. Sunset Beach & Twin Lakes, Inc.*, 59.

WILLS

§ 21.4. Sufficiency of Evidence of Undue Influence

Evidence of the caveators was insufficient to show undue influence so as to invalidate the will of the testatrix. *In re Womack*, 221; *In re Coley*, 318.

§ 22. Mental Capacity of Testator

Evidence of the caveators was insufficient to show lack of testamentary capacity by the testatrix. *In re Womack*, 221; *In re Coley*, 318.

WORD AND PHRASE INDEX

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