NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 55

1 DECEMBER 1981

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16 FEBRUARY 1982

RALEIGH
1982

CITE THIS VOLUME

55 N.C. App.

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THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

NAOMI E. MORRIS

Judges

R. A. HEDRICK
EARL W. VAUGHN
ROBERT M. MARTIN
GERALD ARNOLD
JOHN WEBB
HUGH A. WELLS
CECIL J. HILL
WILLIS P. WHICHARD
CHARLES L. BECTON
CLIFTON E. JOHNSON[1]

Retired Judges

HUGH B. CAMPBELL
FRANK M. PARKER
EDWARD B. CLARK[2]

Clerk

FRANCIS E. DAIL

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FRANKLIN FREEMAN, JR.

Assistant Director

DALLAS A. CAMERON, JR.

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

CHRISTIE SPEIR PRICE

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1. Appointed 3 August 1982 by Gov. James B. Hunt, Jr., to fill the unexpired term of Judge Harry C. Martin who was appointed to the Supreme Court 3 August 1982.

2. Retired as Judge 30 June 1982.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

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DISTRICT	JUDGES	ADDRESS
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	JAMES R. STRICKLAND	Jacksonville
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	N. B. BAREFOOT	Wilmington
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	CHARLES WINBERRY	Rocky Mount
8	R. MICHAEL BRUCE	Mount Olive
	JAMES D. LLEWELLYN	Kinston

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	EDWIN S. PRESTON, JR.	Raleigh
	ROBERT L. FARMER	Raleigh
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	D. B. HERRING, JR.	Fayetteville
	COY E. BREWER, JR.	Fayetteville
13	GILES R. CLARK	Elizabethtown
14	THOMAS H. LEE	Durham
	ANTHONY M. BRANNON	Bahama
	JOHN C. MARTIN	Durham
15A	D. MARSH MCLELLAND	Burlington
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	W. DOUGLAS ALBRIGHT	Greensboro
	EDWARD K. WASHINGTON	High Point
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	JAMES C. DAVIS	Concord
19B	HAL HAMMER WALKER	Asheboro
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	WILLIAM H. HELMS	Wingate

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21	WILLIAM Z. WOOD	Winston-Salem
	JUDSON D. DERAMUS, JR.	Winston-Salem
	WILLIAM H. FREEMAN	Winston-Salem
22	ROBERT A. COLLIER, JR.	Statesville
	PETER W. HAIRSTON	Advance
23	JULIUS A. ROUSSEAU	North Wilkesboro
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25	FORREST A. FERRELL	Hickory
	CLAUDE S. SITTON	Morganton
26	FRANK W. SNEPP, JR.	Charlotte
	WILLIAM T. GRIST	Charlotte
	KENNETH A. GRIFFIN	Charlotte
	ROBERT M. BURROUGHS	Charlotte
	CHASE BOONE SAUNDERS[2]	Charlotte
27A	ROBERT W. KIRBY	Cherryville
	ROBERT E. GAINES	Gastonia
27B	JOHN R. FRIDAY	Lincolnton
28	ROBERT D. LEWIS	Asheville
	C. WALTER ALLEN	Asheville
29	HOLLIS M. OWENS, JR.	Rutherfordton
30	LACY H. THORNBURG	Webster

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PRESTON CORNELIUS	Mooresville
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RUSSELL G. WALKER, JR.	Asheboro
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THOMAS S. WATTS[4]	Elizabeth City
JOHN B. LEWIS[5]	Farmville

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HENRY A. MCKINNON, JR.	Lumberton
GEORGE M. FOUNTAIN	Tarboro
ROBERT D. ROUSE, JR.[6]	Farmville

1. Appointed Resident Judge 20 August 1982 to succeed Robert D. Rouse, Jr. who retired 31 July 1982.
2. Appointed Resident Judge 6 August 1982 to succeed Clifton E. Johnson who was appointed to the Court of Appeals on 3 August 1982.
3. Appointed Special Judge 23 July 1982.
4. Appointed Special Judge 23 July 1982.
5. Appointed Special Judge 27 August 1982.
6. Appointed Emergency Judge 1 August 1982.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	JOHN T. CHAFFIN (Chief)	Elizabeth City
	GRAFTON G. BEAMAN	Elizabeth City
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1. Appointed Chief Judge 23 July 1982 to succeed Herbert O. Phillips III who was appointed to the Superior Court as a Special Judge on 23 July 1982 and then Resident Judge on 20 August 1982.

2. Appointed Judge 30 August 1982.

3. Appointed Chief Judge 20 August 1982.

ATTORNEY GENERAL OF NORTH CAROLINA

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27B	W. Hampton Childs, Jr.	Lincolnton
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29	M. Leonard Lowe	Caroleen
30	Marcellus Buchanan III	Sylva

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27	CURTIS O. HARRIS	Gastonia
28	J. ROBERT HUFSTADER	Asheville

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State v. Surles	55 N.C. App. 179	Denied, 305 N.C. 307
State v. Thornton	55 N.C. App. 133	Denied, 305 N.C. 591
State v. Wade	55 N.C. App. 258	Appeal Dismissed 305 N.C. 307
State v. Whitaker	55 N.C. App. 666	Allowed, 305 N.C. 592
Simons v. Georgiade	55 N.C. App. 483	Denied, 305 N.C. 587
Stilley v. Automobile Enterprises	55 N.C. App. 33	Denied, 305 N.C. 307
Weeks v. Holsclaw	55 N.C. App. 335	Allowed, 305 N.C. 399

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

THE NEWS AND OBSERVER PUBLISHING COMPANY, A CORPORATION, FRANK A. DANIELS, JR., CLAUDE SITTON, AND JOYE BROWN v. WAKE COUNTY HOSPITAL SYSTEM, INC., ETTA S. CREECH, MARJORIE B. DEBNAM, CURTIS M. THOMPSON, HARVEY L. MONTAGUE, J. T. LINDLEY, ODELL C. KIMBRELL, JR., M.D., REX G. POWELL, M. EDMUND AYCOCK, JAMES MICHAEL WEEKS, AND WILLIAM F. ANDREWS, SR.

No. 8110SC274

(Filed 1 December 1981)

1. Counties § 4; Hospitals § 1; Public Records § 1— county hospital system— agency of the county

The Wake County Hospital System, Inc. is an "agency" of Wake County within the purview of the public records statute, G.S. 132-1, notwithstanding it is a non-profit corporation and an independent contractor, where the Hospital System's articles of incorporation provide that it will transfer its assets to the county upon its dissolution and that all vacancies on the board of directors will be subject to approval by the county commissioners; the lease agreement between the Hospital System and the county provides that the Hospital System is to occupy premises owned by the county under a lease for $1.00 a year, that the county commissioners shall review and approve the Hospital System's annual budget, that the county shall conduct a supervisory audit of the Hospital System's books, and that the Hospital System shall report its charges and rates to the county; and the operating agreements provide that the Hospital System shall be financed by county bond orders, that revenue collected pursuant to the bond orders shall be revenue of the county, and that the Hospital System will not change its corporate existence or amend its articles of incorporation without the county's written consent.

2. Public Records § 1— access to records of county hospital system

Records of the Wake County Hospital System, Inc. pertaining to the terms of settlements reached in three actions against it by medical professional associations and expense accounts submitted by the Hospital System's

president and board of directors are "public records" made "pursuant to law or ordinance in connection with the transaction of public business" within the meaning of G.S. 132-1 and must be disclosed under North Carolina's public records statutes. G.S. 143-318.10(b); G.S. 159-39(a).

APPEAL by defendants from *Lee, Judge.* Summary judgment for plaintiff entered 6 January 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 20 October 1981.

This is an action by the News and Observer Publishing Company [hereinafter referred to as the newspaper] to compel the Wake County Hospital System, Inc. [hereinafter referred to as the System] to reveal the terms of settlements reached in three actions against the System by medical professional associations for wrongful termination of agreements by the System, and to reveal expense account records of the System's president and board of directors.

Upon the newspaper's motion for summary judgment, the trial judge found no genuine issue as to any material fact, granted judgment as a matter of law to the newspaper, and concluded that the System is an "agency" of Wake County as defined by G.S. 132-1 and that its records are "public records" as defined by G.S. 132-1 which are subject to "inspection, examination and copying" by the newspaper, except for confidential communications by counsel as defined by G.S. 132-1.1. The trial judge specifically found that the System refused, upon demand by the newspaper, to permit inspection, examination, and copying of the minutes of every board of directors and committee meeting "at which there were deliberations or voting or other actions [by the System] with respect to the settlement of the claims and litigation involved in civil actions" by the three medical professional associations. The System also refused to permit examination and copying of the settlement documents, every check or voucher issued by the System in payment of the settlements to each claimant, and every record of all expense accounts submitted by the president and board of directors of the System over the past five years. Further, it was found that the action authorizing the settlement of one of the claims against the System was taken during an executive session of the board of directors, and the terms of such settlement were not reported in the minutes of the System's board of directors in violation of G.S. 143-318.11(a)(4). The System's attorney also

reported to the board of directors " 'on the three (3) complaints above referred to, and [the board] authorized the settlement of such claims' " at the executive sessions, as well as regular meetings. The trial judge concluded that there was no showing that public inspection of the minutes of the executive sessions when the claims were discussed would "frustrate the purpose of the executive session" under G.S. 143-318.11(d), and that the newspaper is entitled to inspect, examine, and have copies of the records specified.

The trial judge ordered the System to make these records available to the newspaper and to report in the minutes of the board of directors the terms of the settlement authorized in executive session. The System appeals.

Lassiter & Walker, by William C. Lassiter, for plaintiff-appellees.

Hollowell, Silverstein & Brady, by Edward E. Hollowell and Bruce D. Mitchell; and Harris, Cheshire, Leager & Southern, by W. C. Harris, Jr., for defendant-appellants.

HILL, Judge.

On 25 May 1955, the Wake County Board of Commissioners [hereinafter referred to as the Commissioners] followed the recommendation of a "hospital survey" ordered by them in 1954 and created the Wake County Hospital Authority [hereinafter referred to as the Authority]. One county commissioner and six other citizens were named to the board of trustees of the Authority. By resolution on 18 July 1955, the Commissioners vested in the Authority "duties and powers for the planning, establishment, construction, maintenance and operation of a county hospital . . .." The Commissioners further resolved that they would have the power to remove any member of the Authority for misconduct "or for other causes which in the sound discretion of the board renders such member as unfit or disqualified to serve." Also, the county treasurer would have custody of "all funds of the hospital . . . and establish and maintain an accounting system in such manner as to give a true and accurate accounting of all the financial transactions of the hospital and clinics." The Authority, however, would retain control over the expenditures of moneys collected through the operation of its hospitals and clinics. In ad-

dition, the Authority would have the power to adopt its own by-laws and to select and hire all necessary employees and assistants. Significantly, the resolution states that "[t]he Hospital shall be operated at all times, and in every respect administered as a charitable, non-profit hospital; no part of the net earnings of the Hospital shall ever inure to the benefit of any individual, firm, corporation or private shareholder." Further, title to all property for hospital purposes would be vested in the County, although the Authority could purchase necessary equipment. The Commissioners also placed certain fiscal limitations upon the Authority: (1) that the Commissioners review and approve the annual budget of the Authority; (2) that the Authority not borrow money, undertake additional programs, or other expenditures without the approval of the Commissioners; and (3) that a representative of the Commissioners be permitted to attend meetings, review the Authority's records, and make audits necessary in connection with indigent's records.

On 7 June 1965, the Commissioners unanimously approved a resolution adopted by the Authority "to convert Wake Memorial Hospital to a non-profit corporation." Three months later the Commissioners officially approved the articles of incorporation of the System, a lease agreement between the county and the System, and an agreement between the county and the System for the care and treatment of indigent patients.

The System's articles of incorporation, filed 9 September 1965, provide, as did the Commissioners' resolutions creating the Authority, that "[t]he corporation shall not have and issue capital stock and shall be operated without profit to the members or their successors, and no part of the net earnings shall inure, or may lawfully inure, to the benefit of any member or individual." Further, in the event of dissolution of the corporation, "all of its moneys, properties, and other assets" would be donated, transferred and delivered to the county to be used by the county "exclusively for the accomplishments of the purposes for which the corporation is formed." The articles of incorporation also provide that all vacancies in the membership of the System's board of directors would be "subject to the approval of the Board of County Commissioners of Wake County . . .."

The lease agreement entered into by the county and the System on 7 September 1965 provided for a renewable five-year

term; the annual rental was $1.00 per year during the term. The county also placed certain fiscal limitations upon the System very similar to limitations placed upon the Authority by the Commissioners: (1) that the Commissioners review and approve the annual budget of the System; (2) that the System make its records available to an independent auditor mutually satisfactory to the county and the System; (3) that a representative of the county be permitted to attend meetings, review the System's records, and make audits necessary in connection with indigents' records; (4) that the System file with the county a schedule of its charges and rates; and (5) that the System operate its facilities in accordance with standard practices for operating hospitals in North Carolina. The System was operated under this lease agreement until 1 January 1975.

On 1 January 1975, the System became subject to an operating agreement entered into by it and the county. Included in the agreement was a bond order authorizing the issuance of $34,775,000 in revenue bonds which were identified as "Bonds of the County." Pursuant to the bond order, the System agreed to collect revenues for deposit to the revenue fund which "constitute[s] revenues of the County derived from the ownership of the System by the County . . .." The System further agreed to make its records available to the county and furnish it copies of audited financial statements and additional audits and reports as required by law. Upon the termination of this agreement, in accordance with the amended articles of incorporation, the System agreed to "transfer, assign and convey to the County, without any consideration therefor, any and all moneys, properties and other assets" of the System except as otherwise required by law. The System also agreed that it would not change its corporate existence, nor further amend its articles of incorporation, "without the prior written consent of the County." Finally, the System and the county "understood and agreed that the [System] is an independent contractor and that none of the Trustees, officers, employees or agents of the [System] is or shall be deemed to be an agent or employee of the County by reason of anything contained in this Agreement."

After two and one-half years of operation under the 1975 agreement, the county and the System entered into a new operating agreement on 1 June 1977. Included in this agreement

was another bond order of $41,535,000 adopted by the Commissioners to refund the 1975 revenue bonds. The significant provisions of this operating agreement and the 1975 agreement are substantially the same. At all times it has been the purpose of the System "to provide for the care and maintenance of the indigent sick and afflicted poor of Wake County through the continued assistance of contributions by the County."

On 19 December 1978, three separate civil actions were begun against the System by three medical professional associations—David Lane Jones, M.D.,P.A.; Morton Meltzer, M.D.,P.A.; and Cary Family Medicine and Ambulatory Care Center, P.A.—for alleged wrongful termination of agreements to provide professional services to the System by each plaintiff. Each of the civil actions subsequently was dismissed, and the controversies were concluded by settlements. The newspaper was refused permission by the System to examine and copy its records pertaining to those settlements, and the crux of the case *sub judice* is whether those records and the expense account records later requested by the newspaper, are public records which must be disclosed under North Carolina's public records statutes. *See* G.S. 132-1 to -9.

This case is before us on appeal from the trial judge's granting of summary judgment for the newspaper. Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). In ruling on a motion for summary judgment, the trial judge does not decide issues of fact but merely determines whether a genuine issue of fact exists. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). "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." *Vassey v. Burch, supra* at 72, 269 S.E. 2d at 140.

At the outset of this opinion, we find the facts as recounted above to be uncontroverted. The trial judge therefore was correct in concluding that there is no genuine issue as to any material fact in the case *sub judice*. Our review of the newspaper's sum-

mary judgment must focus upon the propriety of the trial judge's conclusions of law and whether they are supported by the facts.

G.S. 132-1 identifies for us which of the trial judge's legal conclusions are crucial to our review:

> "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, *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.* Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government. (Emphasis added.)

Under this statute, two questions must be answered: First, whether the trial judge was correct in concluding that the System is an "agency of North Carolina government or its subdivisions"; i.e., Wake County; and second, if the System is an agency, whether its records are "public records" that were "made or received pursuant to law or ordinance in connection with the transaction of public business . . .."

In deciding whether it is an agency of Wake County, the System urges us to consider, among other statutes, the Municipal Hospital Facilities Act, G.S. 131-126.18 to .30, and the Health Care Facilities Finance Act, G.S. 131A-1 to -25, *in pari materia* with the public records statutes. Those statutes show, the System argues, that the legislature did not intend it to be a "public agency or subdivision of the State."

It is established that "[u]nder the rules of statutory construction, statutes *in pari materia* must be read in context with each other." *Cedar Creek Enterprises, Inc. v. Department of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E. 2d 336, 338 (1976). *Accord, Newlin v. Gill*, 293 N.C. 348, 237 S.E. 2d 819 (1977). "*In pari*

materia" is defined as "[u]pon the same matter or subject." Black's Law Dictionary 898 (4th ed. 1968). It is abundantly clear that the statutes referred to above are not of the "same matter or subject" as the public records statutes. We therefore are obliged only to construe the phrase "agency of North Carolina government or its subdivisions" upon the plain meaning of G.S. 132-1 and in the context of the public records statutes.

There is no decisional law in North Carolina construing the agency requirement of the public records statutes. However, decisional law in the federal jurisdiction has established some guidelines for the meaning of the term "agency" in the Administrative Procedure Act [hereinafter referred to as the APA]. Under the APA, an agency "means each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . .." 5 U.S.C.A. § 551. The North Carolina statute's definition of the phrase "agency of North Carolina government or its subdivisions" is more specific than the APA definition:

> Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.

G.S. 132-1. In spite of this difference in definitions, we find the federal decisional law under the APA instructive in this case.

Soucie v. David, 448 F. 2d 1067 (D.C. Cir. 1971), is a leading case in construing the term "agency" in the APA for application to the Freedom of Information Act. The court declared that "the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." *Id.* at 1073. Administrative entities that neither perform rule-making nor adjudicative duties also may be agencies. *Id. Accord, Koden v. Department of Justice*, 564 F. 2d 228 (7th Cir. 1977). "The important consideration is whether [the administrative entity] has any authority in law to make decisions." *Washington Research Project, Inc. v. Department of Health, Education & Welfare*, 504 F. 2d 238, 248 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

One commentator has suggested that the legislative history of the APA reflects "a desire to use the term 'agency' to identify centers of gravity of the exercise of administrative power. Where a center of gravity lies, where substantial 'powers to act' with respect to individuals are vested, there is an administrative agency for purposes of the APA." J. Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U. Pa. L. Rev. 1, 9 (1970) [hereinafter referred to as Freedman].

[1] The documents creating the System support our conclusion that it is a separate administrative entity which has the power to govern its daily functions with certain supervision and control by the county. Since the System clearly has "independent authority" in the function of its task "to provide for the care and maintenance of the indigent sick and afflicted poor of Wake County," the System falls within the guidelines of the federal jurisdiction defining "agency" in the APA. The critical determination is, however, whether this "independent authority" so overshadows the county's supervisory responsibilities that it forecloses a conclusion that the System is an "agency *of North Carolina government or its subdivisions;*" i.e., Wake County. We hold that it does not, and find that the System is an agency of the county under the North Carolina public records statutes.

The System argues that its status as a "private, non-profit corporation" and "independent contractor" is exclusive of the status of agency under the public records statutes. However, several courts have found corporate entities to be agencies of local government for a variety of purposes. Most notably, in *Coats v. Sampson County Memorial Hospital, Inc.*, 264 N.C. 332, 141 S.E. 2d 490 (1965), our Supreme Court found a hospital organized as a non-stock, non-profit corporation to be an agency of Sampson County for venue purposes. The hospital was governed by a board of trustees appointed by the Sampson County Board of Commissioners, it occupied premises owned and provided by the county under a lease, and in the event of dissolution, the hospital was obligated to transfer its assets to the county. *Id.* Justice Sharp, later Chief Justice, wrote for the Court:

> Admittedly defendant is not a municipality in the sense of a political subdivision such as a city or a town or a quasi-municipality like a county. (Citation omitted.) G.S. 131-126.28

> does, however, declare the establishment, construction, maintenance and operation of hospital facilities to be public and governmental functions; and, under the provisions of G.S. 131-126.20 and G.S. 131-126.21(a), Sampson County has delegated to defendant its authority to exercise these functions. Defendant is, therefore, an agency of Sampson County . . ..

Id. at 334, 141 S.E. 2d at 492.

In *Sides v. Cabarrus Memorial Hospital, Inc.*, 287 N.C. 14, 18, 213 S.E. 2d 297, 300 (1975), a hospital was created by legislative act as a "body corporate." The Court noted that the act granted "the county the authority to levy a special tax to provide for the operation and maintenance of the hospital and to substantially control its operations through the county board of commissioners . . .." *Id.* Based upon examination of the legislative acts of creation and relevant administrative rulings, the Court found the hospital to be an agency of Cabarrus County, maintained thereby as a "proprietary function," and therefore liable in tort for the negligent acts of its employees committed in the scope of their employment. *Id.*

Similarly, a board of trustees of a public library, organized as " 'a separate corporate entity' by the Act under which it came into being," was found to be an agency of the City of Newark, New Jersey, and thereby subject to laws affecting contracts with municipalities. *Glick v. Trustees of Free Public Library*, 2 N.J. 579, 582, 67 A. 2d 463, 464 (1949). The court examined the relationship between the library and the municipality and concluded that "[the Trustees'] incorporation as a body politic . . . in itself does not give rise to a relationship radically different in character from that which would otherwise exist. It is that substance and not the form of the creation that is the key to the legislative design." *Id.* at 583-84, 67 A. 2d at 465.

In *Moberly v. Herboldsheimer*, 276 Md. 211, 345 A. 2d 855 (1975), a hospital with corporate status was found to be an agency of the City of Cumberland, Maryland, and thereby subject to that state's public information law. Among other things, "[a] survey of the enactments relative to the Hospital, including, specifically, the statements relative to the relationship of the Hospital to the City of Cumberland . . . leads to the conclusion that the Hospital is in

fact an agency of the City of Cumberland." *Id.* at 225, 375 A. 2d at 862-63. Likewise, the District Court of Appeal of Florida found "a nonprofit corporation composed of public spirited citizens" to be an agency within the purview of that state's public records law. *Schwartzman v. Merritt Island Volunteer Fire Dept.*, 352 So. 2d 1230, 1231 (Fla. App. 1977).

Although these cases illustrate that a corporate entity also may be considered an agency of local government, even for the purposes of state public records statutes, they are not entirely dispositive of the case *sub judice*. "The unavoidable fact is that each new arrangement must be examined anew and in its own context." *Washington Research Project, Inc. v. Department of Health, Education & Welfare, supra* at 246. *See also Public Citizen Health Research Group v. Department of Health, Education & Welfare*, 449 F. Supp. 937 (D.C. 1978). As did the courts in the above cases, we now must look at the nature of the relationship between the System and the county to determine that the System is an "agency of North Carolina government or its subdivisions."

Wake County's supervisory responsibilities and control over the System are manifest. The System's articles of incorporation provide (1) that upon its dissolution, the System would transfer its assets to the county; and (2) that all vacancies on the board of directors would be subject to the Commissioners' approval. The lease agreement provided (3) that the System occupy premises owned by the county under a lease for $1.00 a year; (4) that the Commissioners review and approve the System's annual budget; (5) that the county conduct a supervisory audit of the System's books; and (6) that the System report its charges and rates to the county. The operating agreements also provide (7) that the System be financed by county bond orders; (8) that revenue collected pursuant to the bond orders be revenue of the county; and (9) that the System would not change its corporate existence nor amend its articles of incorporation without the county's written consent.

The Municipal Hospital Facilities Act also sheds light upon the nature of the System's relationship to the county in congruence with the articles of incorporation, lease, and operating agreements which we have reviewed. G.S. 131-126.28, for example, states that the operation of a county hospital is a "public and

governmental" function, "exercised for a public purpose," and thereby a county function. *See Coats v. Sampson County Memorial Hospital, Inc., supra.*

We note that this relationship between the System and the county was not a radical change from the relationship between the Authority and the county. Most significantly, the entity created by resolution in 1955, "a charitable, non-profit hospital," remained as such under the System's articles of incorporation. The county further retained its ownership and fiscal controls upon the System in a manner virtually identical to those upon the Authority. In short, the relationship between the county and its hospitals has undergone little more than a change of name through incorporation. "[T]he title of the authority in question, whether it be 'agency' or 'board' or 'bureau' or 'office' or 'department,' is irrelevant to assessing the power it exerts." Freedman, 119 U. Pa. L. Rev. at 9.

The System has conceded on oral argument that, as the Authority, it was an agency of Wake County. The history of the System's existence since its incorporation mandates the same concession. These ties to the county lead us to the inescapable conclusion that the System exercises its "independent authority" so intertwined with the county that it must be, and is, an "agency of North Carolina government or its subdivisions;" i.e., Wake County.

[2] Since the System is an agency of Wake County under our public records statutes, we now must determine whether its records are "public records" that were "made or received pursuant to law or ordinance in connection with the transaction of public business . . .." G.S. 132-1. The newspaper seeks inspection and examination of two types of records: first, records reflecting the terms of settlements reached in three actions against the System by medical professional associations; and second, expense account records submitted by the System's president and board of directors.

G.S. 143-318.11(a)(4) requires a "public body" to report its consideration of settlement terms in executive session by entering the terms "into its minutes within a reasonable time after the settlement is concluded." By virtue of the definitions in G.S. 143-318.10(b) and G.S. 159-39(a), we find that the System is a

"public body" that must, by law, record settlement terms considered in executive sessions. In addition, the public has the right to know the terms of settlements made by the System in actions for wrongful terminations of its agreements since the funds from which the settlements were paid must be considered the county's funds. *See Miami Herald Publishing Co. v. Collazo*, 329 So. 2d 333 (Fla. App. 1976); *Courier Journal v. McDonald*, 524 S.W. 2d 633 (Ky. App. 1974). Therefore, we conclude that the documents connected with the settlement terms in the case *sub judice* are "public records" which were "made . . . pursuant to law . . . in connection with the transaction of public business . . .."

We reach the same conclusion regarding the expense accounts submitted by the System's president and board of directors. The phrase in G.S. 132-1, "pursuant to law or ordinance in connection with the transaction of public business," should include, in addition to those records required by law, those records that are kept in carrying out lawful duties. *See* Comment, *Administrative Law—Public Access to Government-Held Records: A Neglected Right in North Carolina*, 55 N.C.L. Rev. 1187 (1977); J. Johnson & D. Lawrence, *Interpreting North Carolina's Public Records Law*, 10 Local Gov't. L. Bull. 1 (Inst. of Gov't., Chapel Hill, N.C., 1977). The statute therefore includes the expense account records submitted by the System's president and board of directors while carrying out their lawful duties. Those records, then, also are "public records" under G.S. 132-1.

We conclude that the trial judge's conclusions of law are supported by the facts as found. Thus, the summary judgment for the newspaper was not improvidently granted.

We have carefully examined the System's remaining arguments and assignments of error and find each to be without merit. For all of the reasons discussed above, the summary judgment for the newspaper is

Affirmed.

Judges VAUGHN and WHICHARD concur.

STATE OF NORTH CAROLINA v. MICHAEL J. FLAHERTY

No. 8126SC464

(Filed 1 December 1981)

Automobiles §§ 38, 114— intersection accident—police vehicle—instructions on involuntary manslaughter improper

In a prosecution for involuntary manslaughter, wherein defendant police officer collided with a car at an intersection while on duty, the trial judge erred in his instructions to the jury. Where defendant's evidence was sufficient to bring him within the exemption for emergency vehicles under G.S. 20-145, the trial court properly instructed that the jury was to consider whether defendant had proven to the satisfaction of the jury that he was acting within the exceptions of the statute. It erred in further instructing, however, that if this was found, the jury should consider "whether or not the conduct of the defendant, Michael Flaherty, was that which a reasonable and prudent person would exercise in the discharge of official duties of a like nature under like circumstances," as a reasonable interpretation of the quoted instruction allowed the jury to convict the defendant of involuntary manslaughter on the basis of simple negligence, and a criminal prosecution for involuntary manslaughter requires proof beyond negligence.

ON a writ of certiorari to review judgment of *Cornelius, Judge.* Judgment entered 28 March 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 20 October 1981.

The defendant was convicted as charged of three counts of involuntary manslaughter. He appeals from the consolidated judgment imposing a jail term of one year minimum, three years maximum.

State's evidence tended to show that the defendant, a patrolman for the Charlotte Police Department, was driving his patrol car along Central Avenue in Charlotte on the night of 16 November 1979 and that he entered the intersection of Central Avenue and Morningside Drive and collided with a BMW automobile that entered the intersection on Morningside. Three passengers in the BMW automobile were killed. There was a traffic light at the intersection, and the posted speed limit along Central Avenue was 35 miles per hour. Witnesses testified that the traffic light was giving a red signal for traffic on Central, and they estimated the defendant's speed at 60 to 75 miles per hour. Witnesses also testified that defendant had his car's flashing

yellow lights and blue lights on and that defendant "hit the siren one time" for a couple of seconds. State presented in evidence General Order 45 issued by the Charlotte Police Department which provides that officers responding to an emergency situation should exceed the posted speed limit by no more than 10 miles per hour.

Defendant testified that he was on Central Avenue when he heard another police officer radio that he was in pursuit of a vehicle and needed help and that he responded to this call. He stated that he turned his siren on but then turned it off so that he could hear the radio transmissions. As he approached the intersection with Morningside Drive, he had his blue lights and four-way flashers on and he had his siren "in the yelp position." Defendant stated that he was traveling 45 to 50 miles per hour and that the traffic light was green for traffic on Central. He stated that he swerved to avoid the automobile on Morningside but that the cars collided. Defendant also presented evidence to the effect that police officers routinely violated General Order 45, especially when life was threatened or when another police officer called for assistance.

Attorney General Edmisten by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Joan H. Byers, for the State.

James H. Carson, Jr., for defendant appellant.

CLARK, Judge.

Defendant's assignments of error relate to the jury instructions. The trial judge submitted involuntary manslaughter and death by motor vehicle as possible guilty verdicts. With respect to involuntary manslaughter, he instructed that the State had to prove beyond a reasonable doubt (1) that the defendant violated the law with respect to the operation of motor vehicles; (2) that the violation constituted culpable negligence, *i.e.*, that it was willful, wanton or intentional; and (3) that the violation proximately caused death. In the course of explaining the first two elements, the judge instructed on the applicable provisions of G.S. § 20-141, the statute which defines speed restrictions, and on § 20-34 of the Charlotte Code, the ordinance which provides for traffic control by means of traffic lights. The judge then in-

structed that under certain circumstances police officers may be exempt from these laws, and in this regard he instructed on the provisions of G.S. § 20-145 and § 20-3 of the Charlotte Code. These laws, in pertinent part, provide as follows:

> G.S. § 20-145. *When speed limit not applicable.*—The speed limitations set forth in this Article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation . . . . This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others.
>
> Sec. 20-2. *Emergency vehicles; exemptions.*
>
> (a) The provisions of this chapter regulating the operation, parking, and standing of vehicles shall not apply to vehicles of the police department nor to fire department or fire patrol vehicles when an exemption from said provisions is reasonably necessary in the actual discharge of official duties . . . .
>
> . . .
>
> (d) The provisions of this section shall not operate to relieve the driver of any such vehicle from the duty to drive with due regard for the safety of all persons and property using the streets, nor shall such provisions protect the driver of any such vehicle from the consequences of his reckless disregard of the safety of others.

Applying G.S. § 20-145, the trial judge instructed as follows:

> Should the defendant, Michael J. Flaherty, satisfy you that he was a police officer who operated his vehicle with due regard for the safety of others while he was engaged in a chase or apprehension of violators of the law or persons suspected of such violations, and did not recklessly disregard the safety of others, he would then be exempt from the normal requirements of the speed laws. Should he fail to so satisfy you, however, he would not be exempt from the normal requirements of the speed laws, and you would not consider his operation of the vehicle under the standard

applicable to exempt police officers. If you should find to your satisfaction that Officer Flaherty has proved that he is exempt from the normal requirements of the speed laws, you will then consider whether or not the conduct of Officer Flaherty was that which a reasonable and prudent person would exercise in the discharge of official duties of a like nature under like circumstances.

Thus, as to the second element, culpable negligence, on the question of the speed laws, you must first decide whether or not there is a wilful, wanton, or intentional violation of the safety statute, the burden of proof on that question being upon the State to prove it to you beyond a reasonable doubt. You will then decide whether or not the defendant, Michael Flaherty, has satisfied you that he was operating a police vehicle with due regard for the safety of others while engaging in a chase or apprehension of a violator of the law, or a person charged with or suspected of a violation, and that he did not recklessly disregard the safety of others. Should the defendant Flaherty so satisfy you, he would then be exempt from the normal requirements of the speed laws, and you would then consider whether or not the conduct of the defendant, Michael Flaherty, was that which a reasonable and prudent person would exercise in the discharge of official duties of a like nature under like circumstances.

Applying § 20-3 of the Charlotte Code, the trial judge instructed:

Thus, should the defendant, Michael Flaherty, satisfy you that the manner in which he operated his vehicle was reasonably necessary and in the actual discharge of his official duties; and that the manner in which he operated his vehicle was with due regard for the safety of all persons and properties using the streets, and that he did not recklessly disregard the safety of others, you would then find he was exempt from the provisions of Section 20-34 of the City Code requiring that he stop at a red light. Should the defendant fail to satisfy you that he is exempted from the provisions of this ordinance, you would not consider the question of the reasonableness of the defendant's conduct. Should, however, you be satisfied by the defendant, Michael Flaherty, that he was exempted from the provisions of the Ordinance, Section

> 20-34, you would then consider whether or not his conduct was that which a reasonable and prudent person would exercise in the discharge of official duties of a like nature under like circumstances.
>
> Thus, on the question of the stop signal, you will first decide whether or not there was a wilful, wanton, or intentional violation of the safety statute, that being the City Code ordinance relating to stopping at traffic signals. You will then decide whether or not Officer Flaherty has satisfied you that he is exempted from the operation of that safety statute. Should Officer Flaherty fail to satisfy you of his exemption, you will go no further on the question of his reasonableness. Should he satisfy you that he is exempted from the operation of the traffic signal ordinance, you will then consider whether or not his conduct was that of a reasonable and prudent person in the discharge of official duties of a like nature under like circumstances.

Defendant challenges the manner in which the trial judge allocated the burden of proof and the manner in which he related the various motor vehicle statutes and ordinances to the present facts.

Initially, we must consider the nature of the exemptions provided by G.S. § 20-145 and § 20-3 of the Charlotte Code. We begin with the following discussion in *State v. Connor*, 142 N.C. 700, 701-02, 55 S.E. 787, 787 (1906):

> It is well established that when a statute creates a substantive criminal offense, the description of the same being complete and definite, and by subsequent clause, either in the same or some other section, or by another statute, a certain case or class of cases is withdrawn or excepted from its provisions, these excepted cases need not be negative in the indictment, nor is proof required to be made in the first instance on the part of the prosecution.
>
> In such circumstance, a defendant charged with the crime who seeks protection by reason of the exception, has the burden of proving that he comes within the same. (Citations omitted.)
>
> . . .

> . . . [T]he rule and its application depends not so much on the placing of the qualifying words, or whether they are preceded by the terms, "provided" or "except;" but rather on the nature, meaning and purpose of the words themselves.

Stated otherwise, "when defendant relies upon some independent, distinct, substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself, the *onus* of proof as to such matter is upon the defendant. (Citations omitted.)" *State v. Davis*, 214 N.C. 787, 793, 1 S.E. 2d 104, 108 (1939). In fact, the distinction between an element of crime and a matter of defense is not as clear-cut as these cases might suggest. As this Court noted in *State v. Trimble*, 44 N.C. App. 659, 262 S.E. 2d 299 (1980):

> Upon close analysis, however, the distinction between the element and the defense blurs, for it is together that the elements and defenses define the substantive parameters of criminal liability. When one thinks in terms of circumscribing the parameters of criminal liability, disregarding for the moment the allocation of the burden of proof, there is little difference between requiring the State to show that an individual's actions are within the circumscribed area, and requiring the defendant to show that his actions are without the circumscribed area: in either case the prohibited range of conduct is the same.

Id. at 665, n. 2, 262 S.E. 2d at 303, n. 2.

The matter was further complicated when the constitutionality of shifting to the defendant the burden of proof as to defenses was brought into question by language in *In re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970). The United States Supreme Court there wrote, "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary to constitute the crime* with which he is charged." 397 U.S. at 364 (emphasis added). Should the phrase "every fact necessary to constitute the crime" be read broadly to include matters in defense, the traditional distinction drawn by cases such as *Connor* and *Davis* could no longer be upheld. In *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881

(1975), the United States Supreme Court invoked *Winship* to invalidate a shift in the burden of proof as to a matter not formally classified as an element of the crime charged. In response to this decision, our Supreme Court reversed our long-standing rule requiring the defendant in a homicide case to prove to the satisfaction of the jury that he killed in self defense. *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd. on other grounds*, 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977). In *Patterson v. New York*, 432 U.S. 197, 53 L.Ed. 2d 281, 97 S.Ct. 2319 (1977), the United States Supreme Court again considered the scope of *Winship*. The Court in *Patterson* upheld a New York law requiring the defendant in a prosecution for second degree murder to carry the burden of persuasion as to the defense of extreme emotional disturbance in order to reduce the charge to manslaughter. In a significant restatement of the *Winship* language quoted above, the Court wrote:

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt *all of the elements included in the definition of the offense* of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

432 U.S. at 210 (emphasis added).

This Court has since had occasion to consider whether, in light of these United States Supreme Court decisions, an exception to a criminal statute should be regarded as an element of the offense or as an affirmative defense. *State v. Trimble, supra*, involved a criminal statute against putting poisonous foodstuffs in certain public places which provided that the statute "shall not

apply" to poisons used for protecting crops and gardens and for rat extermination. Expressing concern that a purely formalistic or procedural approach to assigning burdens of proof might raise constitutional problems, this Court decided to apply the following standard:

> [W]here, as in the instant case, the General Assembly has left open the question of whether a factor is to be an element of the crime or a defense thereto, it is more substantively reasonable to ask what would be a "fair" allocation of the burden of proof, in light of due process and practical considerations, and then assign as "elements" and "defenses" accordingly, rather than to mechanically hold that a criminal liability factor is an element without regard to the implications in respect to the burden of proof.

State v. Trimble, supra, at 666, 262 S.E. 2d at 303. It is this approach which we will apply herein.

The case law suggests various factors to be considered in deciding upon a fair allocation of the burden of proof. *See generally* Note, *The Constitutionality of Affirmative Defenses After Patterson v. New York*, 78 Colum. L. Rev. 655 (1978). One such factor is access to the relevant evidence. In *State v. Connor, supra,* our Supreme Court noted that cases in which the burden of proof as to statutory exceptions from criminal liability had been shifted to the defendant were cases "where the burden was changed by the statute, or the facts referred to in the exception or proviso related to the defendant personally, or were particularly within his knowledge." 142 N.C. at 704, 55 S.E. at 789. This factor was cited by the New York Court of Appeals in justifying the shift of the burden of proof in the *Patterson* case. The state court wrote, "The placing of the burden of proof on the defense, with a lower threshold, however, is fair because of defendant's knowledge or access to the evidence other than his own on the issue." 432 U.S. at 212, n. 13 (quoting *People v. Patterson*, 39 N.Y. 2d 288, 305, 347 N.E. 2d 898, 909 (1976)). The United States Supreme Court suggested other factors to be considered when it wrote in *Patterson*, "To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate." 432 U.S. at 209. Another fac-

tor to be considered in allocating the burden of proof is the importance of the fact at issue to the degree of defendant's culpability. The more critical the fact is to the concept of culpability, the more consistent it is with fundamental notions of fairness to require the State to bear the burden of proof. *See Mullaney v. Wilbur, supra,* 421 U.S. at 696; 78 Colum. L. Rev., *supra,* at 670-671.

The last factor cited above weighs in favor of requiring the State to carry the burden of proof as to the nonexistence of the exceptions recognized by G.S. § 20-145 and § 20-3 of the Charlotte Code since these exceptions, if applicable, relieve the defendant of blame. Similar exceptions to traffic regulations have been recognized even in the absence of statutory provisions. *See* Annot., 9 A.L.R. 367 (1920 and Later Case Service). However, the other factors cited weigh in favor of placing the burden of proof upon the defendant. These exceptions will be applicable to a very small number of cases, and it would be cumbersome to require the State to prove their nonexistence in every prosecution for traffic law violations. Further, the evidence relevant to these exceptions relates to the defendant personally and is particularly within his knowledge. We conclude that it would be a fair allocation of the burden of proof to require a defendant to prove that he comes within the exceptions recognized by G.S. § 20-145 and § 20-3 of the Charlotte Code.

The defendant's testimony tends to show that he received a radio dispatch from Officer Hayes advising that he was in pursuit of a vehicle and needed help, and that defendant responded to this call for assistance. The language of G.S. 20-145 is broad enough to include not only police in direct or immediate pursuit of law violators or suspected violators but also police who receive notice of the pursuit and respond by proceeding to the scene for the purpose of assisting in the chase or apprehension. We find that defendant's evidence was sufficient to bring him within the exemption provided by G.S. 20-145. Therefore, under the evidence in this case the burden is upon the defendant to prove: (1) that he was a police officer acting within the scope of his official duties; (2) that he was operating his vehicle with due regard for the safety of others; and (3) that he was engaged in the chase or apprehension of violators or suspected violators of the law.

The burden of proof required of a defendant as to his affirmative defenses is the satisfaction of the jury. *State v. Leonard*, 296 N.C. 58, 248 S.E. 2d 853 (1978); *State v. Cook*, 263 N.C. 730, 140 S.E. 2d 305 (1965); 2 Stansbury's N.C. Evidence, § 214 (Brandis rev. 1973). We hold that the trial judge herein was correct in requiring the defendant to prove to the satisfaction of the jury that he was acting within the exceptions. This does not mean, however, that the jury instructions herein are without error.

The instructions quoted above required the jury to consider first whether the State had proven a willful, wanton or intentional violation of a safety statute beyond a reasonable doubt. If such was found, the jury was instructed to consider then whether the defendant had proven to the satisfaction of the jury that his conduct was within the exceptions to the safety statutes. If this was also found, the judge instructed the jury to consider then "whether or not the conduct of the defendant, Michael Flaherty, was that which a reasonable and prudent person would exercise in the discharge of official duties of a like nature under like circumstances." This was error. The trial judge's final mandate as to involuntary manslaughter also required the jury to consider this question as the last step in its deliberations on that charge. The burden of proof as to this last step was not specified.

We must consider the instructions "in the context of how a reasonable juror might interpret the words." *See State v. White*, 300 N.C. 494, 506, 268 S.E. 2d 481, 489 (1980). We believe that a reasonable interpretation of the jury instructions in this case would permit the jury to convict the defendant, notwithstanding his proof to the satisfaction of the jury that he was exempt from the safety statutes involved, should the jury find that the defendant had not acted as a reasonable and prudent person in the discharge of official duties of a like nature under like circumstances. This the law will not allow. A law enforcement officer may be held negligent in a civil action if it is proven that he violated such a standard. *Goddard v. Williams*, 251 N.C. 128, 110 S.E. 2d 820 (1959); *Collins v. Christenberry*, 6 N.C. App. 504, 170 S.E. 2d 515 (1969). However, a criminal prosecution for involuntary manslaughter requires proof beyond negligence. "Involuntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or

(2) a culpably negligent act or omission. (Citation omitted.)" *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976).

> Culpable negligence in the criminal law requires more than the negligence necessary to sustain a recovery in tort. Rather, for negligence to constitute the basis for the imposition of criminal sanctions, it must be such reckless or careless behavior that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others. As is stated in 1 Wharton, Criminal Law and Procedure, § 291 at 613 (1957), "There must be negligence of a gross and flagrant character, evincing reckless disregard of human life. . . ."

State v. Everhart, 291 N.C. 700, 702, 231 S.E. 2d 604, 606 (1977). Although the trial judge stated in other parts of the instructions herein that the jury had to find the defendant culpably negligent in order to convict him, we believe that a reasonable interpretation of the final step outlined for the jury in the instructions quoted above and in the mandate as to involuntary manslaughter allowed the jury to convict the defendant of involuntary manslaughter on the basis of simple negligence. "[W]here the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part. This is particularly true when the incorrect portion of the charge is the application of the law to the facts. (Citations omitted.)" *State v. Parrish*, 275 N.C. 69, 76, 165 S.E. 2d 230, 235 (1969).

Defendant also argues that the trial judge erred by failing to instruct on the effect of G.S. § 20-156(b), which requires drivers to yield the right-of-way to police vehicles giving a warning signal by appropriate light and siren. We disagree. In *Upchurch v. Funeral Home*, 263 N.C. 560, 140 S.E. 2d 17 (1965), our Supreme Court held that the General Assembly did not intend for the right-of-way privileges accorded by G.S. 20-156(b) to be applied to intersections controlled by automatic traffic lights. Defendant also argues that the trial judge herein erred by failing to define the term "wilful," but we again disagree. This term is common enough to be understood by jurors without being defined in jury instructions. *State v. Jenkins*, 35 N.C. App. 758, 242 S.E. 2d 505, *disc. review denied*, 295 N.C. 470, 246 S.E. 2d 11 (1978).

For the error identified above, the defendant is entitled to a New trial.

Judges HEDRICK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. DANIEL LEVON McMILLAN

No. 8112SC278

(Filed 1 December 1981)

1. **Witnesses § 1.1— mental capacity of witness to testify**

The evidence was sufficient to support the trial court's determination that a rape victim had the requisite mental capacity to testify where the victim stated that she knew the meaning of taking an oath, she understood her duty to tell the truth, and she recalled and could testify about the events which occurred in her home on the day of the alleged rape.

2. **Criminal Law § 89.5— corroboration—prior written statement—slight variances in description of rape**

Although a prior written statement of a rape victim contained a more explicit description of the alleged rape than the victim's in-court testimony, the variations between the prior statement and the in-court testimony were slight, and the prior statement was properly admitted to corroborate the victim's in-court testimony.

3. **Criminal Law § 89.2— corroborating statement—failure to limit consideration—harmless error**

The trial court's instruction that a prior written statement by a rape victim could be considered to the extent that it corroborated "a previous witness" was erroneous in failing to limit consideration of the statement to corroboration of the victim who made it, but such error was harmless in this case.

4. **Criminal Law § 114.5— instruction that "you must find"—expression of opinion**

The trial court expressed an opinion on the evidence when, in response to questioning from the jury on the difference between second degree rape and assault on a female, the court instructed that "you must find" from the evidence beyond a reasonable doubt that defendant engaged in sexual intercourse with the victim by committing certain acts.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 11 November 1980 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 16 September 1981.

Although tried for second degree rape and common law robbery, defendant was only convicted of second degree rape.

At trial, a *voir dire* was conducted to determine the competency of the prosecutrix, Sophie Buie, to testify. After making findings of fact, the trial court concluded that Mrs. Buie was competent to testify. Thereafter, testimony was elicited from Mrs. Buie regarding the alleged rape. William Martin, who was at Mrs. Buie's home when the alleged rape occurred, then testified for the State. Later, the State introduced, for corroborative purposes, statements taken by police officers from these two witnesses within a few days after the alleged rape. The alleged rape occurred on 24 March 1980. William Martin gave his statement to law enforcement officers on 25 March 1980; Sophie Buie gave her statement to law enforcement officers on 29 March 1980.

According to the defendant, the statement made by Mrs. Buie to the police was clear and coherent, quite unlike her disjointed, sometimes non-responsive and inconsistent testimony at trial.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

Appellate Defender Project for North Carolina, by Adam Stein and Marc D. Towler, for defendant appellant.

BECTON, Judge.

The defendant appeals from his conviction of second degree rape contending that the trial court (1) erroneously permitted Mrs. Buie, an incompetent witness, to testify; (2) allowed into evidence, for corroborative purposes, a prior statement of Mrs. Buie which included prejudicial material not testified to by Mrs. Buie; (3) failed to instruct the jury properly on the limited use of the "corroborating" statement; and (4) erred in its jury charge on second degree rape.

I

[1] First, the defendant argues that his Sixth Amendment right to confrontation was denied when the trial court determined that Mrs. Buie possessed the requisite mental capacity and permitted her to testify. We disagree. The trial court's determination that a

witness is competent to testify is binding on this Court unless it is shown that the trial court abused its discretion. *State v. Squires*, 265 N.C. 388, 144 S.E. 2d 49 (1965). In *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970), our Supreme Court said:

> "Unsoundness of mind does not per se render a witness incompetent, the general rule being that a lunatic or weak-minded person is admissible as a witness if he has sufficient understanding to apprehend the obligation of an oath and is capable of giving a correct account of the matters which he has seen or heard with respect to the questions at issue. The decision as to the competency of such a person to testify rests largely within the discretion of the trial court."

Id. at 650, 174 S.E. 2d at 799, *quoting* 97 C. J. S. Witnesses § 57(b) (1957). Further, "mental eccentricities or aberrations which fall short of complete mental incapacity do not render a witness incompetent. . . ." *State v. Wetmore*, 287 N.C. 344, 352, 215 S.E. 2d 51, 56 (1975), *quoting* 3 Jones on Evidence § 20.13, pp. 614-15 (6th ed. 1972), *judgment vacated on other grounds* 428 U.S. 905, 49 L.Ed. 2d 1212, 96 S.Ct. 3213 (1976), *new trial* 298 N.C. 743, 259 S.E. 2d 870 (1979).

In the case before us, there is evidence to support the trial court's findings of fact and conclusions of law that Mrs. Buie possessed the requisite mental capacity to testify. In response to questions from the State, Mrs. Buie testified that she knew the meaning of taking the oath, that she understood her duty to tell the truth, and that she recalled and could testify about the events which occurred in her home on the day of the alleged rape. There is no evidence of abuse of discretion; consequently, the trial court's decision will not be disturbed.

II

[2] The defendant next argues that the trial court erred in admitting into evidence, as State Exhibit 1, the prior type-written statement of Mrs. Buie as corroborative evidence since the prior statement contained additional material prejudicial to the defendant which was not contained in Mrs. Buie's in-court testimony. We disagree.

"Unlike the law in many other states, prior consistent statements of a witness in North Carolina are admissible as cor-

roborative evidence even when that witness has not been impeached." *State v. Perry*, 298 N.C. 502, 505, 259 S.E. 2d 496, 498 (1979) (citations omitted). However, "the state may not, under the guise of 'corroboration,' introduce 'new' evidence—i.e., evidence which substantially and materially goes beyond that which it is intended to corroborate." *State v. Rogers*, 299 N.C. 597, 606, 264 S.E. 2d 89, 95 (1980) (Exum, J., concurring). *See also State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354 (1963). When, on the other hand, there are only slight variances between the prior statement and the witness' in-court testimony, the variances do not render the prior statement inadmissible but only go to its credibility and weight. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. denied sub nom White v. North Carolina*, 410 U.S. 958, 35 L.Ed. 2d 691, 93 S.Ct. 1432 (1973) and *cert. denied sub nom Holloman v. North Carolina*, 410 U.S. 987, 36 L.Ed. 2d 184, 93 S.Ct. 1516 (1973); *State v. Norris*, 264 N.C. 470, 141 S.E. 2d 869 (1965). Whether the statement does, in fact, corroborate the witness' testimony is a question for the jury. *State v. Case*, 253 N.C. 130, 116 S.E. 2d 429 (1960), *cert. denied* 365 U.S. 830, 5 L.Ed. 2d 707, 81 S.Ct. 717 (1961).

In the case before us, Mrs. Buie's prior type-written statement contained an explicit allegation that the defendant had sexual intercourse with her, and it explicitly described penetration. In the statement she said: "[h]e forced me to lay on the bed and he pushed my knees up to my shoulders and said, I'm going to do that to you. He opened his pants and took his privates out and he raped me. . . . [He] inserted his privates in my privates and raped me." Her in-court testimony, however, was conclusory on the issue of rape. Even though she did not articulate her allegations as coherently at trial as she expressed them in her statement, the import of her testimony was clear. She testified:

> A. The [defendant], he offered [William Martin] to use me and [William Martin] didn't but the [defendant] did, forced me on the bed and used me.
>
> Q. When you say "He used me" what do you mean by that?
>
> A. Well, I mean complete forcible raping me and he did and I am not telling no lie, either. He did force me on the bed and he raped me . . . the [defendant] did force me and rape me and definitely he did.

The prior statement, while more explicit than the in-court testimony, is a consistent statement and was properly admitted to corroborate the witness' testimony. The variations did not go beyond the in-court testimony or amount to "new" evidence. *See State v. Brooks.* Mrs. Buie's prior statement and her in-court testimony is similar to the prior statement (defendant "raped" her) and in-court testimony ("I felt his penis in my vagina.") of the prosecuting witness in *State v. Mayhand,* 298 N.C. 418, 420, 425-26, 259 S.E. 2d 231, 234, 237 (1979). The *Mayhand* Court held that the variations were slight and that the statement was properly admitted. Consequently, we hold that the variations in the statement and in the in-court testimony in this case were slight and did not render the statement incompetent.

Even if the statement contained material variations, the defendant's assignment of error would be rejected because defendant did not object to any part of the statement. "Where the defendant contends part of the testimony does not tend to corroborate the prior witness's [sic] testimony, he has a duty to point out to the court the objectionable part." *State v. Harris,* 46 N.C. App. 284, 286, 264 S.E. 2d 790, 792 (1980) (citations omitted). In *State v. Spain,* 3 N.C. App. 266, 164 S.E. 2d 486 (1968), the defendant was charged with raping his stepdaughter. Statements made by her to a police officer after the incident occurred were introduced to corroborate her testimony. The prior statement went beyond the testimony of the witness and the defendant entered a general objection. This Court held that even though a part of the statement was incompetent because it went beyond the testimony of the witness, the trial court did not err in overruling defendant's general objection since the statement was admissible for corroborative purposes. 3 N.C. App. at 269, 164 S.E. 2d at 489.

III

[3] The defendant further argues that the trial court erred in "failing to instruct the jury that the corroborating statement [of Mrs. Buie] could be considered in support of the credibility of only the witness who had made the prior statement and not in support of the credibility of any other witness." We agree, but we find the error harmless.

The court's limiting instruction before and after the introduction of Mrs. Buie's statement is set out below:

> Ladies and gentlemen of the jury, the following evidence which is about to be received is being admitted for the limited purpose of corroboration, that is, to the extent that you find it does corroborate the testimony of *a witness* previously given under oath at this trial and you will consider this evidence which is about to be received for the limited purpose of corroboration and corroboration only. It is not substantive evidence of anything. [Emphasis added.]

After her statement, the court instructed:

> Ladies and gentlemen of the jury, the foregoing evidence was admitted for the limited purpose of corroboration, that is, to the extent that you find that it does corroborate the previous testimony made by *a previous witness* under oath at this trial, you will consider it for purposes of corroboration and corroboration only. It is not substantive evidence of anything. [Emphasis added.]

These instructions are erroneous. A corroborative statement is admissible only to corroborate the testimony of *the witness who made the statement. State v. Miller*, 288 N.C. 582, 596, 220 S.E. 2d 326, 336 (1975); *see State v. McAdoo*, 35 N.C. App. 364, 241 S.E. 2d 336, *disc. rev. denied* 295 N.C. 93, 244 S.E. 2d 262 (1978). However, once a trial court instructs a jury that a prior statement is admissible only to corroborate the testimony of the witness who made the prior statement, it is not necessary for the trial court further to instruct the jury that it is not to consider the prior statement "in support of the credibility of any other witness" as is suggested by defendant. The limiting instruction given in this case did not clearly charge the jury that it was to consider Mrs. Buie's statement only as corroboration of her testimony. It is quite possible that the jury considered Mrs. Buie's statement as corroboration of William Martin's testimony since he also testified *prior* to the introduction of the statement.

Although we find that the instruction was erroneous, we do not find that the instruction was prejudicial on the facts of this case. As stated earlier, Mrs. Buie's prior statement did *not* contain material variations; it did not amount to new evidence. Since the corroborating statement was admissible in its entirety as corroboration of Mrs. Buie's testimony, the defendant is not harmed,

on the facts of this case, by the possibility that Mrs. Buie's prior statement may have been used to corroborate William Martin.

IV

[4] The defendant's final argument is that the trial court committed prejudicial error by expressing an opinion on the evidence when it instructed the jury on second degree rape and when it failed to mention evidence very important to defendant's defense. We agree that the instruction on second degree rape was error, and for this reason the defendant is entitled to a new trial.

In response to questioning from the jury on the difference between second degree rape and assault on a female the court gave the following instruction:

> Now, with respect with these two charges I charge that *you must find* from the evidence beyond a reasonable doubt that on March 24, 1980, Daniel Levon McMillan engaged in sexual intercourse with Sophie Buie and that he did so by taking her pants off and pushing her legs up to her chest and moving her hand away from her private parts and that this was sufficient to overcome any resistance which Sophie Buie might make and that Sophie Buie did not consent and it was against her will it would be your duty to return a verdict of second degree rape. [Emphasis added.]

Our Supreme Court has found reversible error in two cases in which the trial court made similar mistakes. In *State v. Williams*, 280 N.C. 132, 136, 184 S.E. 2d 875, 878 (1971), the trial court charged the jury that:

> In that connection, you are instructed, ladies and gentlemen of the jury, the State of North Carolina has satisfied you beyond a reasonable doubt that the Defendant, Mr. Robert Williams, Jr., unlawfully, willfully and feloniously, in a criminal and negligent way and the act was criminally negligent, reckless and careless and showed total disregard for consequences or heedless indifference to the safety and rights of others and such act was done with a deadly weapon, as that term has been described to you, and you are further satisfied from the evidence that the deceased, Mr. Stroud's death was a natural and probable result of the Defendant's

act, it would be your duty to return a verdict of involuntary manslaughter.

The Court opined that regardless of whether the omission of the word "if" from the above charge was inadvertent, the expression by the court that the State had shown the defendant's acts to be criminally negligent resulted, and that that error, taken along with others, required that a new trial be ordered.

Further, in *State v. Cates*, 24 N.C. App. 65, 210 S.E. 2d 100 (1974), the trial court made a similar mistake which resulted in a new trial for the defendant. There the trial court charged the jury as follows:

> The Court instructs you *that the fact that* this was a moving automobile and was being driven on the road at a time that [the student] could not have gotten out of the automobile because it was a moving automobile, without subjecting herself to injury, at the time the automobile was first in the streets there, the University Road and the other streets, or after [the student] had requested that he let her out some, I believe, according to her testimony, some ten or twelve times, and that finally when the car stopped at a stop sign she jumped out of the car when it was not being operated. (Emphasis added.)

Id. at 70, 210 S.E. 2d at 104. The Court found this instruction to constitute prejudicial error and ordered a new trial "since the jury could have understood the judge to mean that the most crucial facts at issue were established. . . ." *Id.*

Although "seriously doubt[ing]" whether the omission of the single word "if" constituted prejudicial error, the *Williams* Court concluded "that the total charge failed to clarify the material issues so as to aid the jury in reaching the verdict." 280 N.C. at 137, 184 S.E. 2d at 878. We do not have similar doubts in this case. More than an "if" was omitted in this case. The trial court affirmatively said: "I charge that you *must* find. . . ." (Emphasis added.) Significantly, what was probably an inadvertent, yet prejudicial, statement occurred, not in the middle of long instructions, but in the final mandate. Moreover, the instruction was particularly critical since the jury was obviously confused and had returned to the courtroom specifically to ask for additional in-

structions. Some or all of the jurors may have understood the judge to be telling them that *they were required* to find that the essential elements of rape had been established when these elements were actually still at issue. The fact that defendant was acquitted of the common law robbery charge in the face of testimony from the same State's witness that testified against him on the rape charge takes on added significance. That is, the trial court did not erroneously tell the jury that it was required to find defendant guilty of common law robbery, and defendant was acquitted of that charge. As we said in *Cates:*

> We cannot say that the error was harmless. The jury had some difficulty in arriving at a verdict. On one occasion the jury returned to the courtroom [to ask a question]. . . . The case was a close one and the error may very well have tipped the scales against the defendant [on the rape charge].

24 N.C. App. at 70, 210 S.E. 2d at 104.

Because we grant a new trial on this issue, we do not address the defendant's remaining contention.

For the foregoing reasons, the defendant is entitled to a

New trial.

Judge MARTIN (Robert M.) and Judge MARTIN (Harry C.) concur.

CYNTHIA LYNN STILLEY v. AUTOMOBILE ENTERPRISES OF HIGH POINT, INC.

JAMES D. STILLEY v. AUTOMOBILE ENTERPRISES OF HIGH POINT, INC.

No. 8122SC96

(Filed 1 December 1981)

1. Rules of Civil Procedure § 37— answers to interrogatories—failure to impose sanctions—no abuse of discretion

Where plaintiffs failed to answer interrogatories submitted by defendant; the court ordered plaintiffs to answer interrogatories on or before 25 July

1979 or have their actions dismissed; plaintiffs signed and verified answers on 23 July 1979 but the answers were not filed until November 1979 and where the record contained affidavits of plaintiffs' attorney and his secretary averring that on 23 July 1979 the answers were signed and mailed to defendant's attorney at his old address in Greensboro rather than at his new Winston-Salem address, there was no abuse in discretion in the court's decision not to dismiss plaintiffs' actions for failure to comply with the discovery order.

2. **Rules of Civil Procedure § 56.3— summary judgment—failure of movant to support motion**

The court properly denied defendant's motions for summary judgment where plaintiffs alleged facts sufficient to establish a prima facie case against defendant, and defendant failed to carry either the first burden of showing no genuine issue of material fact or the second burden of showing its entitlement to judgment as a matter of law as it filed no supporting affidavits with its motion.

3. **Rules of Civil Procedure § 37— limiting plaintiffs' expert witnesses—improper sanction**

The court improperly granted defendant's motion in limine whereby it limited plaintiffs' expert witnesses. Through this motion, defendant sought imposition of a Rule 37(b)(2)(B) sanction and such sanction may only be imposed for failure of a party to comply with a court order compelling discovery. Here, defendant did not obtain an order compelling plaintiffs to supplement their answers to any interrogatories they had answered.

4. **Automobiles § 23— defective condition of "loaner" vehicle—directed verdict improper**

In a civil action in which plaintiffs alleged a defective condition in a car loaned to them while defendant repaired their car, the trial court erred in directing a verdict for defendant at the end of plaintiffs' evidence as plaintiffs produced more than a scintilla of evidence that a defective steering mechanism caused the collision which resulted in their injuries, that the defect existed prior to and at the time defendant loaned the car to plaintiffs, and that defendant's representatives knew of the defect because of complaints about the steering by prior users.

APPEAL by plaintiffs from *Davis, Judge*. Judgments entered 26 August 1980 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 3 September 1981.

In May 1976 defendant loaned a 1972 Javelin automobile to plaintiff Cynthia Stilley to use while it repaired an automobile registered to her father, plaintiff James Stilley, but operated by plaintiff Cynthia Stilley. Ms. Stilley and her father were seriously injured in a collision while Ms. Stilley was driving the Javelin with her father as passenger. The plaintiffs filed complaints in

which they alleged that the steering mechanism and other mechanical parts of the Javelin were defective when defendant loaned them the car, that such defects caused the collision, and that defendant knew or should have known of the defective and unsafe condition when it loaned the car to plaintiffs. Plaintiffs also alleged defendant failed to repair the car properly and failed to warn them of the defective and unsafe condition. Defendant denied negligence and counterclaimed for damage to the car.

At trial plaintiffs produced evidence that defendant had obtained the car as a "salvage" automobile and had done some repair work to it prior to transferring it to Fanny Hayes Covington under an installment sales agreement. Ms. Covington returned the car to defendant for repairs shortly after she purchased it, having had problems with the tires and turning mechanism. She later returned the car a second time and told defendant to keep it. Defendant then sold the car to Steve Thayer who returned it shortly thereafter because he was not satisfied with its performance. Steve and his father, Claude Thayer, had inspected the car and found a worn stabilizer. While the car was on defendant's lot one of defendant's wreckers backed into it causing front end damage which defendant's employees repaired. The day defendant loaned the car to plaintiffs no employee of defendant inspected the car for defects or unsafe conditions. Between the day plaintiffs first obtained the car and the day of the collision Ms. Stilley complained about the car's performance to an employee of defendant. The employee told defendant's vice-president and another employee of Ms. Stilley's complaints. He told them he did not consider the car to be reliable transportation because he thought something was wrong with the suspension and the left front wheel was leaning.

Plaintiffs testified that on the day of the collision Ms. Stilley was driving in the left, south bound lane of temporary I-85 at 45-50 miles per hour; that traffic was heavy; and that she was not passing cars, but was waiting for a space to clear in the right lane so she could move into it in order to exit. Suddenly the car veered to the left and did not respond to Ms. Stilley's attempts to turn it back toward the right. The car left the pavement and entered the grass median between the north and south bound lanes. When Ms. Stilley attempted to turn the steering wheel to the right, it turned round and round in her hands with no

resistance. The car continued to travel in a straight line and entered the north bound lanes where it collided with another car.

Plaintiffs appeal from judgments granting defendant's motions for directed verdicts at the close of plaintiffs' evidence. Defendant cross-appeals.

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

Womble, Carlyle, Sandridge and Rice, by Daniel W. Donahue and Keith Clinard, for defendant appellee.

WHICHARD, Judge.

DEFENDANT'S APPEAL

Defendant presents two questions: (1) whether the court erred in declining to dismiss plaintiffs' complaint for failure to comply with an order to answer interrogatories by a certain date; and (2) whether the court erred in denying its motion for summary judgment. We answer both questions in the negative.

I. MOTION TO DISMISS FOR NONCOMPLIANCE WITH DISCOVERY ORDER

[1] Defendant submitted interrogatories to plaintiffs which asked them to list their expert witnesses and those witnesses who would testify concerning any alleged defect or unsafe condition of the automobile. When defendant did not receive answers to these interrogatories within the time permitted by statute, it moved for an order compelling plaintiffs to answer. The court ordered plaintiffs to answer on or before 25 July 1979 or have their actions dismissed. Plaintiffs signed and verified the answers on 23 July 1979. The answers were not filed, however, until November 1979. The record contains affidavits of plaintiffs' attorney and his secretary averring that on 23 July 1979 the answers were signed and mailed to defendant's attorney at his old address in Greensboro rather than at his new Winston-Salem address. The certificate of service was dated 23 July 1979.

Defendant moved that the court dismiss plaintiffs' actions for failure to comply with the discovery order. The court found the answers were signed and served on defendant on 23 July 1979 by copies being deposited with the United States Post Office Depart-

ment addressed to defendant's counsel, and that defendant's counsel later received the copies. The court therefore declined to impose sanctions on plaintiffs.

The court's order was supported by the affidavits submitted by plaintiffs in response to the motion. We find no abuse of discretion in the court's decision not to dismiss plaintiffs' actions. *See generally Telegraph Co. v. Griffin*, 39 N.C. App. 721, 251 S.E. 2d 885 *disc. review denied* 297 N.C. 304, 254 S.E. 2d 921 (1979).

II. Motions For Summary Judgment

[2] Defendant filed motions for summary judgment which asserted that no genuine issues of material fact existed in plaintiffs' actions. Defendant filed no supporting affidavits. Plaintiffs countered the motions with affidavits of Claude Thayer, Stephen Thayer, Sammie Hedrick, and Cynthia Stilley.

"The law places the burden on a movant for summary judgment to show (1) that no genuine issue of material fact exists, and (2) that the movant is entitled to judgment as a matter of law." *Green v. Wellons, Inc.*, 52 N.C. App. 529, 532, 279 S.E. 2d 37, 40 (1981). For purposes of the motion, defendant accepted as true the facts revealed by a review of the materials before the court in the light most favorable to plaintiffs. In their complaint, plaintiffs alleged facts sufficient to establish a prima facie case against defendant. By not supporting its motion with affidavits, defendant failed to carry either the first burden of showing no genuine issue of material fact or the second burden of showing its entitlement to judgment as a matter of law. Until defendant met its burden, plaintiffs had no burden of producing a forecast of evidence in support of their claims. *Green*, 52 N.C. App. at 532, 279 S.E. 2d at 40. Thus, by filing affidavits plaintiffs did more than the law required. The court properly denied defendant's motions.

Plaintiffs' Appeal

Plaintiffs present three questions: (1) whether the court erred in ruling, on defendant's motion in limine, that plaintiffs could not offer any expert witnesses and that only plaintiffs and four witnesses whose affidavits plaintiffs had obtained could testify concerning any alleged defect or unsafe condition of the automobile; (2) whether the court erred in excluding the testimony of

defendant's vice-president concerning his knowledge of the condition of the automobile when it was loaned to plaintiffs; and (3) whether the court erred in granting directed verdicts for defendant at the close of plaintiffs' evidence. We answer each question in the affirmative.

I. Motion In Limine

[3] In their answers to interrogatories plaintiffs stated they intended to call no expert witnesses. They listed no witnesses who would testify about defects, but stated they expected to develop further evidence concerning defects or unsafe conditions prior to trial. They did not supplement their answers. During trial the court ordered, in response to a motion in limine by defendant, that plaintiffs could not offer any expert testimony and could only offer, concerning alleged defects or unsafe conditions, their own testimony and that of four witnesses whose affidavits they had filed.

Through this motion in limine defendant sought imposition of a Rule 37(b)(2)(B) sanction. Such sanction may only be imposed for failure of a party to comply with a court order compelling discovery. G.S. 1A-1, Rule 37(b)(2)(B); W. Shuford, N.C. Civil Practice and Procedure § 37-3 (2d ed. 1981). Defendant did not obtain an order compelling plaintiffs to supplement their answers to the interrogatories referred to above. Because plaintiffs had not failed to comply with a discovery order, the court improperly granted defendant's motion in limine. *Id.*

II. Testimony Of Defendant's Vice-President

Plaintiffs offered defendant's vice-president as an adverse witness. The court sustained objection to plaintiffs' questions as to whether this witness had inspected the automobile on the day he authorized its loan to plaintiffs. Plaintiffs, by these questions, sought direct evidence relating to defendant's duty to inspect and knowledge of defects in the vehicle. The court therefore improperly excluded the testimony. *See* Stansbury's North Carolina Evidence § 76 (Brandis rev. 1973).

III. Motions For Directed Verdict

[4] A motion for directed verdict presents the question whether the evidence was sufficient to have a jury pass on it. The trial

court should deny the motion when, viewing the evidence in the light most favorable to the plaintiff and giving the plaintiff the benefit of all reasonable inferences, it finds " 'any evidence more than a scintilla' to support plaintiff's prima facie case in all its constituent elements." 2 McIntosh, North Carolina Practice and Procedure 2d, § 1488.15 (Phillips Supp. 1970); *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 644, 272 S.E. 2d 357, 360 (1980).

Defendant as a bailor is liable for injuries to plaintiffs as bailees if, at the time it allowed the vehicle to leave its possession, it knew, or in the exercise of reasonable care should have known, that the vehicle was in a defective or unsafe condition, and if such defective or unsafe condition caused plaintiffs' injuries. *See, e.g., Austin v. Austin*, 252 N.C. 283, 113 S.E. 2d 553 (1960). To exercise reasonable care a retail dealer who undertakes to repair and recondition a used vehicle for use upon the public highways must inspect the vehicle to detect defects which would make it a menace to those who might use it or come in contact with it, and must make repairs necessary to render the vehicle reasonably safe for such use. The dealer is charged with knowledge of defects which are patent and discoverable in the exercise of due care. *See, e.g., Jones v. Chevrolet Co.*, 217 N.C. 693, 9 S.E. 2d 395 (1940).

Plaintiffs produced more than a scintilla of evidence that a defective steering mechanism caused the collision which resulted in their injuries, that the defect existed prior to and at the time defendant loaned the car to plaintiffs, and that defendant's representatives knew of the defect because of complaints about the steering by prior users. Plaintiffs also produced evidence that no representative of defendant inspected the car immediately prior to loaning it to plaintiffs. From this evidence a jury could find failure to exercise due care.

Defendant argues that plaintiffs failed to produce any evidence of a specific defect which existed at the time they obtained possession of the automobile and which caused their injuries. We disagree. "Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances . . . ." *Austin v. Austin*, 252 N.C. 283, 288, 113 S.E. 2d 553, 557 (1960). Cynthia Stilley testified that, after the car sud-

denly veered to the left, she turned the steering wheel to the right, it went all the way around, and the car did not react. Steve Thayer, Claude Thayer, and Sammie Hedrick testified, in affidavits and at trial, that there was something seriously wrong with the automobile's steering mechanism. Their testimony related to times prior to plaintiff's possession of the automobile. This evidence permitted an inference that a defective steering mechanism, which existed prior to and at the time of defendant's bailment of the automobile to plaintiff, caused the collision. The evidence, in the light most favorable to plaintiff, thus presented questions of fact for the jury; and the court erred in granting directed verdicts for defendant.

RESULT

In defendant's appeal, affirmed.

In plaintiffs' appeal, reversed and remanded for re-trial in accordance with this opinion.

Judges HEDRICK and HILL concur.

JENNIE DUNCAN, PLAINTIFF v. JOY NADINE AYERS, DEFENDANT AND THIRD-PARTY PLAINTIFF v. LILLIE PITMAN PENDLEY, THIRD-PARTY DEFENDANT

LILLIE PITMAN PENDLEY, PLAINTIFF v. JOY NADINE AYERS, DEFENDANT

No. 8124SC197

(Filed 1 December 1981)

1. Automobiles § 77— automobile accident—contributory negligence—failure to direct verdict proper

In a civil action whereby plaintiffs alleged negligence on the part of defendant in turning into their car while making a left turn, the plaintiffs' evidence was sufficient to support a verdict for them. Although there was evidence of plaintiffs having passed a vehicle stopped in the left lane improperly, all the evidence which supported plaintiffs' claim, when taken as true and viewed in the light most favorable to them, was sufficient to support a verdict for them.

2. Automobiles § 90— failure to instruct on plaintiff's contributory negligence—improper

The defendant was entitled to have the jury instructed with respect to one plaintiff's contributory negligence in passing a vehicle on the right in violation of G.S. 20-150(c) as defendant's evidence tended to support that charge.

APPEAL by defendant from *Snepp, Judge.* Judgment entered 1 October 1980, Superior Court, MITCHELL County. Heard in the Court of Appeals 23 September 1981.

These actions, consolidated for trial and on appeal, arose out of an intersection collision between a vehicle owned by Jennie Duncan (hereinafter Duncan) and driven by Lillie Pitman Pendley (hereinafter Pendley) and a vehicle driven by Joy Nadine Ayers (hereinafter Ayers). From the pleadings and the evidence, it appears to be uncontradicted that Duncan was proceeding in a westerly direction on U.S. 19 and that Ayers was proceeding in an easterly direction on U.S. 19. Ayers attempted to make a left turn and collided with Duncan who was continuing in her right hand lane. There is some evidence that one Thomas was preparing to make a left turn from 19E. As he sat waiting for traffic to clear the intersection, Pendley came from behind him and to his right side, went into the intersection, and collided with defendant's vehicle.

Duncan brought an action against Ayers. Ayers answered, denying any negligence on her part, pleading the contributory negligence of Pendley and counterclaiming for damages against Duncan. She also filed a third-party complaint seeking damages or contribution from Pendley arising from Pendley's negligence.

Duncan replied to the counterclaim denying all allegations of negligence attributed to her, asserted contributory negligence of Ayers, and reasserted the alleged negligence of Ayers.

Pendley answered denying any negligence on her part, counterclaiming for damages, and alleging contributory negligence on Ayers's part. The trial court dismissed Ayers's third-party plaintiff action against Pendley except for the plea for contribution.

Subsequently Pendley brought an action against Ayers for damages for personal injuries. Ayers answered, denying negligence, pleading contributory negligence and asserting a

counterclaim for damages allegedly resulting from Pendley's negligence. Pendley replied, denying negligence and pleading the alleged contributory negligence of Ayers.

The cases were consolidated for trial. After the evidence was in, Pendley moved for directed verdict as to Ayers's claim for contribution and this motion was allowed. Plaintiffs Duncan and Pendley moved for directed verdict with respect to Ayers's counterclaims. These motions also were allowed. Motions of defendant Ayers for directed verdict in each case was denied. The cases went to the jury in the posture of *Duncan v. Ayers* and *Pendley v. Ayers* on the alleged negligence of Ayers and the averred contributory negligence of Pendley, imputed to Duncan. The jury answered the issues in favor of the plaintiffs and, defendant appeals. Additional facts necessary for decision are set out in the opinion.

G. D. Bailey, for plaintiff Duncan appellee.

Bruce Briggs, and Watson and Dobbin, by Frank H. Watson, for plaintiff Pendley appellee.

Morris, Golding, Blue and Phillips, by Sheila Fellerath and William C. Morris, Jr., for defendant appellant.

MORRIS, Chief Judge.

Defendant contends that his motion for directed verdict should have been granted and that the court should have instructed the jury with respect to the contributory negligence as a matter of law of plaintiff Pendley in passing a vehicle on the right under the circumstances of this case. With the first argument we cannot agree. With respect to the second contention, we are in agreement and order a new trial.

[1] Defendant argues that plaintiff's failure to keep a proper lookout constituted contributory negligence as a matter of law and, therefore, the jury had no function to serve, and his motion for a directed verdict should have been granted. In passing upon a motion for a directed verdict in a jury case, as here, all evidence which supports plaintiff's claim must be taken as true and viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be

drawn from the evidence, and with contradictions, conflicts, and inconsistencies being resolved in his favor. *Home Products Corp. v. Motor Freight, Inc.*, 46 N.C. App. 276, 264 S.E. 2d 774, *cert. denied*, 300 N.C. 556, 270 S.E. 2d 105 (1980). The motion may be granted only if, as a matter of law, the evidence is not sufficient to support a verdict for the plaintiff. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). Viewed in the light of these principles, the evidence was sufficient to support a verdict. Evidence for plaintiffs was that plaintiff Pendley, driving plaintiff Duncan's car, was proceeding in a westerly direction on Highway 19, a two-lane highway, approaching the intersection of Highway 19 with RPR 1428. When she was "a right smart distance down the road" from the intersection, she saw a red pickup, "a pretty good ways down the other way" coming from the opposite direction. She was driving on the right hand side of the road and there was no obstruction in her "line of vision" as she looked through the intersection. She had a straight road and "didn't see another thing" in her lane until she hit the truck being driven by defendant. She was not required to assume negligence on the part of the driver of the truck in turning without first seeing that a turn could be made in safety. *Boone v. North Carolina Railroad Co. and Southern Railway Co.*, 240 N.C. 152, 81 S.E. 2d 380 (1954). There was evidence of her having passed a vehicle stopped in the left lane preparatory to making a left turn, but she testified that she had no obstruction in her line of vision. This makes *Almond v. Bolton*, 272 N.C. 78, 157 S.E. 2d 709 (1967), inapplicable. There plaintiff, who had passed a truck stopped for a left turn and entered the intersection to collide with a vehicle making a left turn from the opposite direction, testified that the "truck blocked my view as I started to go around it, and it wasn't until I got alongside the truck that I was able to see what traffic was either in the intersection or just east of it." *Id.* at 79. We think the question here was for the jury, and the defendant's motion was properly denied.

[2] This brings us to the more difficult question. Was defendant entitled to have the jury instructed with respect to plaintiff Pendley's contributory negligence in passing a vehicle on the right in violation of G.S. 20-150(c) and G.S. 20-150.1. G.S. 20-150(c) prohibits the passing of another vehicle proceeding in the same direction at any intersection unless permitted to do so by a traffic or police officer. A violation of the statute has been held to be

negligence *per se* if injury proximately results therefrom. *Carter v. Scheidt*, 261 N.C. 702, 136 S.E. 2d 105 (1964); *Crotts v. Transportation Co.*, 246 N.C. 420, 98 S.E. 2d 502 (1957) and cases there cited; *Teachey v. Woolard*, 16 N.C. App. 249, 191 S.E. 2d 903 (1972).

G.S. 20-150.1 designates four conditions under which the driver of a vehicle may overtake and pass upon the right of another. The only listed condition which could possibly be applicable here is "when the vehicle overtaken is in a lane designated for left turns." The uncontradicted evidence here is that the east side of the intersection, where the vehicle was stopped and the direction from which plaintiff Pendley was approaching the intersection, had one lane for traffic travelling west toward Asheville, and there was no marked left turn area, although such an area was marked off for left turns on the opposite side of the intersection.

Randy Thomas, defendant's only witness, testified that he was stopped in the highway (U.S. 19), close to the divider between the eastbound and westbound lanes, waiting to make a left turn to go into a filling station on the opposite side of the intersection. He saw defendant Ayers enter the intersection. They approached it at the same time. Defendant Ayers was coming from the west, and he was coming from the east. He saw left turn signals being given by the truck. He came to a stop waiting to make a left turn. Defendant stopped at the stop sign and remained stopped for about 10 to 15 seconds and then started to cross the intersection. After she started her turn, the witness observed another vehicle approaching the intersection. This was a Ford car, the vehicle driven by plaintiff Pendley. The witness testified, ". . . just at the moment it (red truck) started to turn I looked in my rear view mirror. At that moment I saw the Pendley vehicle immediately behind me. I immediately looked back in front of me and the vehicles had collided. . . . The Ford had passed my stopped vehicle on the right hand side before the collision. . . . Before the collision I looked in my rear view mirror. I saw the car, heard the tires, heard the brakes, heard the tires squealing but I did not see the collision."

Teachey v. Woolard is strikingly similar in its facts. We quote from the opinion:

> Plaintiff's evidence tended to show that on 15 October 1970 at about 1:00 p.m. she was operating her automobile in a

> northerly direction on North Main Street within the town of Fuquay-Varina approaching the point where it is intersected by Wake Chapel Road; that prior to making a left turn into Wake Chapel Road, plaintiff gave a left turn signal and brought her vehicle to a complete stop; that at approximately the same time, oncoming southbound traffic on North Main Street also came to a complete stop with the lead vehicle making preparation to turn left into a private drive; that as plaintiff began to turn left into Wake Chapel Road, defendant drove his vehicle from a position two cars to the rear of the stopped southbound vehicle preparing to turn left into the the private drive, thus overtaking and passing the two stopped vehicles on the right and then collided with the vehicle driven by the plaintiff which was then in the actual process of turning left into Wake Chapel Road.

Teachey v. Woolard, supra, at 250.

Defendant's motions for directed verdict were denied. The jury found defendant negligent and plaintiff free from contributory negligence and awarded damages. Defendant assigned as error the following portion of the judge's charge as being an instruction on abstract principles of law and statutory provisions without allegations or evidence to support it:

> . . . that he overtook and passed another car preceding him in the same direction at an intersection of streets without being permitted to do so by a traffice officer or police officer, or that he passed the car in front of him on the right when the car in front of him was not giving a clear signal of intention to make a left turn or had not left sufficient room to pass to the right to permit passing in safety or that he turned from a direct line and attempted to pass the vehicle in front of him without exercising due care to see that he could make the movement in safety . . . [and] that such negligence in any one or more of these respects was a proximate cause of the collision and resulting injuries and damages to the plaintiff . . . .

Id. at 253.

We held the charge proper, noting that although the court did not specifically refer to G.S. 20-150(c), it did embody the substance of it in the instructions. We also said that it might have been proper

for the trial judge to instruct that passing on the right when not sanctioned by G.S. 20-150.1 also constitutes negligence *per se*.

So it is in the case before us. It is for the jury to determine whether, if they find that plaintiff Pendley did pass on the right another car proceeding in the same direction without being permitted to do so by a traffic officer or police officer or not under any of the permitted conditions, that negligence was a proximate cause of the collision and resulting damages to plaintiffs.

Plaintiffs argue that the question is not properly presented. It is true that in excepting to the portions of the court's charge with respect to plaintiff Pendley's negligence, defendant did not put in her assignment of error what she contends the court should have charged. This is, without question, a position well taken. Rule 10(b)(2), Rules of Appellate Procedure, provides that "[a]n exception to the failure to give particular instructions to the jury . . . shall identify the omitted instruction . . . by setting out its substance immediately following the instructions given." Nevertheless we cannot perceive that plaintiffs have been prejudiced by this failure. In defendant's answer in each suit he averred as an act of negligence on plaintiff Pendley's part that she "overtook and passed another motor vehicle on the right side thereof when such overtaking and passing was not allowed." The only evidence presented by defendant spoke to this averment. Since this was the only assignment of error to the charge, the court has not been unduly inconvenienced, although our discussing these exceptions in this case is, by no means, to be taken as a waiver in any other case of the requirements of Rule 10.

For the reasons stated herein, defendant is entitled to a

New trial.

Judges CLARK and WELLS concur.

Isbey v. Crews

EDWARD KENNETH ISBEY, JR. AND WILLIAM C. MORRIS, JR. v. H. DENNISTON CREWS, M.D. AND ARTUS M. MOSER, M.D. INDIVIDUALLY AND T/D/B/A ASHEVILLE KIDNEY CENTER

No. 8128DC300

(Filed 1 December 1981)

1. **Landlord and Tenant § 11.1— covenant against subletting without lessor's consent**

An express covenant in a lease which allows the tenant to assign the lease or sublet the premises only if he receives the lessor's consent is valid and does not require that the lessor's withholding of consent be reasonable.

2. **Landlord and Tenant § 19— breach of lease agreement—abandonment of premises—damages**

In an action to recover for breach of a lease of premises for use only as physician's offices and for a dialysis unit, the trial court properly entered summary judgment for plaintiffs for the amount of rent due under terms of the lease where plaintiff's materials showed that defendant tenants abandoned the premises and failed to pay a particular amount of rent which was due, and defendants offered no evidence with respect to plaintiffs' failure to exercise reasonable diligence to mitigate their loss.

APPEAL by defendants from *Israel, Judge.* Summary judgment for plaintiffs in the amount of $2,867.33 entered 16 March 1981 in District Court, BUNCOMBE County. Heard in the Court of Appeals on 22 October 1981.

This is a civil action wherein plaintiffs, lessors, seek to recover from the defendants, lessees, $2,867.33 because of the latter's alleged breach of a rental agreement.

Plaintiffs moved for summary judgment. The record discloses the following uncontroverted facts:

Plaintiffs and defendants entered into a lease on 14 September 1976 by which the plaintiffs agreed to lease to defendants certain premises located in Asheville. The lease was for a renewable term of five years and was for a rental sum of $172,040, "said rental due and payable in . . . equal monthly installments of . . . ($2867.33) . . . , payable in advance on the first day possession of said premises is delivered to [defendants] and on the same day of each month thereafter during the term of this lease. . . ." The lease also contained the following relevant provisions:

1. The leased premises shall be used and occupied by Lessee as and only for physicians' offices and for a dialysis unit and for no other purposes whatsoever without Lessor's written consent . . .

. . .

4. The Lessee shall not assign this lease or sublet the premises or any part thereof, or use the same or any part thereof, or permit the same, or any part thereof, to be used for any other purpose than as above stipulated, or make any alterations therein, or additions thereto, without the written consent of the Lessor. . .

From the time defendants moved into the building and including 15 August 1980, the defendants made all of the rental payments provided for in the lease. After operating a dialysis facility at the premises leased by plaintiffs, the defendants moved out on 22 May 1980 and acquired other premises. After the defendants vacated the premises, they sought plaintiffs' permission to sublet the property to a company which sells and distributes medical supplies. Plaintiffs refused to permit the defendants to sublet the premises. Plaintiffs thereupon brought this action to recover from defendants the sum of $2,867.33 (plus interest) which the defendants allegedly were required to pay under the lease as rent due on 17 September 1980. From summary judgment awarding plaintiffs $2,867.33 plus interest, defendants appealed.

Morris, Golding, Blue & Phillips, by William C. Morris, Jr., and Sheila Fellerath, for plaintiff appellees.

Adams, Hendon, Carson & Crow, by George Ward Hendon, for defendant appellants.

HEDRICK, Judge.

Defendants assign as error the court's entry of summary judgment. Summary judgment is properly entered if there is no genuine issue of material fact, *Branch Banking & Trust Co. v. Creasy*, 301 N.C. 44, 269 S.E. 2d 117 (1980), but a motion for summary judgment must be denied if there is such an issue of fact. *Dendy v. Watkins*, 288 N.C. 447, 219 S.E. 2d 214 (1975). An issue of fact is material, for the purpose of determining whether a motion for summary judgment should be denied, if the facts as al-

leged would constitute a legal defense or would affect the result of the action or would prevent the party against whom it is resolved from prevailing in the action. *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 268 S.E. 2d 190 (1980). In the present case, defendants argue that there were two issues of material fact which should have precluded summary judgment.

[1] Defendants first argue that there was an issue of material fact as to whether plaintiffs unreasonably refused to consent to the sublease proposed by defendants. Defendants contend this issue is material because an unreasonable refusal would constitute a material breach, by plaintiffs, of the lease agreement and would thereby entitle defendants to terminate the lease and their obligations to pay rent thereunder. Defendants would have us read into the lease agreement an obligation on the part of the lessor not to *unreasonably* withhold consent to a subtenant proposed by the lessee.

A tenant for an estate for years, however, may be *absolutely* barred from transferring his term by either assignment or sublease if there is an express covenant in the lease forbidding assignments and subletting. J. Webster, *Real Estate Law in North Carolina* § 70 (1971); *Rogers v. Hall*, 227 N.C. 363, 42 S.E. 2d 347 (1947). A fortiori, a tenant may be subjected to a lesser restraint than an absolute prohibition on alienation, to wit, an express covenant which allows the tenant to transfer his term if he receives the lessor's consent, but which bars the tenant from such a transfer if the lessor reasonably or unreasonably withholds his consent. The lease in the present case contains such an express restraint, forbidding the lessee from alienating the premises "without the written consent of the lessor;" nowhere did the lease state that such consent would not be unreasonably withheld. If it had, the lessor's withholding of consent could not be based on arbitrary considerations of personal taste, sensibility, or convenience, however honest the judgment. *Jones v. Andy Griffith Products, Inc.*, 35 N.C. App. 170, 241 S.E. 2d 140, *disc. rev. denied*, 295 N.C. 90, 244 S.E. 2d 258 (1978). The lessor plaintiffs in the present case, however, did not relinquish their rights to exert their own subjective criteria in deciding who could or could not be subtenants. A court does not insert terms into a contract when the parties elected to omit such terms, *Taylor v. Gibbs*, 268 N.C.

363, 150 S.E. 2d 506 (1966), and we will not here insert a requirement that the lessor not unreasonably withhold his consent.

The case of *Sanders v. Tropicana*, 31 N.C. App. 276, 229 S.E. 2d 304 (1976) is distinguishable. *Sanders* held that the Board of Directors of a cooperative apartment could not unreasonably withhold its consent under a contract which restrained a tenant-shareholder from transferring his lease and stock subscription without the Board's consent. The Court's imposition of a "reasonableness" limitation on the Board's discretion may be attributed to the fact that *Sanders* involved the alienability of *corporate stock* as well as a leasehold, the Court noting at 281, 229 S.E. 2d at 308 that "[r]estraints on alienation of coprorate stock in the form of consent requirements are generally disfavored." Restrictions on the alienability of corporate stock, however, are not at issue in the present case, and therefore *Sanders*, which centered more around such restrictions than on restraints on the alienability of leaseholds, is not apposite.

We hold, therefore, that the record discloses that the defendants breached their agreement with plaintiffs when they refused to make the rental payment which fell due on 17 September 1980, and plaintiffs are entitled as a matter of law to recover damages for such breach.

[2] Defendants argue there is a genuine issue of material fact as to the amount of damages plaintiffs are entitled to recover for any breach. This argument presents the question of how damages are to be computed when a tenant abandons the leased premises and fails to pay rent therefor, in breach of the lease, and the lease agreement contemplates, as here, that the premises will be occupied by a specific type of tenant and will be put exclusively to a specific kind of use. In computing breach of contract damages,

> the general rule is that a party who is injured by breach of contract is entitled to compensation for the injury sustained and is entitled to be placed, as near as this can be done in money, in the same position he would have occupied if the contract had been performed. Stated generally, the measure of damages for the breach of a contract is the amount which would have been received if the contract had been performed as made, which means the value of the contract, including the profits and advantages which are its direct results and fruits.

Perkins v. Langdon, 237 N.C. 159, 169-70, 74 S.E. 2d 634, 643 (1953). This formulation is especially relevant in the present case insofar as it takes account of the possibly peculiar value to plaintiffs of having the *defendants* perform their obligations under the lease agreement.

With respect to the question of mitigation of damages, the law in North Carolina is that the nonbreaching party to a lease contract has a duty to mitigate his damages upon breach of such contract. *Weinstein v. Griffin*, 241 N.C. 161, 84 S.E. 2d 549 (1954); *Monger v. Lutterloh*, 195 N.C. 274, 142 S.E. 12 (1928); J. Webster, *Real Estate Law in North Carolina* § 225 (1971). Hence, when the tenant abandons the leased premises and fails to pay rent, the landlord can recover only those damages which he could not with reasonable diligence avoid by reletting the premises. *See Monger v. Lutterloh, supra; J. Webster, supra.* If the landlord fails to use such reasonable diligence, his recovery as against the tenant will be limited to the difference between what he would have received had the lease agreement been performed, and the fair market value of what he could have received had he used reasonable diligence to mitigate. *See Monger v. Lotterloh, supra. See generally Perkins v. Langdon, supra.* If the landlord does mitigate by reletting, his recovery will consist of what he would have received had the lease been performed, less the net value of what he did receive from reletting during the relevant contract period. *See Monger v. Lutterloh, supra*, and *Eutaw Shopping Center, Inc. v. Glenn*, 39 N.C. App. 67, 249 S.E. 2d 459 (1978), *disc. rev. denied*, 296 N.C. 737, 254 S.E. 2d 177 (1979). These rules can take account of the peculiar advantages the lessor contracted for under the lease, and any quantifiable disadvantages which the lessor may suffer from having as his tenant someone other than the lessee with whom he contracted; hence, even if held to a duty to mitigate, the lessor may be made whole.

While the nonbreaching party is under duty to use reasonable diligence to minimize the loss occasioned by the injuring party's breach of contract, the burden is on the breaching party to prove that the nonbreaching party failed to exercise reasonable diligence to minimize the loss. *First National Pictures Distributing Corp. v. Seawell*, 205 N.C. 359, 171 S.E. 354 (1933). In the present case the plaintiffs supported their motion for summary judgment with evidentiary matter which disclosed that

there was no genuine issue with respect to the defendants' breach and to the amount of damages suffered by plaintiffs because of such breach. The defendants, on the other hand, offered in opposition to the motion for summary judgment no evidence with respect to plaintiffs' failure to exercise reasonable diligence to mitigate their loss. In the affidavit filed in opposition to the motion for summary judgment the defendants merely stated

> [t]he space in question has remained vacant since we moved out on May 22, 1980 and as far as I have been able to determine no one, particularly Dr. Isbey or Mr. Morris, has made any effort to rent the space since the termination of our lease on September 17, 1980.

This statement is nothing more than the conclusion of the affiant. The record is devoid of any evidence that the plaintiffs failed to exercise reasonable diligence to relet the premises after the defendants breached the contract. We hold the record discloses no genuine issue of material fact as to defendants' breach or as to the amount of loss suffered by plaintiffs as a result of such breach.

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. WILLIAM HOWARD YARBOROUGH

STATE OF NORTH CAROLINA v. ROBERT FLEMING

STATE OF NORTH CAROLINA v. DAVID HUFF

No. 819SC452

(Filed 1 December 1981)

1. Riot and Inciting to Riot § 2.1— sufficiency of the evidence

The evidence was sufficient to convict defendants of rioting where it tended to show that the defendants came into the prosecuting witness's yard carrying large sticks; that the prosecuting witness, her children and her friends

retreated into the house; that the defendants followed and tore the screen door; that a crowd of about 12 people had gathered nearby; that the defendants did further damage to her house and her car; and that the crowd eventually grew to about 150 people which was unruly and took the sheriff 35 to 45 minutes to disperse.

2. **Burglary and Unlawful Breakings § 5.5— breaking or entering—sufficiency of the evidence**

The evidence was sufficient to convict three defendants of breaking or entering where one defendant "entered" the house when he reached through the screen and threw a snake into the victim's house and when he was observed inside the house after a riotous crowd was dispersed; a second defendant broke into and entered the house when he cut through the screen with a knife and his "arm came through the door"; and the third defendant was present and participated as an aider and abettor when the first defendant reached through the screen and put the snake in the house and later when the other defendant cut the screen with a knife and put his arm through the door.

3. **Criminal Law § 43.2— admission of photographs—proper foundation**

A proper foundation for the admission of photographs of damage to a riot victim's house was made where the witnesses who took the photographs all testified about the damage to the house, and they testified that the photographs accurately and fairly portrayed the scene as they saw it following the riot.

APPEAL by defendants from *McKinnon, Judge.* Judgments entered 17 October 1980, in Superior Court, VANCE County. Heard in the Court of Appeals 19 October 1981.

These cases were consolidated for trial and for appeal. Each defendant was convicted of felonious breaking or entering and felonious rioting. Defendant William Howard Yarborough was given a two to five year active sentence. Defendants Robert Fleming and David Huff were each given five-year sentences, but four and one-half years were suspended.

Attorney General Edmisten, by Assistant Attorney General R. Darrell Hancock, for the State.

Perry, Kittrell, Blackburn & Blackburn, by Charles F. Blackburn for defendant Yarborough, George T. Blackburn, II, for defendant Fleming, and Bennett H. Perry, Jr., for defendant Huff.

BECTON, Judge.

In this case, we must determine (1) if the evidence was sufficient to support the convictions of rioting and breaking or enter-

ing and (2) if a sufficient foundation was laid for the introduction of photographs showing extensive damage to the prosecuting witness' house.

I

[1] The evidence concerning the rioting and breaking or entering charges follows. On the evening of 6 June 1980, the prosecuting witness, Pamela Neal, was in her yard with her two children and two friends. The defendants came into Ms. Neal's yard carrying sticks which were three feet long and two to four inches thick. Additionally, the defendant Huff was holding a long snake in his hand. When Huff said to one of Ms. Neal's friends, "Nigger, do you want this snake?", Ms. Neal, her children and her friends retreated into the house. The defendants followed. When they reached the porch, Huff reached through a tear in the screen door and threw the snake into the house. The snake landed at the feet of Ms. Neal's children. At that time, Ms. Neal noticed that a crowd of about twelve people had gathered nearby and had begun to call her names. Ms. Neal specifically testified:

> After this I shut the back door and locked it. I then walked through the house to the front door, and looked out and recognized William Yarborough, Robert Fleming and David Huff. William Yarborough had a knife in his hand and said "I'm going to kill you, you nigger loving bitch." *He swung the knife and cut through the screen. I jumped back and his arm came through the door.* Mr. Huff and Mr. Fleming were on the front porch at this time. The knife which Yarborough had is what is known as a hawk-billed knife. After this I stepped back and slammed the door and locked it.
>
> At the time the only persons I saw on my front porch were David Huff, William Yarborough and Robert Fleming. As soon as I slammed the door, the front windows of my house were broken out. The window in the front door was broken and there were two other windows on the front of the house. Danny Newton went out and got in my car to try to get some help. I head [sic] glass breaking and I looked out of the window and observed David Huff and Robert Fleming. They were breaking the windows in my 1971 Dodge. They had big sticks.

Danny jumped out of the car and William Yarborough chased him across the street with his knife and said "Well I reckon you're a God damn nigger lover too."

In response to telephone calls, Deputy Sheriff Cordell and Cora Champion (Ms. Neal's mother) went to Ms. Neal's house. Deputy Cordell testified that when he arrived he saw Huff and Fleming in a crowd of approximately fifty people, holding "sticks or iron pipes approximately two to four feet long." Deputy Cordell stayed at the scene for about twenty minutes and left. Cora Champion testified that when she arrived at the scene, Yarborough approached her with an open knife and threatened to kill her daughter, Ms. Neal.

Later, and after Ms. Neal and Mrs. Champion had gone by the magistrate's office, Deputy Cordell returned to Ms. Neal's residence. He testified: "When I came back at this time, I saw that more windows had been broken out at the house. Items of furniture were thrown about the yard. Stuff in the kitchen and stuff out of the refrigerator had been thrown across the floor." The crowd had grown to approximately 150. According to Deputy Cordell, Huff and Fleming made statements "to the effect that they were going to get rid of that nigger loving whore." The crowd was unruly, and Deputy Cordell radioed for assistance. It took thirty-five to forty-five minutes to disperse the crowd. Deputy Cordell then left the scene to go to talk with the Sheriff. When Deputy Cordell returned to the scene for the third time, he found another large crowd in the street in front of the Neal residence. On this occasion, it took at least an hour to get the crowd to disperse. By this time, all of the windows in the house were broken, as well as the rear and side windows in the car. There were large dents in the car. Chunks of wood had been gouged from the furniture. The curtains, sheets, and one mattress had been ripped apart.

Later that night, Ms. Neal rode by the house and saw that the front door was open and that Huff was standing inside the house. Ms. Neal estimated that $2,000.00 worth of damage had been done to her house and furnishings.

On the basis of this evidence, we summarily reject defendants' argument that there was insufficient evidence to support a conviction of rioting. G.S. 14-288.2 defines "riot" as

> a public disturbance involving an assemblage of three or more persons which by disorderly and violent conduct, or the imminent threat of disorderly and violent conduct, results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property.

See State v. Riddle, 45 N.C. App. 34, 262 S.E. 2d 322, *appeal dismissed*, 300 N.C. 201, 269 S.E. 2d 627 (1980). The evidence we have reviewed places each of the defendants at the scene of a public disturbance and connects each of them with acts of destruction of property. The three defendants were clearly involved in disorderly and violent conduct, and we affirm their conviction of rioting.

[2] Defendants' assignment of error that the evidence was insufficient to convict them of breaking or entering is also totally without merit. Huff "entered" the house when he reached through the screen and threw the snake into the house. *Compare State v. Jones*, 272 N.C. 108, 157 S.E. 2d 610 (1967) (breaking of store window held sufficient to constitute a breaking or entering). Huff also broke into or entered the house after the crowd was dispersed. Ms. Neal observed him inside the house as she drove by. Yarborough also broke into and entered the house when he cut through the screen with a knife and his "arm came through the door." Fleming was present and participated as an aider and abettor when Huff reached through the screen and put the snake in the house and later when Yarborough cut the screen with a knife and put his arm through the door. *See State v. Robinette*, 33 N.C. App. 42, 234 S.E. 2d 28 (1977) *and State v. Curry*, 25 N.C. App. 101, 212 S.E. 2d 509 (1975). With regard to the intent element of the felonious breaking or entering offense, Yarborough stated, "I'm gonna kill you, you nigger loving bitch," at the time he swung the knife at Ms. Neal. This is sufficient to show an intent to commit the felony of assault with a deadly weapon with intent to kill. The evidence shows that the defendants either feloniously broke into or entered Ms. Neal's house or aided and abetted each other in the felonious breaking or entering of Ms. Neal's house. We, therefore, affirm the breaking or entering convictions.

II

[3] The defendants also contend that they are entitled to a new trial because the court erroneously admitted photographs showing the damage to Ms. Neal's house. Defendants contend that no proper foundation was laid for the admissibility of the photographs since no witness could state what, if any, damage each defendant did. We find no error in this assignment. Ms. Neal, Deputy Cordell, and Deputy Jerry Prather, who took the photographs, all testified about the damage to the house. They testified that the photographs accurately and fairly portrayed the scene as they saw it following the riot. We find that the photographs were introduced after a proper foundation had been laid.

For the reasons stated above, the judgments below should be affirmed. We find

No error.

Chief Judge MORRIS and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. JAMES LLOYD TYNDALL

No. 8110SC602

(Filed 1 December 1981)

1. Narcotics § 1.3— elements of trafficking in cocaine

In order to constitute the offense of "trafficking in cocaine," G.S. 90-95(h)(3)(a) requires the sale, manufacture, deliverance, transportation or possession of a mixture of 28 grams or more of a substance containing cocaine and does not require that the mixture contain 28 grams or more of cocaine. Therefore, defendant could be convicted of trafficking in cocaine where the evidence tended to show that defendant sold an undercover agent a powdery mixture weighing 37.1 grams and that 5.565 grams of that mixture were cocaine.

2. Narcotics § 2— trafficking in cocaine—no fatal variance between indictment and proof

There was no fatal variance between an indictment charging defendant with feloniously selling 28 grams or more but less than 200 grams of the controlled substance cocaine to a named person on a particular date in violation of G.S. 90-95(h)(3)(a) and proof that defendant sold a powdery mixture weighing 37.1 grams but containing only 5.565 grams of cocaine.

3. Criminal Law §§ 23, 91— rejection of plea bargain by judge—right to continuance

Where defendant and the State entered into a plea bargain arrangement on the morning defendant's trial was to begin, and the trial judge informed the parties prior to jury selection that he was rejecting the plea arrangement, the trial judge erred in denying defendant's oral motion for a continuance, since G.S. 15A-1023(b) provided defendant with a continuance as a matter of right.

APPEAL by defendant from *Godwin, Judge*. Judgment entered 26 March 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 17 November 1981.

Defendant was convicted of feloniously trafficking in cocaine in violation of G.S. 90-95(h)(3)(a). Judgment imposing a prison sentence was entered.

The evidence tends to show the following. On 19 August 1980, an undercover agent of the North Carolina State Bureau of Investigation entered a grocery store in Raleigh and walked back to the meat department. He rang the bell there and asked to speak to "J. L." Defendant identified himself as that individual. The agent then asked defendant "where he would like to do the deal."

Defendant led him through the freezer area of the store and into a bathroom. The agent asked defendant what price he wanted for 1.5 ounces of cocaine. He replied, "$3,200.00." The agent then gave defendant $3,200.00 in special funds and asked defendant where the cocaine was located. Defendant told him it was wrapped in a towel, lying on the passenger floorboard of his white Cutlass.

Once defendant explained where his automobile was parked, the agent walked outside to it and removed the towel. Inside the towel was a plastic bag containing another plastic bag of white powder.

Tests were later performed which determined the total weight of the white powder to be 37.1 grams. Of the 37.1 grams, 5.565 grams were cocaine. The rest of the mixture was noncontrolled substance.

At the close of the State's evidence, the defendant moved to have the charges against him dismissed. The motion was denied.

A jury found defendant guilty of violating G.S. 90-95(h)(3)(a). He received a five-year sentence, six months of which he was to serve in prison and the remainder on probation. He was also ordered to pay a $1,000.00 fine. The trial judge later reinterpreted the sentencing provisions of G.S. 90-95(h)(3)(a) and resentenced defendant under its mandatory provisions to three to five years imprisonment and a fine of $50,000.00.

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

Dement, Redwine, Askew and Gaskins, by Johnny S. Gaskins, for defendant appellant.

VAUGHN, Judge.

[1] At issue is the construction of G.S. 90-95(h)(3)(a). Defendant contends that the provision does not prohibit the sale of a mixture unless that mixture contains 28 grams of cocaine. We disagree.

Article 5 of Chapter 90 is the North Carolina Controlled Substances Act. It was amended in 1979 to include G.S. 90-95(h). Prior to that time, G.S. 90-95(a) made it unlawful to manufacture, sell or deliver, or possess with the intent to manufacture, sell, or deliver, a controlled substance. G.S. 90-95(h) added penalties for "trafficking" in certain type controlled substances. The present defendant was indicted under G.S. 90-95(h)(3)(a). It states the following:

> "(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of coca leaves or any salts, compound, derivative, or preparation thereof which is chemically equivalent or identical to any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine) or any mixture containing any such substance, shall be guilty of a felony which felony shall be known as 'trafficking in cocaine' and if the quantity of such substances or mixture involved:
>
> a. Is 28 grams or more, but less than 200 grams, such person shall, upon conviction, be punished by imprisonment for not less than three years nor more than 10 years in the

State's prison and shall be fined not less than fifty thousand dollars ($50,000). . . ."

The evidence shows that defendant sold an undercover agent a powdery mixture weighing 37.1 grams. Of that mixture, 5.565 grams were cocaine. The remainder consisted of noncontrolled substances. Defendant argues that since he did not deliver 28 grams or more of cocaine, he cannot be guilty of violating G.S. 90-95(h)(3)(a). At most, the evidence supports a conviction for unlawful possession and sale under G.S. 90-95(a)(1).

To so conclude, defendant focuses on the statute's phrase "any mixture containing any such substance." Defendant argues that "such substance" refers to the previously stated "28 grams or more of coca leaves." He, therefore, interprets G.S. 90-95(h)(3)(a) to state that any person who delivers 28 grams or more of cocaine or any mixture *containing 28 grams or more of cocaine* is guilty of the felony of "trafficking in cocaine."

Upon close reading of the statute, we cannot agree with defendant's construction. The remainder of the subsection quoted by defendant provides that "if the quantity of such substances *or mixture* involved is 28 grams or more . . ., such person shall be punished by imprisonment. . . ." (Emphasis added). It appears, therefore, that the quantity of the mixture containing cocaine may be sufficient in itself to constitute a violation of G.S. 90-95 (h)(3)(a).

Defendant persuasively argues that such a construction creates anomalous results. If the amount of cocaine in the mixture is not determinative of a violation of G.S. 90-95(h)(3)(a), then the person who sells 2 grams of cocaine in a mixture of more than 28 grams of noncontrolled substances will receive a harsher penalty than the person who sells 28 grams of pure cocaine and therefore violates the lesser offense of G.S. 90-95(a)(1). The penalty would seem to increase not because the individual sold a greater quantity of cocaine but because he sold a greater amount of a noncontrolled substance.

Defendant, however, overlooks the purpose behind G.S. 90-95 (h)(3)(a) of deterring "trafficking" in controlled substances. Our legislature has determined that certain amounts of controlled substances and certain amounts of mixtures containing controlled

substances indicate an intent to distribute on a large scale. Large scale distribution increases the number of people potentially harmed by use of drugs. The penalties for sales of such amounts, therefore, are harsher than those under G.S. 90-95(a)(1).

We conclude there was sufficient evidence of a violation of G.S. 90-95(h)(3)(a) to charge the jury on such an offense. The mixture defendant sold contained cocaine and weighed more than 28 grams but less than 200 grams. Defendant's motion to dismiss was, therefore, properly overruled. We also conclude the judge properly instructed the jury as to the elements of "trafficking in cocaine":

> "The Court instructs you that if you find from the evidence and beyond a reasonable doubt that the white powdery substance weighed more than 28 grams, to wit, 37.1 grams, and that it contained cocaine, and that the defendant . . . sold it . . . for $3,200.00; then you would return a verdict of guilty as charged.
>
> You are not to concern yourselves with whether the 37.1 grams of white powdery substance contained anything more than cocaine, the amount of pure cocaine, which according to the testimony of the chemist was only 15% of the total of 37.1. . . ."

Because the defendant was properly convicted by the jury of the offense of trafficking in cocaine under the court's instructions, the later sentence imposed was also without error.

[2] Defendant finally raises the question of a variance between the indictment against him and the proof offered. He states that the indictment charged him with feloniously selling 28 grams or more, but less than 200 grams, of the controlled substance cocaine in violation of G.S. 90-95(h)(3)(a). The evidence, however, is that defendant sold a mixture weighing 28 grams or more, only 5.565 grams of which were cocaine.

A fatal variance between the allegations of the indictment and the proof is properly raised by a motion to dismiss. *State v. Blackburn*, 34 N.C. App. 683, 239 S.E. 2d 626 (1977), *cert. denied*, 294 N.C. 442, 241 S.E. 2d 522 (1978). Not every variance, however, is sufficient to require a motion to dismiss. *State v. Furr*, 292 N.C.

711, 235 S.E. 2d 193, *cert. denied*, 434 U.S. 924, 98 S.Ct. 402, 54 L.Ed. 2d 281 (1977).

The present indictment alleged the particular subsection of G.S. 90-95 upon which the State relied. It alleged the date of the sale and the purchaser. Although the indictment stated defendant sold 28 grams of cocaine rather than 28 grams of a mixture containing cocaine, defendant cannot claim that the variance hampered his preparation of an adequate defense. *See generally United States v. Holt*, 529 F. 2d 981 (4th Cir. 1975); *State v. Bailey*, 49 N.C. App. 377, 271 S.E. 2d 752 (1980), *cert. denied*, 301 N.C. 884, 276 S.E. 2d 288 (1981). At trial, he strongly argued his present contention that G.S. 90-95(h)(3)(a) does not cover the sale of a mixture containing less than 28 grams of cocaine. We hold that in this case, the variance was not fatal.

[3] Notwithstanding the foregoing, a violation of G.S. 15A-1023(b) makes it necessary that there be a new trial. That provision, amended in 1977, reads as follows:

> "(b) Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly. If the judge rejects the arrangement, he must so inform the parties, refuse to accept the defendant's plea of guilty or no contest, and advise the defendant personally that neither the State nor the defendant is bound by the rejected arrangement. The judge must advise the parties of the reasons he rejected the arrangement and afford them an opportunity to modify the arrangement accordingly. Upon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court. A decision by the judge disapproving a plea arrangement is not subject to appeal."

Prior to the amendment, a defendant in North Carolina had the right to a continuance only if the judge, at the time of sentencing, determined to impose a sentence other than the one provided for in the negotiated plea arrangement. The defendant did not have a continuance as a matter of right if the judge rejected the negotiated plea arrangement prior to trial. *State v. Williams*, 291 N.C. 442, 230 S.E. 2d 515 (1976). By adding the fourth

sentence of G.S. 15A-1023(b), the legislature has clearly granted to the defendant such an absolute right upon rejection of a proposed plea agreement at arraignment.

The defendant and State in this action entered into a plea bargain arrangement on the morning defendant's trial was to begin. Both parties have stipulated on appeal that prior to jury selection, the trial judge informed the parties he was rejecting the plea arrangement. Defendant's attorney made an oral motion for a continuance, but it was denied.

G.S. 15A-1023(b) provided defendant with a continuance as a matter of right. The court, therefore, committed prejudicial error in denying his motion for which defendant is entitled to a new trial.

New trial.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA v. SHERRY CONARD

No. 8129SC589

(Filed 1 December 1981)

1. **Criminal Law § 75.13— statement to magistrate—no Miranda warnings—admission proper**

Statements by defendant to a county magistrate were properly admissible in the absence of Miranda warnings as defendant specifically asked to talk with the magistrate, the magistrate was not engaged in law enforcement, the magistrate was not acting as a law enforcement officer at the time she talked with defendant, and where the court's finding that the confession was voluntarily and understandingly made was supported by the evidence.

2. **Criminal Law § 16.1— felony murder—jurisdiction of superior court**

A fifteen-year-old defendant's case was properly transferred to superior court for trial as mandated by N.C. Gen. Stat. § 7A-608 where there was sufficient evidence for the trial judge to find that the defendant participated in felonious larceny, from which a felony murder resulted.

3. **Criminal Law § 138; Robbery § 6.1— sentence within statutory limits—armed robbery**

Where defendant was sentenced to imprisonment for 30 years minimum and 30 years maximum for armed robbery and to a sentence of 30 years

minimum and 30 years maximum for murder, the trial court rendered sentences which fell within the appropriate statutory limits and the record indicated no abuse of discretion.

APPEAL by defendant from *Howell, Judge.* Judgment entered 22 January 1981 in Superior Court, POLK County. Heard in the Court of Appeals 16 November 1981.

On 15 October 1980, a juvenile petition was filed in Polk County District Court against the fifteen year old defendant, alleging her to be a delinquent child for having committed murder. Another juvenile petition was filed on 17 October 1980 alleging that defendant was delinquent for having committed armed robbery. A probable cause hearing was held on these petitions at which time the State amended the first petition to allege that the defendant had committed felony murder. The District Court found probable cause as to the murder and armed robbery and transferred the cases to Superior Court. The defendant was found guilty of murder in the second degree and armed robbery in a jury trial. From a sentence of imprisonment for 30 years minimum and 30 years maximum for the armed robbery conviction, and a sentence of 30 years minimum and 30 years maximum on the murder conviction, the sentences to run concurrently, defendant appealed.

The State's evidence tended to show that on 13 October 1980, the defendant asked her nineteen year old friend Collene Wright to help her "roll this guy." The defendant was going to try to get the man's pants down to where she could get his billfold and kick it out the door and wanted Wright to get it and make some excuse for the defendant to leave. They met the man, Bill Burnette, now deceased, and rode with him in his truck into the woods where they began drinking beer and taking speed and quaaludes. Burnette asked the two girls to help him sell some drugs, and the three of them rode around trying to sell speed.

Burnette and the two girls went to an abandoned house at Holbert's Cove to drink beer. As Burnette and the defendant were walking toward the house, Wright got a gun out of the dash of the truck, a gun that Burnette had showed the girls earlier that day. At some point the defendant had told Wright that "we'd have to kill him to get his money." They went inside and drank beer and on the way out, Wright shot Burnette. After Burnette

fell, the defendant got his money out of his pockets. The defendant did not present any evidence.

Attorney General Edmisten by Assistant Attorney General Harry H. Harkins, Jr., for the State.

Lee Atkins for the defendant-appellant.

MARTIN (Robert M.), Judge.

[1] The defendant first assigns as error the admission into evidence of statements made by defendant to Hazel Wiggins, a Polk County Magistrate. The defendant asked to speak with Mrs. Wiggins, whom defendant knew well because Mrs. Wiggins had worked with the defendant in the past as a juvenile officer. Mrs. Wiggins testified that the defendant told her that "you've always tried to help me and I want you to know the truth about the whole thing." The defendant alleges that her statement to Mrs. Wiggins is not admissible because the requirements of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), were not met.

Miranda warnings are only required when an accused is subjected to custodial interrogation. *State v. Fletcher* and *State v. St. Arnold*, 279 N.C. 85, 181 S.E. 2d 405 (1971). Custodial interrogation is a questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom. *State v. Thomas*, 284 N.C. 212, 200 S.E. 2d 3 (1973). In this case the defendant was in custody. The trial court, however, concluded that Mrs. Wiggins "was not an employee of the Polk County Sheriff's Department or any law enforcement agency of the State of North Carolina, but was a Magistrate . . . and did not interrogate as a Police Officer or Agent or Representative of any Law Enforcement Agency . . ." We agree with the trial court.

In *State v. Johnson*, 29 N.C. App. 141, 223 S.E. 2d 400, *disc. rev. denied*, 290 N.C. 310, 225 S.E. 2d 831 (1976), this Court refused to exclude inculpatory statements made by a defendant in custody to a radio dispatcher employed by the police department. The Court concluded that the dispatcher "was not a sworn police officer and did not have the power of arrest; . . . did not make criminal investigations, did not interview witnesses or defendants and was not employed to take statements from anyone . . . was

not in any way acting as a police officer, and, in fact, was not a law enforcement officer, and that even though defendant was in custody her talking with him was not a police interrogation." Id. at 143, 223 S.E. 2d 402.

The Johnson case controls the case at bar. The only difference is that in the present case Mrs. Wiggins was a judicial official; while in *Johnson* the witness was a civilian employee of the police department. Neither woman was engaged in law enforcement, although both worked closely with law enforcement officials and both worked in the building where the law enforcement agencies were located. Neither witness was acting as a law enforcement officer at the time that she talked with the defendant. Further, in the present case the defendant specifically asked to talk with Mrs. Wiggins, while in *Johnson* the dispatcher initiated the conversation. The admission of Mrs. Wiggins' testimony was proper in view of the findings of fact and conclusions of law made by the trial judge.

The defendant next contends that her statement to Mrs. Wiggins was not made voluntarily as required by *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975). "In determining whether' a minor's in-custody confession was voluntarily and understandingly made the judge will consider not only his age but his intelligence, education, experience, the fact that he was in custody, and any other factor bearing upon the question. In other words, 'the "totality of circumstances" rule for admission of out-of-court confessions applies to the confessions of minors as well as adults.' " (Citation omitted.) *State v. Lynch*, 279 N.C. 1, 13, 181 S.E. 2d 561, 568-69 (1971). The trial court's finding that a confession was voluntarily and understandingly made is conclusive on appeal if there is evidence in the record to support it. *State v. Cooper, supra; State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970).

In this instance the trial court found that at the time the defendant made the statement in question, she was coherent, rational and not under the influence of drugs or alcohol. The court concluded as follows:

> [T]hat [the] statement made by defendant to the extent that it implicates her in any crime was made freely and voluntarily and was not the result of coercion, inducement or any other factor that would constitute the statement involuntary,

as defined by applicable law and that the Court concludes that the above-mentioned statements are true notwithstanding the youth and immaturity of the defendant, this all being taken into account by the Court in making these conclusions.

The testimony of Mrs. Wiggins and of Mary Jane Miller, a matron in the jail, supports the trial court's findings that the defendant made her statement voluntarily. Thus defendant's assignment of error is without merit and is overruled.

[2] In her third assignment of error the defendant argues that the trial court should have granted the defendant's motion to set aside the verdict for lack of jurisdiction of the superior court, because there was insufficient evidence produced at the probable cause hearing to support the transfer of the case from district court to superior court pursuant to N.C. Gen. Stat. § 7A-608. We disagree.

Considering the written statements introduced at the preliminary hearing and the stipulations of counsel, there was sufficient evidence for the trial judge to find that the defendant participated in felonious larceny, from which a felony murder resulted. The trial judge properly transferred the offense to superior court for trial as mandated by N.C. Gen. Stat. § 7A-608.

[3] In the defendant's final assignment of error, she contends that the sentences imposed upon her are so disproportionate to her guilt that they violate due process of law as guaranteed by the federal and state constitutions.

Our Court has held that ". . . so long as the punishment rendered is within the maximum provided by law, an appellate court must assume that the trial judge acted fairly, reasonably and impartially in the performance of his office. *State v. Spencer*, 7 N.C. App. 282, 285, 172 S.E. 2d 280, 282, *modified and affirmed* 276 N.C. 535, 173 S.E. 2d 765 (1970). Furthermore, when the sentence imposed is ". . . within statutory limits . . . [it] cannot be considered excessive, cruel or unreasonable." *State v. Johnson*, 5 N.C. App. 469, 470, 168 S.E. 2d 709, 711 (1969). Notwithstanding the principle that such sentences are nonreviewable, appellate courts have reviewed sentences when the particular sanction imposed is clearly harsh, gross and abusive. Only when such an abuse of discretion is readily discernible will appellate courts intercede. *State v. Harris*, 27 N.C. App. 385, 219 S.E. 2d 306 (1975).

In this case the trial court rendered a sentence which falls within the appropriate statutory limit and the record indicates no abuse of discretion. Therefore, defendant's assignment of error is without merit and is overruled.

No error.

Chief Judge MORRIS and Judge HEDRICK concur.

IN THE MATTER OF FORECLOSURE OF A DEED OF TRUST EXECUTED BY WARREN HELMS AND WIFE, JONNIE T. HELMS, TO W. O. McGIBONY, TRUSTEE AND THE FEDERAL LAND BANK OF COLUMBIA, DATED JUNE 24, 1969, AND RECORDED IN BOOK A-182 PAGE 196, UNION COUNTY REGISTRY, BY C. FRANK GRIFFIN, SUBSTITUTE TRUSTEE

No. 8120SC363

(Filed 1 December 1981)

1. **Evidence § 31— best evidence rule—photocopies**

The best evidence rule was not violated by the admission of photocopies of a note and deed of trust where the mortgagors testified that the documents appeared to be photocopies of the note and deed of trust they had signed and that the photocopies of their signatures appeared to be copies of their actual signatures.

2. **Mortgages and Deeds of Trust § 25— foreclosure of deed of trust—sufficiency of evidence to support court's findings**

The evidence in a foreclosure hearing was sufficient to support findings by the trial court that respondents had executed a deed of trust, the deed of trust secured a valid debt evidenced by a note payable to a bank, there had been a default because of failure of the mortgagors to pay property taxes on the mortgaged land, and nonpayment of the taxes gave the substitute trustee the right to foreclose.

3. **Mortgages and Deeds of Trust § 25— hearing on right to foreclose—no consideration of equitable defense**

In a hearing on the right to foreclose pursuant to the power of sale in a deed of trust, the clerk or the judge on appeal may not enjoin foreclosure upon equitable grounds but may enjoin foreclosure only upon a ground stated in G.S. 45-21.16. Therefore, the trial court in such a hearing could not properly consider the mortgagors' contention that the mortgagee had waived its right to foreclose.

In re Foreclosure of Deed of Trust

APPEAL by respondents from *Freeman, Judge.* Judgment entered 11 December 1980 in Superior Court, UNION County. Heard in the Court of Appeals 17 November 1981.

Respondents appeal from an order authorizing the substitute trustee to proceed with foreclosure of their real estate.

On 18 November 1980, there was a hearing before the Clerk of Superior Court of Union County to determine the substitute trustee's right to foreclose on property owned by respondents. From an order authorizing such sale, respondents appealed to the Superior Court under G.S. 45-21.16.

At the hearing *de novo* held 8 December 1980, the following evidence was presented. On 24 June 1969, Warren and Jonnie T. Helms executed a deed of trust securing a debt of $67,500.00. The Federal Land Bank of Columbia is holder of both the note and the deed of trust. According to the terms of the deed of trust, the mortgagors are to pay, when due, all taxes assessed against the land. Upon failure to comply with this covenant, The Federal Land Bank retains the options of paying the unpaid taxes and seeking immediate repayment or declaring all amounts secured under the instrument immediately due.

On 18 March 1980, The Federal Land Bank gave respondents written notice that Union County real property taxes for 1978 and 1979, as well as Cabarrus County real property taxes for 1979, were past due and had become liens on the real estate. The bank stated that failure of the mortgagors to pay the taxes by 30 April 1980 would result in its payment of the taxes and charges assessed to the respondents' account. When respondents had not paid the taxes by 15 May 1980, The Federal Land Bank paid them.

On 18 June 1980, The Federal Land Bank unsuccessfully sought reimbursement from respondents. On 1 July 1980, it mailed the Helms notice that the loan was in default because of the nonpayment of delinquent taxes. In a second notice dated 21 August 1980, the bank stated its right under the deed of trust to accelerate payment. As a courtesy to respondents, however, foreclosure could be avoided by their contacting Larry Shoffner, an officer of The Federal Land Bank, and making satisfactory arrangements within fifteen days. Satisfactory financial arrangements were not made within that time.

Based on the evidence presented, the court found that Warren and Jonnie Helms had created a valid debt secured by a deed of trust; that the holder of the note was The Federal Land Bank of Columbia; that there had been a default in payment of the indebtedness; and that the Helms, the record owners of the real estate, had received proper notice of hearing before the clerk. It, therefore, ordered that the substitute trustee could proceed with foreclosure of respondents' real estate secured by the deed of trust.

Perry and Bundy, by Donald C. Perry and H. Ligon Bundy, for petitioner appellee.

Harry B. Crow, Jr., for respondent appellants.

VAUGHN, Judge.

[1] Respondent-mortgagors make several assignments of error. They first contend the trial court erred in admitting into evidence photocopies of the promissory note and deed of trust. They argue that under the "best evidence" rule, the originals should have been required. We disagree.

The rationale behind the "best evidence" rule is that the original instrument best identifies its own contents. 2 Stansbury, N.C. Evidence § 190 (Brandis rev. 1973). When the opposing party, however, admits that the documents shown him are correct copies of the original, the original need not be produced. *Beard v. R.R.*, 143 N.C. 137, 55 S.E. 505 (1906); *Cleary v. Cleary*, 37 N.C. App. 272, 276, 245 S.E. 2d 824, 827 (1978).

In the present cause, both mortgagors examined the documents in question. They testified that the documents appeared to be photocopies of the note and deed of trust they had signed and that the photocopies of their signatures appeared to be copies of their actual signatures. The only question the respondents raised was that Mr. Helms did not recall the presence of an eight percent interest rate in the note. The amount outstanding of a debt, however, is not relevant to a foreclosing proceeding. *In re Foreclosure of Burgess*, 47 N.C. App. 599, 603, 267 S.E. 2d 915, 918 (1980). We conclude that the photocopies of the note and deed of trust were properly admitted.

[2] Respondents' next three assignments of error argue the lack of sufficient evidence to support the court's findings of fact. Since the note and deed of trust were properly admitted, however, there is ample evidence to support the court's findings that respondents had executed a deed of trust, that the deed of trust secured a valid debt evidenced by a note payable to The Federal Land Bank of Columbia, and that there had been default in the payment of indebtedness. Because the deed of trust specified a fixed time when nonpayment of taxes became a default, the court also correctly found that nonpayment gave the substitute trustee the right to foreclose. *In re Foreclosure of Deed of Trust*, 41 N.C. App. 563, 255 S.E. 2d 260, *cert. denied*, 298 N.C. 297, 259 S.E. 2d 914 (1979). Respondents' assignments of error are overruled.

[3] Respondents' final assignment of error is that the court erred in failing to conclude that The Federal Land Bank of Columbia had waived its right to foreclosure. We hold that the court properly excluded consideration of any equitable defense raised at the hearing *de novo*.

Respondents testified that after receiving the bank's letter of 21 August 1980, they contacted Mr. Shoffner on the 25th of August. He told them they would have a few weeks to "catch up the note." Relying on the delay, respondents arranged to sell another tract of land to a third party. One week later, when Mrs. Helms called Mr. Shoffner to learn how much money they would need to reimburse the bank for the tax payment, she was told that reimbursement would not be acceptable. Foreclosure proceedings had begun. Respondents argue that if the court had made findings consistent with their testimony, it would have concluded that the bank had waived any foreclosure right it may have had.

According to G.S. 45-21.16, however, there are only four issues before the clerk at a foreclosure hearing: the existence of a valid debt of which the party seeking to foreclose is the holder, the existence of default, the trustee's right to foreclose, and the sufficiency of notice to the record owners of the hearing. The clerk's findings are appealable to the Superior Court within ten days for a hearing *de novo*, but the court's authority is likewise limited. *In re Foreclosure of Burgess, supra.* The judge has no equitable jurisdiction and cannot enjoin foreclosure upon any

ground other than the ones stated in G.S. 45-21.16. *Golf Vistas v. Mortgage Investors*, 39 N.C. App. 230, 249 S.E. 2d 815 (1978); *In re Watts*, 38 N.C. App. 90, 247 S.E. 2d 427 (1978).

Because the hearing under G.S. 45-21.16 is designed to provide a less timely and expensive procedure than foreclosure by action, it does not resolve all matters in controversy between mortgagor and mortgagee. If respondents feel that they have equitable defenses to the foreclosure, they should be asserted in an action to enjoin the foreclosure sale under G.S. 45-21.34.

The judgment of the trial court is affirmed.

Affirmed.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA v. BERNARD HAYWOOD REID

No. 8126SC397

(Filed 1 December 1981)

1. **Robbery § 4.3— armed robbery—sufficiency of evidence**

The trial court properly denied defendant's motion to dismiss the charge of armed robbery for insufficiency of the evidence where the evidence tended to show that upon the victim's refusal to allow defendant to use his car, defendant obtained a shotgun, told the victim to get out of the car, shot and beat the victim, and where the automobile was found deserted close to defendant's apartment.

2. **Robbery § 5.4— armed robbery—lesser offenses—failure to submit—proper**

The trial court properly failed to submit to the jury instructions of larceny and of unauthorized use of a motor conveyance where there was uncontroverted evidence that defendant unlawfully took the victim's automobile after shooting the victim with a sawed-off shotgun and then hit the victim with the butt of that shotgun.

APPEAL by defendant from *Griffin, Judge.* Judgment entered 25 November 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals on 13 October 1981.

The defendant was indicted on charges of armed robbery and assault with a deadly weapon with intent to kill inflicting serious

injuries. At trial the State presented evidence tending to show that during the early morning hours of 1 August 1980, Steve Fant saw the defendant on a bicycle as Fant was returning home from a party. Although Fant did not know the defendant, he stopped his car when defendant threw up his hand. After putting defendant's bicycle in the trunk of the car, the two men proceeded to Fant's apartment where they engaged in sexual relations. Afterwards defendant asked Fant if he could borrow the car which belonged to Fant's mother. Fant refused but promised to drive defendant where he needed to go.

At defendant's request, Fant drove him to Fairview Homes where defendant went into an apartment. He returned to the car with a paper bag from which he pulled a sawed-off single barrel shotgun. Pointing the shotgun at Fant, defendant told him to drive. They went to a narrow street called Hutchinson-McDonald where defendant told Fant to get out of the car. Before Fant could get out, defendant shot him in the arm. Afterwards, outside the car, the two men scuffled, and, when defendant hit him across the back of his head with the butt of the shotgun, Fant lost consciousness. Fant was hospitalized for approximately twenty-eight days for treatment of his fractured arm, multiple facial lacerations, and a fractured jaw.

Later on 1 August, the car Fant had been driving was found at the dead end of Eureka Street, near Fairview Homes.

At the close of the State's evidence, defendant's motion to dismiss on the basis that there was no evidence of an armed robbery or of an intent to kill was denied. Defendant presented no evidence. The jury returned guilty verdicts to both charges, and from a judgment sentencing defendant to not less than 10 nor more than 15 years in prison, defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney Michael Rivers Morgan, for the State.

Appellate Defender Project for North Carolina, by Appellate Defender Adam Stein and Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant appellant.

HEDRICK, Judge.

[1] Defendant first contends that the trial court erred in denying his motion to dismiss. His argument, that there was insufficient

evidence of armed robbery for a rational trier of fact to find guilt beyond a reasonable doubt, is twofold. He argues, first, that there was not sufficient evidence that the defendant took the automobile by use of a deadly weapon and, second, that there was insufficient evidence that defendant took and carried away the vehicle. We disagree.

G.S. § 14-87 sets forth the essential elements of armed robbery: (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use, or threatened use of "any firearms or other dangerous weapon, implement or means;" and (3) danger or threat to the life of the victim. *See State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978). While defendant concedes that the evidence tends to show assault as well as the presence of a deadly weapon, he argues the case of *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980), for the proposition that a defendant, taking the automobile only as an afterthought once the victim has been rendered unconscious, cannot be found guilty of armed robbery. In *Powell*, defendant, after raping, strangling and stabbing the victim in her home, took her automobile, television, and carving knife. The Supreme Court held that, while there was sufficient evidence to support a charge of larceny, there was not sufficient evidence that the defendant used a dangerous weapon in taking the items to support a finding of armed robbery. The Court, construing the evidence in the light most favorable to the State, found that it indicated only that defendant took the objects as an afterthought once the victim died.

We believe that the factual situation of *Powell* is distinguishable from the factual situation before us. Here we have uncontroverted evidence that defendant asked Fant for his car, but Fant refused, offering instead to take defendant where he wanted to go. Once defendant had obtained the shotgun and was in Fant's car, he told Fant to get out. Even though the defendant eventually got out of the car and scuffled with Fant, there was sufficient circumstantial evidence from which a reasonable trier of fact could conclude that defendant intended to get rid of Fant and then to take Fant's car. For a factually similar case finding sufficient evidence of armed robbery, *see State v. Reaves*, 9 N.C. App. 315, 176 S.E. 2d 13 (1970).

Likewise, based on the same evidence, we find that there was sufficient circumstantial evidence tending to show that defendant in fact took and carried away the automobile. Moreover, there was additional evidence that the automobile was found deserted in close proximity to defendant's apartment. Defendant's motion to dismiss for insufficiency of the evidence was properly denied.

[2] We now consider defendant's contentions that the trial court erred in failing to submit to the jury instructions of larceny, a lesser included offense of armed robbery, *State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399, *appeal dismissed and cert. denied*, 402 U.S. 1006, 91 S.Ct. 2199, 29 L.Ed. 2d 428 (1971), and of unauthorized use of a motor conveyance, a lesser included offense of larceny, *State v. Ross*, 46 N.C. App. 338, 264 S.E. 2d 742 (1980). When there is conflicting evidence of the essential elements of the greater crime and there is also evidence of lesser included offenses, the trial court must instruct on the lesser included offenses whether or not there has been a specific request for such instructions. *State v. Brown*, 300 N.C. 41, 265 S.E. 2d 191 (1980). If, however, the evidence discloses no conflicting evidence relating to the essential elements of the greater crime, then it is not necessary to submit the lesser included offense or offenses. *Id.*

We have already reviewed the essential elements of the crime of armed robbery. From our reading of the record, there was uncontroverted evidence that defendant unlawfully took Fant's automobile after shooting him with a sawed-off shotgun and then hitting Fant with the butt of that shotgun, thereby endangering Fant's life. Under these circumstances, there was no conflicting evidence concerning the essential elements of armed robbery, and there was, therefore, no need to submit to the jury any lesser included offense of armed robbery.

There was, in defendant's trial,

No error.

Judges CLARK and MARTIN (Harry C.) concur.

NATIONWIDE MUTUAL INSURANCE COMPANY v. JUNIOR REX TAYLOR; SHARON LAJOY LITTLE, INDIVIDUALLY; SHARON LAJOY LITTLE, ADMINISTRATRIX OF THE ESTATE OF DIVETTE LAJOY LINEBERGER, LINDA MISHER McCLEAVE, INDIVIDUALLY; AND LINDA MISHER McCLEAVE, ADMINISTRATRIX OF THE ESTATE OF MELVIN LEE McCLEAVE

No. 8125SC163

(Filed 1 December 1981)

Insurance § 84.1 — automobile liability policy — temporary substitute automobile — vehicle owned by policyholder's wife

An automobile liability policy which includes the spouse of the policyholder as a "named insured" under the policy and excludes vehicles owned by the "named insured" from the definition of a "temporary substitute automobile" is interpreted so that "named insured" includes the policyholder's spouse only while the spouse is operating an "owned automobile" and "temporary substitute automobile" requires only that the automobile used as a substitute not be owned by the person operating it as a substitute. Therefore, an automobile owned by the wife and involved in a collision while being operated by the husband was a "temporary substitute automobile" within the meaning of the policy issued to the husband where the husband was using the automobile with the permission of the wife as a substitute for an owned automobile when the owned automobile was withdrawn from normal use because of breakdown or need of repair.

APPEAL by plaintiff from *Ferrell, Judge.* Judgment entered 14 January 1981 in Superior Court, CATAWBA County. Heard in the Court of Appeals 17 September 1981.

Plaintiff filed a complaint pursuant to the Uniform Declaratory Judgment Act, G.S. 1-253 et seq., seeking construction of provisions of a policy of automobile liability insurance. From a judgment for defendants, plaintiff appeals.

Patrick, Harper and Dickson, by Stephen M. Thomas, and Petree, Stockton, Robinson, Vaughn, Glaze and Maready, by James H. Kelly, Jr. and Michael L. Robinson, for plaintiff appellant.

Corne and Pitts, by Stanley J. Corne, for defendant appellees.

WHICHARD, Judge.

The sole question is whether the trial court correctly concluded that the 1971 Chevrolet Monte Carlo owned by Linda Mc-

Cleave and involved in a collision while being operated by her husband, Melvin McCleave, was a "temporary substitute automobile" as defined in a policy of liability insurance issued by plaintiff to Melvin McCleave, so as to afford excess coverage of the collision under that policy. We hold that it did.

Plaintiff entered a contract of automobile liability insurance with Melvin McCleave which covered a 1963 Ford van and a 1970 Chevrolet Malibu. The policy afforded coverage to Melvin McCleave as "named insured" while he was driving an "owned automobile." The policy definition of "owned automobile" included the vehicles described in the policy and a "temporary substitute automobile," defined as "any automobile . . ., not owned by the Named Insured, while temporarily used with the permission of the owner as a substitute for the owned automobile . . . when withdrawn from normal use because of breakdown, repair, servicing, loss or destruction." The policy contained the following provision in its liability coverage section: "The following are Insureds under [the liability section]: (a) with respect to the owned automobile, (1) the Named Insured and any resident of the same household . . . ." The definition of "named insured" was "the individual named in the declarations and also includes his spouse, if a resident of the same household."

On 14 June 1977, while the policy was in effect, Melvin McCleave was killed in a collision which occurred while he was driving his wife's 1971 Chevrolet Monte Carlo. One passenger in the Monte Carlo was killed, and another was seriously injured. Suits brought by and on behalf of the passengers against Linda McCleave individually and as administratrix of her husband's estate were reduced to judgment. The limits of Linda McCleave's automobile liability insurance policy were paid but did not satisfy the judgments. Plaintiff sought determination whether Melvin McCleave's policy afforded excess coverage.

The court found as a fact that on the night of the accident Melvin McCleave's 1970 Chevrolet Malibu "had been withdrawn from normal use because of its breakdown and need of repairs and that because of that condition of the 1970 Chevrolet Malibu Melvin McCleave was driving the 1971 Chevrolet Monte Carlo owned by his wife and with her permission." The evidence sup-

ports this finding, and it is therefore conclusive on appeal. *See, e.g., Insurance Co. v. Allison*, 51 N.C. App. 654, 277 S.E. 2d 473 (1981). The finding establishes that the requirements of the definition of "temporary substitute automobile" that the vehicle (1) was used as a substitute for the owned automobile when the owned automobile was withdrawn from normal use because of breakdown or need of repair, and (2) was used with the permission of its owner, have been satisfied. On the basis of this finding the court concluded as a matter of law that the 1971 Chevrolet Monte Carlo was at the time of the collision a "temporary substitute automobile" within the meaning of that phrase as used in the policy.

Plaintiff argues that Linda McCleave's vehicle could not constitute a "temporary substitute automobile" under her husband's policy because Linda McCleave was a "named insured" under the policy and the definition of "temporary substitute automobile" excluded vehicles owned by the "named insured." We disagree with plaintiff's interpretation of those provisions of its policy.

> The heart of a contract is the intention of the parties. The intention of the parties must be determined from the language of the contract, the purposes of the contract, the subject matter and the situation of the parties at the time the contract is executed. . . . Any ambiguity in a written contract is construed against the party who prepared the writing.

Adder v. Holman & Moody, Inc., 288 N.C. 484, 492, 219 S.E. 2d 190, 196 (1975).

> [A] contract of insurance should be given the construction which a reasonable person in the position of the insured would have understood it to mean and, if the language used in the policy is reasonably susceptible of different constructions, it must be given the construction most favorable to the insured, since the company prepared the policy and chose the language.

Grant v. Insurance Co., 295 N.C. 39, 43, 243 S.E. 2d 894, 897 (1978). Applying these principles to plaintiff's argument, we conclude that a reasonable person in the position of the insured

would have understood that the purpose of including the policyholder's spouse in the definition of "named insured" was to broaden coverage under certain circumstances by extending it to one other than the policyholder. We do not believe the parties intended, by a provision evidently designed to extend coverage to one other than the policyholder, to reduce significantly the coverage afforded the policyholder himself. Such reduction would be the effect of the interpretation for which plaintiff contends, and we thus reject the contention.

As we interpret the policy, the term "named insured" refers to the person designated as the policyholder when that person is driving an "owned automobile." "Named insured" includes the policyholder's spouse only while the spouse is operating an "owned automobile." Thus, the definition of "temporary substitute automobile" requires that the automobile used as a substitute not be owned by the person operating it as a substitute. The policy protects the policyholder while operating, as a temporary substitute for the described vehicle while the described vehicle is withdrawn from use for one of the specified reasons, any vehicle not owned by him. The policy also protects the spouse of the policyholder while operating, as a temporary substitute for the described vehicle, a vehicle not owned by said spouse.

Under this interpretation the 1971 Monte Carlo owned by Linda McCleave and operated by Melvin McCleave was, at the time of the collision, "not owned by the Named Insured" within the intent and meaning of that phrase as used in the policy. As noted above, the other requirements for constituting a vehicle a "temporary substitute automobile"—*viz.*, that it was used as a substitute for the "owned automobile" when the "owned automobile" was withdrawn for repairs, and that it was used with the permission of the owner, have been satisfied. We thus hold that the insurance contract between plaintiff and Melvin McCleave provided excess coverage for the collision. At least two other jurisdictions have reached the same result on similar facts. *See Caldwell v. Hartford Accident and Indemnity Co.*, 160 So. 2d 209 (Miss. 1964); *Baxley v. State Farm Mutual Automobile Liability Insurance Co.*, 241 S.C. 332, 128 S.E. 2d 165 (1962).

The judgment is

Affirmed.

Judges HEDRICK and HILL concur.

STATE OF NORTH CAROLINA EX REL HOWARD N. LEE, SECRETARY, DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT v. JOE WILLIAMS

No. 8024SC662

(Filed 1 December 1981)

1. **Appeal and Error § 40— failure to include judgment in record**

Appeal is subject to dismissal because of appellant's failure to include the complete judgment appealed from in the record on appeal. Appellate Rule 9(b) (1) (viii).

2. **Administrative Law § 5— action to recover civil penalty—no judicial review of administrative decision**

Where defendant failed to seek judicial review of a final agency decision denying his request for remission of a civil penalty for violations of the Sedimentation Pollution Control Act and failed to pay the penalty, and the attorney general, on behalf of the agency, instituted a civil action in Watauga County to recover the civil penalty and compel compliance with the Act, the trial court erred in granting the attorney general's motion in limine to limit the issue in the civil action to such judicial review of the agency decision which denied remission as that to which defendant would have been entitled had he appealed the decision pursuant to G.S. 150A-43, since (1) defendant waived his right to judicial review of the agency decision by failing to perfect an appeal therefrom and judicial review of the decision in a suit for enforcement of the decision was improper, and (2) Watauga County Superior Court lacked subject matter jurisdiction to review the agency decision because Wake County Superior Court had exclusive jurisdiction to review the final decision of a State agency under G.S. 150A-45.

APPEAL by defendant from *Ervin, Judge.* Judgment entered 5 February 1980 in Superior Court, WATAUGA County. Heard in the Court of Appeals 4 February 1981.

Defendant appeals from a judgment which ordered him to pay a civil penalty for alleged violations of the Sedimentation Pollution Control Act of 1973, G.S. 113A-50 et seq. [hereinafter the Act], and to bring his property into compliance with the Act.

Attorney General Edmisten, by Assistant Attorney General James L. Stuart, for plaintiff appellee.

Robert S. Cahoon for defendant appellant.

WHICHARD, Judge.

[1] The record filed on appeal does not contain the complete judgment. By failing to include the judgment appealed from in the record on appeal, the defendant has violated Rule 9(b)(1)(viii) of the North Carolina Rules of Appellate Procedure, and his appeal is subject to dismissal. *Craven v. Dimmette*, 8 N.C. App. 75, 173 S.E. 2d 647 (1970); *see Abernethy v. Trust Co.*, 211 N.C. 450, 190 S.E. 735 (1937). Pursuant to Rule 9(b)(6) of the North Carolina Rules of Appellate Procedure, the court on its own initiative has obtained a certified copy of the judgment from the Clerk of Superior Court of Watauga County. The court, therefore, will entertain the appeal.

[2] The case comes to this court after a lengthy and complex series of administrative proceedings. During 1976 representatives of the North Carolina Department of Natural and Economic Resources (now the Department of Natural Resources and Community Development) inspected defendant's property for possible violations of the Act. The Department notified defendant that he was in violation of the Act, and that if corrective measures were not begun within ten days, the Department would assess a civil penalty against him. Corrective measures were not taken, and the Department notified defendant of assessment of a civil penalty in the amount of $75.00 per day until he brought the property into compliance with the Act.

This notification ordered defendant, within 60 days of receipt, (1) to submit payment of the accrued assessment, (2) to submit a written request for remission or mitigation of the penalty with a statement of factual issues in dispute, or (3) to submit a request for a formal adjudicatory hearing with a statement of issues to be litigated. Within apt time defendant requested remission or mitigation. The agency held a hearing in 1977 on defendant's remission or mitigation request which inquired into the reasonableness of the penalty imposed. After the hearing the Secretary notified defendant that the Department had denied his

request for remission, but had reduced the penalty to $25.00 per day as of the hearing date.

Defendant failed to seek judicial review of the final agency decision on his remission request and failed to pay the penalty. Pursuant to G.S. 113A-64(a)(2), the Secretary referred the matter to the Attorney General for institution of a civil action to recover the civil penalty and compel compliance with the Act. The Attorney General instituted this action in Watauga County Superior Court.

The plaintiff filed a motion in limine to limit the issue in the civil action to such judicial review of the agency decision which denied remission as that to which defendant would have been entitled had he appealed the decision pursuant to G.S. 150A-43. By its motion the state sought to preclude defendant from raising such factual issues as he might have raised in an adjudicatory hearing on the imposition of civil penalties, because defendant waived his right to an adjudicatory hearing by seeking remission or mitigation. The court granted the motion and remanded the case for a new remission hearing because it found the record of the first hearing insufficient to permit judicial review.

The agency conducted the hearing after which the Secretary remitted the $25.00 per day penalty, ordered payment of the penalty which had accrued prior to the initial hearing, and ordered defendant to take certain corrective measures in accordance with specified plans. Defendant did not seek judicial review of that decision. The Watauga County Superior Court then entered a judgment wherein it made findings of fact and conclusions of law "pursuant to G.S. 150A-51." The court affirmed the decision of the Secretary and also ordered defendant to perform certain actions which the Secretary had not ordered.

The plaintiff, by its motion in limine, attempted to convert this civil action for the enforcement of a penalty into one for judicial review of a final agency decision. The court erred in granting plaintiff's motion.

G.S. 150A-43 afforded defendant a right to judicial review of the Secretary's 1977 decision denying his remission request. Defendant waived his right to such judicial review by failing to perfect this appeal pursuant to the procedure set forth in G.S.

150A-45. "When the statute under which an administrative board has acted provides an orderly procedure for appeal to the superior court for review of the [agency's] action, this procedure is the exclusive means for obtaining such judicial review." *Snow v. Board of Architecture*, 273 N.C. 559, 570-571, 160 S.E. 2d 719, 727 (1968). Judicial review of the Secretary's decision in the suit for enforcement of that decision, therefore, was improper.

Moreover, G.S. 150A-45 confers exclusive jurisdiction for judicial review of final agency decisions on the Superior Court of Wake County when, as here, a state rather than a local agency made the initial determination. Subject matter jurisdiction derives from the law which organizes a tribunal and cannot be conferred on a court by action of the parties nor assumed by a court except as provided by that law. *In re Peoples*, 296 N.C. 109, 250 S.E. 2d 890 (1978) *cert. denied* 442 U.S. 929 (1979). Because exclusive jurisdiction was vested in the Superior Court of Wake County, the Watauga County Superior Court lacked subject matter jurisdiction to review the Secretary's 1977 decision. We therefore vacate the judgment and remand the case to the trial court.

The Attorney General, on behalf of the Department, filed this action for the collection of civil penalties, G.S. 113A-64(a)(2), and for the imposition of an order enforcing compliance with the Act and an injunction, G.S. 113A-66. The action is a civil action, not one for review of a final agency decision. Defendant requested a jury trial in his answer and is therefore entitled to jury trial on all factual issues upon remand.

Vacated and remanded.

Judges WEBB and MARTIN (Harry C.) concur.

JOY RUSSELL v. PATRICK TENORE

No. 8126SC339

(Filed 1 December 1981)

Constitutional Law § 24.7; Process § 9.1— no in personam jurisdiction—insufficient connection between transaction and State

Where plaintiff, a resident of North Carolina, sued defendant, a resident of California, for breach of a promise by defendant to pay plaintiff her portion of the purchase price for a restaurant, located in Chicago, and where the record contained no evidence that plaintiff was a North Carolina resident at the time the contract between her and defendant was executed or that any correspondence from defendant was directed to her in North Carolina, the evidence was insufficient to establish the requisite substantial connection between the transaction and this State to confer in personam jurisdiction. G.S. 1-75.4(5)(a).

APPEAL by plaintiff from *Allen, Judge.* Judgment entered 9 February 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 November 1981.

Plaintiff's complaint alleged that she was a citizen and resident of Charlotte, North Carolina, and that defendant was a citizen and resident of Irvine, California. Plaintiff and defendant were joint owners of a restaurant in Chicago, Illinois. The restaurant was sold to a third party, and defendant had promised to pay plaintiff her share (4/10) of the sales price, plus money she had advanced for operation of the restaurant. Defendant received a check for the restaurant made payable to plaintiff and himself, forged plaintiff's endorsement, cashed it and retained the full amount. Defendant refused plaintiff's demands that he pay her the money owed to her. Plaintiff prayed for compensatory and punitive damages.

Defendant was served by publication. He made a special appearance to move that the complaint be dismissed for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. From the granting of that motion, plaintiff appeals.

Plumides, Plumides and Shuster by Michael G. Plumides for plaintiff appellant.

George Daly for defendant appellee.

CLARK, Judge.

The sole question before this Court is whether the trial court acquired personal jurisdiction over defendant. A state court may assert jurisdiction over a nonresident defendant and bind him by its judgment only if the following elements exist: (1) a statutory ground for the exercise of jurisdiction over his person; (2) such minimum contacts with the state that it is fair to require him to defend within the state; and (3) proper service of process. *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977); *Globe, Inc. v. Spellman*, 45 N.C. App. 618, 263 S.E. 2d 859, *disc. review denied*, 300 N.C. 373, 267 S.E. 2d 677 (1980). The manner of service of process is not disputed herein.

With respect to statutory authorization, G.S. 1-75.4(5)(a) provides that a state court has jurisdiction in any action which

> "Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; . . ."

It is well settled that a single contract can provide the basis of the exercise of jurisdiction over a nonresident defendant. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 2d 223 (1957). If the contract is to be actually performed in North Carolina and has a substantial connection with this State, jurisdiction will lie. *Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E. 2d 476 (1980). Therefore, a promise by defendant to pay to plaintiff in North Carolina her portion of the purchase price for the restaurant, plus money she had advanced for its operation, could be sufficient to bring defendant within the provisions of G.S. 1-75.4(5)(a).

In her verified complaint plaintiff alleges that at the time of its filing, she was a citizen and resident of North Carolina. Other than this allegation, the record is devoid of any connection between North Carolina and the promise by defendant to pay the sale proceeds to plaintiff. Plaintiff relies upon the letter of 8 August 1977 from defendant to plaintiff in which he described the upcoming sale of the restaurant and told her he would send her the monies from the sale. However, the record shows no inside address on the letter nor is there an envelope indicating a North

Carolina address for plaintiff. Attached to this letter was a special power of attorney which defendant asked plaintiff to execute to enable him to handle the real estate closing. Plaintiff contends in her brief that defendant changed the state on the power of attorney from Illinois to North Carolina and then initialed the change. However, there is no evidence in the record that defendant actually made this change or that he signed his initials beside the correction. Therefore, the record contains no evidence whatsoever that plaintiff was a North Carolina resident at the time the contract between her and defendant was executed or that any correspondence from defendant was directed to her in North Carolina. We find the evidence insufficient to establish the requisite substantial connection between the transaction and this State.

We hold, therefore, that the jurisdictional statutory grounds are not present here so as to enable the courts of this State to exercise jurisdiction over the person of defendant.

The order of 9 February 1981 dismissing plaintiff's complaint for lack of personal jurisdiction is

Affirmed.

Judges HEDRICK and MARTIN (Harry C.) concur.

FLEXOLITE ELECTRICAL, LTD. v. THOMAS D. GILLIAM, JR. AND THOMAS D. GILLIAM COMPANY

No. 8122SC374

(Filed 1 December 1981)

Limitation of Actions § 16.1; Pleadings § 38.3— judgment on pleadings based on statute of limitations

The trial court erred in entering judgment on the pleadings for defendants on the ground that it appeared on the face of the complaint that plaintiff's action for breach of contract was barred by the statute of limitations where plaintiff alleged that it advanced money to defendants and defendants agreed to issue stock in defendant corporation to plaintiff, and that defendants breached the contract by failing to issue the stock and failing to return the money to plaintiff, but it did not appear on the face of the complaint when the

breach occurred, since the statute of limitations governing actions based on express contracts does not begin to run until the alleged breach occurs and the cause of actions accrues.

APPEAL by plaintiff from *Kivett, Judge.* Judgment entered 4 March 1981 in Superior Court, IREDELL County. Heard in the Court of Appeals 18 November 1981.

Plaintiff appeals from the dismissal of its claim as being time barred. In its complaint, plaintiff alleged the following facts:

> 3. Plaintiff advanced to Defendant, Thomas D. Gilliam Company, the sums of $5,000 on January 11, 1977; Plaintiff advanced to Defendant, Thomas D. Gilliam, Jr. the sums of $5,000 on March 11, 1977, $5,000 on April 29, 1977, and $5,000 on May 12, 1977, said sums initially advanced to Defendant, Thomas D. Gilliam, Jr., for the purchase of 50% of the capital stock of Defendant, Thomas D. Gilliam Company.
>
> 4. After failing to issue any stock, Defendants by letter dated January 12, 1978, a copy of which is attached hereto as Exhibit A and incorporated herein, acknowledged this debt of $20,000, and agreed to execute a note for $15,000 to Plaintiff in accordance with the terms contained in the letter, and to treat the additional $5,000 as payment for services rendered, all in accordance with the terms of the letter.
>
> 5. Defendants have neither delivered stock in the Defendant, Thomas D. Gilliam Company, nor have they paid any amount of this outstanding debt, nor have they issued notes in accordance with said letter attached hereto.

The letter, Exhibit A, was written and signed by Thomas D. Gilliam, Jr. and refers to the $20,000 advanced to the defendants. It is addressed to Mr. Edward Lenkov, c/o Cleve Mont Industries, Ltd., 4035 Richelieu Street, Montreal, Quebec, Canada.

Satisky & Silverstein, by Howard P. Satisky, for plaintiff appellant.

Raymer, Lewis, Eisele & Patterson, by Douglas G. Eisele, for defendant appellees.

MARTIN (Harry C.), Judge.

Plaintiff's claim was improperly dismissed. A judgment on the pleadings in favor of a defendant who asserts the statute of

limitations as a bar is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted. *Huss v. Huss*, 31 N.C. App. 463, 230 S.E. 2d 159 (1976); *Land v. Pontiac, Inc.*, 6 N.C. App. 197, 169 S.E. 2d 537 (1969), *cert. denied*, 276 N.C. 85 (1970). In their motion to dismiss, defendants allege only that "it appears upon the face of the complaint that the contractual claims alleged by the plaintiff are barred by the applicable statute of limitations, North Carolina General Statute 1-52."

This is an action for breach of contract. Plaintiff alleges it advanced money to defendants and defendants agreed to issue stock in defendant corporation to plaintiff. Plaintiff alleges defendants breached the contract by failing to issue the stock and failing to return the money to plaintiff. However, it does not appear on the face of the complaint when the breach occurred. "In no event can a statute of limitations begin to run until plaintiff is entitled to institute action." *Reidsville v. Burton*, 269 N.C. 206, 211, 152 S.E. 2d 147, 152 (1967). A judgment on the pleadings based upon a plea of the statute of limitations is proper only when the pleadings fail to present any issue of fact for determination by a jury. *Id.* "The three-year period of the statute of limitations governing actions based on express contracts does not begin to run until the alleged breach occurs and the cause of action accrues." *Silver v. Board of Transportation*, 47 N.C. App. 261, 266, 267 S.E. 2d 49, 53-54 (1980).

Judgment on the pleadings is not favored by law and the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmovant. *Wilson v. Development Co.*, 276 N.C. 198, 171 S.E. 2d 873 (1970); *Huss, supra.* The complaint fails to disclose when plaintiff's cause of action accrued; therefore, all the facts necessary to establish the limitation do not appear on the face of the pleadings. *Reidsville, supra.* On the hearing of the motion to dismiss, plaintiff had the burden to show that its claim was not barred on the face of the complaint. *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 101 S.E. 2d 8 (1957). It has carried that burden.

Reversed.

Judges ARNOLD and WELLS concur.

Trudell v. Heating & Air Conditioning Co.

JAMES TRUDELL, EMPLOYEE, PLAINTIFF v. SEVEN LAKES HEATING & AIR CONDITIONING COMPANY, EMPLOYER; HARTFORD ACCIDENT & INDEMNITY COMPANY, CARRIER; DEFENDANTS

No. 8110IC345

(Filed 1 December 1981)

Master and Servant § 55.1 — workers' compensation — injury not caused by accident — denial of claim proper

Plaintiff's claim for compensation for a lower back strain was properly denied where he was installing air ducts in the crawl space underneath a building and worked for at least one week and possibly two weeks under the same conditions before experiencing the pain of which he complained. The low crawl space had become part of plaintiff's normal work routine; therefore, there was no "accident" causing his back injury.

APPEAL by plaintiff from the North Carolina Industrial Commission opinion and award of 13 January 1981. Heard in the Court of Appeals 12 November 1981.

In October of 1978, plaintiff was employed with Seven Lakes Heating and Air Conditioning Company to do service installments. He began work at the Seven Lakes Condominium site around 1 December 1978. In order to install air ducts, he had to work in the crawl space underneath the building. The crawl space of this unit was lower than any other under which plaintiff had previously worked. After two weeks of such labor, he began to feel pain in his lower back. On 22 December 1978, the pain became so intense that he left work. Plaintiff was hospitalized from 2 January 1979 to 9 January 1979 and diagnosed as suffering from acute lumbosacral strain.

On 1 May 1980, a Deputy Commissioner entered an opinion which contained the following pertinent finding of fact:

> "5. During the week prior to December 22, 1978, plaintiff sustained an injury, but at the time complained of, he did not sustain an injury by accident. Plaintiff had been doing the same type of work under the same circumstances or work conditions for at least one, and perhaps two weeks, when he began feeling the pain in his back. Additionally, plaintiff could not remember a specific occasion when his back began to hurt. These facts do not constitute an interruption in the

plaintiff's normal work routine. The low crawl space under the condominiums had become a part of his normal work routine by the time he began to experience the back pain."

She concluded that plaintiff had not sustained an injury by accident and denied his claim to compensation. The Full Commission affirmed the denial on 13 January 1981.

Pollock, Fullenwider, Cunningham and Patterson, by Bruce T. Cunningham, Jr., for plaintiff appellant.

Johnson, Patterson, Dilthey and Clay, by Richard T. Boyette, for defendant appellees.

VAUGHN, Judge.

Plaintiff's appeal does not challenge the sufficiency of the Commission's Findings of Fact. Plaintiff rather challenges its conclusion that his injury was not caused by an "accident." The issue, therefore, is whether the Commission's award is justified by its findings. *Buck v. Procter & Gamble Co.*, 52 N.C. App. 88, 278 S.E. 2d 268 (1981). We conclude it is.

Mere injury does not entitle an employee to compensation under North Carolina's Workers' Compensation Act. *Bigelow v. Tire Sales Co.*, 12 N.C. App. 220, 182 S.E. 2d 856 (1971). The injury must result from an accident arising out of and in the course of employment. G.S. 97-2(6). "Accident" has been defined as (1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause. *Pulley v. Association*, 30 N.C. App. 94, 226 S.E. 2d 227 (1976).

An injury which occurs under normal work conditions is not considered an accident arising out of employment. Work conditions may be considered normal despite the presence of changed circumstances. *E.g., Jackson v. Highway Commission*, 272 N.C. 697, 158 S.E. 2d 865 (1968); *Reams v. Burlington Industries*, 42 N.C. App. 54, 255 S.E. 2d 586 (1979). In *Jackson*, the claimant suffered a heart attack while working a snow plow overtime. The Court stated that the "extra hours on call were customary when, by weather conditions, there was need for the use of the machine he operated." 272 N.C. at 701, 158 S.E. 2d at 868. In *Reams*, this

Court stated "[w]e do not think that the mere fact that the plaintiff was performing a task for his employer which involved a greater volume of lifting than his ordinarily assigned task may be taken as an indication that an injury he sustained while performing the work was the result of an accident. . . ." 42 N.C. App. at 57, 255 S.E. 2d at 588.

In the present cause, we also fail to find evidence that plaintiff's injury was caused by an "unlooked for and untoward event" or a "fortuitous cause." The uncontradicted evidence is that plaintiff had performed similar work for two and a half years prior to his employment with Seven Lakes Heating and Air Conditioning Company. Although plaintiff testified that the Seven Lakes Condominium was the lowest unit under which he had ever worked, there is no evidence that plaintiff's task involved unusual exertion or twisting. *See generally Edwards v. Publishing Co.*, 227 N.C. 184, 41 S.E. 2d 592 (1947); *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E. 2d 360 (1980). His location underneath the building was normal for air duct installation. *Compare with Dunton v. Construction Co.*, 19 N.C. App. 51, 198 S.E. 2d 8 (1973). At times he was required to lie on his back but there is no finding that that position was an unusually cramped one from which to work.

Plaintiff worked for at least one week and possibly two weeks under such conditions before experiencing the pain of which he presently complains. We agree with the Commission that by that time, the low crawl space had become part of plaintiff's normal work routine. There was, therefore, no accident causing his back injury. The award order is affirmed.

Affirmed.

Judges HILL and WHICHARD concur.

STATE OF NORTH CAROLINA v. MIGUEL SANTOS PEREZ A/K/A MIGUEL SOTO

No. 813SC592

(Filed 1 December 1981)

1. **Criminal Law § 124— sufficiency of verdicts**

Judgments against defendant were not invalid because the verdict form failed to specify with what offense defendant was charged in each count since the verdicts can be given proper interpretation by reference to the indictment, the evidence and the court's instructions.

2. **Narcotics § 4.5— instructions—knowledge of possession and sale**

The trial court did not err in failing to instruct the jury that it must find that defendant knowingly possessed and sold heroin in order to find him guilty of felonious possession of heroin with intent to sell and felonious sale of heroin where the issue of guilty knowledge was not presented by the evidence and there was no prayer for instructions.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 30 October 1979 in Superior Court, PITT County. Writ of Certiorari issued by the North Carolina Court of Appeals on 20 April 1981. Heard in the Court of Appeals 17 November 1981.

The State's evidence tended to show that defendant sold and delivered five bindles of heroin to an S.B.I. agent for $100.00. Defendant's evidence was to the effect that he had never sold anything to the agent and was not even in the area where the drugs were alleged to have been sold.

Defendant was convicted of felonious possession of a controlled substance with intent to sell and of felonious sale of such controlled substance. Judgments imposing prison sentences were entered.

Attorney General Edmisten, by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

Appellate Defender Project for North Carolina, by Adam Stein and James H. Gold, for defendant appellant.

VAUGHN, Judge.

[1] Defendant argues the judgments against him should be vacated because the verdict form fails to specify with what of-

fense defendant was charged in each count. The verdicts, however, can be given proper interpretation by reference to the indictment, the evidence and the court's instructions. *State v. Hampton*, 294 N.C. 242, 239 S.E. 2d 835 (1978). Defendant's assignment of error is, therefore, overruled.

[2] Defendant contends that the judge committed prejudicial error in that he failed to instruct the jury that it must find that defendant knowingly possessed and sold the controlled substance in order to find him guilty. On the facts of this case, the argument is without merit. It is the duty of the judge to declare and explain the law arising on the evidence in the case then being tried. Here the State's evidence discloses that, after the agent's request for heroin and payment of $100.00, the defendant went into a duplex, came out shortly thereafter and handed the agent five bags of heroin. Defendant's evidence did not raise a question as to whether he knew the heroin he sold was in his possession. He denied selling or possessing anything.

> "A person is presumed to intend the natural consequences of his act. [Citations omitted.] Hence, ordinarily, where a specific intent is not an element of the crime, proof of the commission of the unlawful act is sufficient to support a verdict. [Citation omitted.] . . . .
>
> Nothing else appearing, it would not be necessary for the court, in the absence of a prayer, to make reference in its charge to guilty knowledge or intent. *Scienter* is presumed. . . ."

State v. Elliott, 232 N.C. 377, 378, 61 S.E. 2d 93, 95 (1950).

Where, however, a question of guilty knowledge is raised, it *then* becomes an essential element of the crime which the State must prove beyond a reasonable doubt. It is only then that the "due process" arguments advanced by defendant would be relevant. Here, as in *State v. Gleason*, 24 N.C. App. 732, 212 S.E. 2d 213 (1975),

> "the issue of guilty knowledge is not presented by the evidence, and there was no prayer for instructions. Under these circumstances we do not find error in the failure of the trial court to give instructions on guilty knowledge, either of the fact of 'possession' or of the fact of 'narcotic character.' "

24 N.C. App. at 735, 212 S.E. 2d at 216.

No error.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA v. FRANKLIN EARL MURRAY

No. 814SC561

(Filed 1 December 1981)

Criminal Law § 114.3— repetition of jury charge—no prejudicial error

Where defendant was convicted of attempted armed robbery and conspiracy to commit armed robbery, and the trial judge repeated the final mandate to the jury on the conspiracy charge, prefacing the repetition as follows: "Now, Members of the Jury, I'm going to summarize that charge to you again," the repetition did not constitute an expression of opinion by the court upon the evidence and the record failed to disclose any prejudice to defendant by the repetition. N.C. Gen. Stat. § 15A-1232.

APPEAL by defendant from *Rouse, Judge.* Judgments entered 30 September 1980 in Superior Court, DUPLIN County. Heard in the Court of Appeals 12 November 1981.

Attorney General Edmisten, by Associate Attorney General Thomas J. Ziko, for the State.

Louis Jordan for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant was convicted on proper bills of indictment of attempted armed robbery and conspiracy to commit armed robbery. On appeal he contends that the court erred in repeating a portion of its charge on conspiracy. The trial judge repeated the final mandate to the jury on the conspiracy charge, practically verbatim. He prefaced the repetition as follows: "Now, Members of the Jury, I'm going to summarize that charge to you again." The record fails to disclose any prejudice to defendant by the repetition. There are many reasons why a trial judge may repeat a part of the charge: he may feel that he spoke too softly or that a noise interfered with the jury's ability to hear what he said; he may have noticed that a juror was not paying attention to his instruc-

tions or that there was an expression of puzzlement or confusion on a juror's face. The trial judge has wide discretion in *how* he charges the jury. In the absence of a showing of prejudice or manifest abuse of discretion, we will not disturb the verdicts for this reason. *See Miller v. Greenwood,* 218 N.C. 146, 10 S.E. 2d 708 (1940).

Nor do we find that the repetition constitutes an expression of opinion by the court upon the evidence. Defendant was not deprived of a fair and impartial trial. *State v. Greene,* 285 N.C. 482, 206 S.E. 2d 229 (1974); N.C. Gen. Stat. § 15A-1232 (1978).

Defendant also argues that the court expressed an opinion on the evidence in the following part of the charge:

> One of the contentions of the State is that the defendant, Murray, is guilty of a charge of attempted robbery with a firearm as a co-conspirator even though he did not personally participate in any of the acts constituting the alleged attempted robbery. If the defendant was a party to the conspiracy as a party to the conspiracy, he would be equally guilty as a principal with the other participants in the commission of the crimes contemplated by the conspiracy. It makes no difference that the defendant was not personally present when those crimes were committed. For once a conspiracy is shown each conspirator is responsible for all acts committed by the other in execution of the common purpose which are a natural or probable consequence of the unlawful combination or undertaking. Even though such acts are not intended or contemplated as a part of the original design.

The argument is meritless. Our Supreme Court approved a substantially identical charge in *State v. Smith,* 221 N.C. 400, 20 S.E. 2d 360 (1942). *See also State v. Bindyke,* 288 N.C. 608, 220 S.E. 2d 521 (1975); *State v. Grier,* 30 N.C. App. 281, 227 S.E. 2d 126 (1976).

Finally, defendant contends that the court committed error by gesturing or pointing his finger at the jury during his charge. The record contains no evidence or finding that the court gestured during the charge. Assuming that the court did use gestures in instructing the jury, no inference of impropriety arises therefrom. Appellant would have to show on appeal that such actions resulted in prejudice to him, depriving him of a fair and impartial trial. *State v. Greene, supra.*

No error.

Judges HEDRICK and CLARK concur.

HAYES LOCKLEAR, JR., EMPLOYEE v. ROBESON COUNTY, EMPLOYER, SHELBY MUTUAL INSURANCE COMPANY, CARRIER

No. 8110IC307

(Filed 1 December 1981)

Master and Servant § 55.3— workers' compensation—injury while lifting ambulance patient—accident

The evidence supported a determination by the Industrial Commission that plaintiff ambulance attendant suffered an injury by accident to a disc of the lumbar spine at the time he lifted a woman patient and removed her from a car where plaintiff's partner testified that he experienced "an unusual jerking motion from plaintiff" as plaintiff almost dropped the woman's body when he was removing her from her car, since such sudden jerking and near loss of load supported the conclusion that plaintiff's injury resulted from an unlooked for and untoward event not expected or designed by the employee.

APPEAL by defendants from the Industrial Commission, opinion and award filed 12 December 1980. Heard in the Court of Appeals 22 October 1981.

Defendants appeal from an award of workers' compensation benefits to plaintiff.

G. B. Johnson for plaintiff appellee.

I. Murchison Biggs, P.A., by Adelaide G. Behan, for defendant appellants.

WHICHARD, Judge.

Plaintiff sought workers' compensation benefits for a back injury which his treating physician indicated could have been caused by a small ruptured disc of the lumbar spine at the time he lifted a patient in the course of his employment by Robeson County as an ambulance attendant. After a hearing on plaintiff's claim the hearing officer found the following facts: At the time of his injury plaintiff had been employed as a Robeson County ambulance attendant for two years. His employment generally required him to drive an ambulance and pick up patients, and to clean the floors of the ambulance parking bay. On 30 May 1977 plaintiff and

a fellow employee, Douglas Wayne Maynor, answered a call to assist a woman who had passed out in her car. The woman was in the driver's side of the car, partially sitting and partially lying down. Plaintiff got in the driver's side and lifted the woman under her arms, and Maynor lifted under her knees from the passenger side. They removed the woman, who weighed 155 pounds, feet first from the passenger side with plaintiff walking across the seat on his right knee and across the floorboard on his left foot. They had to twist the woman to remove her. Maynor felt an unusual jerking motion as if plaintiff were going to lose the load when plaintiff exited the car carrying the woman. Plaintiff came out of the car all bent over. They put the woman on a stretcher and loaded it in the ambulance. When plaintiff sat in the ambulance he noticed pain in his lower back and was so sore that he could hardly sit down.

The hearing officer concluded that plaintiff suffered an injury by accident arising out of and in the course of his employment and awarded benefits. In making the conclusion the officer stated, "[t]he cramped and awkward position in which plaintiff removed this body coupled with the jerk and loss of balance with the load which can be inferred therefrom was an unexpected event and interruption of the work routine which introduced unusual conditions likely to result in unexpected consequences." The full commission affirmed and adopted the hearing officer's decision.

Plaintiff offered his own testimony and that of Douglas Wayne Maynor. Defendant offered no contrary evidence. The commission's findings of fact restate the testimony of plaintiff and Maynor and are therefore fully supported by evidence in the record. Consequently, the findings are conclusive on appeal. *Jackson v. Highway Commission*, 272 N.C. 697, 158 S.E. 2d 865 (1968). The appeal presents the question whether the findings support the commission's conclusions of law.

To receive workers' compensation benefits, plaintiff must have sustained an injury by accident arising out of and in the course of employment. G.S. 97-2(6). An accident is "(1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 428, 124 S.E. 2d 109, 110-111 (1962). "[T]here must be some unforeseen or unusual event other than the bodily injury itself" for an incident to constitute an accident within the meaning of the Workers' Compensa-

tion Act. *Rhinehart v. Market*, 271 N.C. 586, 588, 157 S.E. 2d 1, 3 (1967).

The facts found by the hearing officer and adopted by the full commission support the conclusion that plaintiff's injury resulted from an accident. Plaintiff's partner experienced "an unusual jerking motion from plaintiff" as plaintiff almost dropped the woman's body when he was removing her from her car. Such sudden jerking and near loss of load supports the conclusion the plaintiff's injury resulted from an unlooked for and untoward event not expected or designed by the employee. We therefore affirm the commission's opinion and award.

Affirmed.

Judges VAUGHN and HILL concur.

TROY EUGENE BALL AND WIFE, SHIRLEY O. BALL v. REUBEN BALL, JR. AND WIFE, BETTY JUNE BALL

No. 8130DC322

(Filed 1 December 1981)

Appeal and Error § 6.2— order allowing employment of surveyor—interlocutory appeal

An order in a case concerning a reformation of a deed which allowed plaintiffs to employ a surveyor was interlocutory in nature since it did not finally dispose of the case and since it required further action by the trial court. Therefore, an appeal from the order was premature.

APPEAL by defendants from *McDarris, Judge.* Order signed 30 December 1980 in District Court, SWAIN County. Heard in the Court of Appeals 10 November 1981.

Plaintiffs filed a complaint seeking to reform a deed conveying land from defendants to plaintiffs, alleging that the deed did not correctly describe the land due to an error made by the surveyor. Plaintiffs moved for a court-appointed surveyor to accurately describe the lands intended to be conveyed, or, alternatively, moved that plaintiffs be allowed to employ a surveyor who would be provided with the protection of the court in the completion of the survey work.

On 30 December 1980, the court issued an order allowing plaintiffs to employ a surveyor and prohibiting defendants from interfering in any way with the surveying of the land. From this order, defendants appeal.

McKeever, Edwards, Davis & Hays by Fred H. Moody, Jr., for plaintiff appellees.

Herbert L. Hyde for defendant appellants.

CLARK, Judge.

The sole question presented by defendants is whether the lower court erred in entering the order allowing plaintiffs to survey on defendants' lands. However, the threshold question to be considered, although not argued by either party, is whether an appeal lies from Judge McDarris's order. While final judgments are always appealable, interlocutory decrees are immediately appealable only when they affect some substantial right of the appellant and will cause an injury to him if not corrected before an appeal from final judgment. *Bailey v. Gooding,* 301 N.C. 205, 270 S.E. 2d 431 (1980); *Auction Co. v. Myers,* 40 N.C. App. 570, 253 S.E. 2d 362 (1979). *See* G.S. 1-277 and G.S. 7A-27(d).

Unquestionably, the order of Judge McDarris is interlocutory since it does not finally dispose of the case and requires further action by the trial court. We hold that the order does not affect any substantial right of defendants. Defendants are simply ordered to allow a neutral third party, a surveyor, to enter upon their land for the purpose of completing an accurate survey of the property. The interlocutory order, therefore, is not appealable. *See Sawyer v. Whitfield,* 251 N.C. 706, 111 S.E. 2d 874 (1960).

The appeal is

Dismissed.

Judges HEDRICK and MARTIN (Harry C.) concur.

Bowlin v. Bowlin

TERRY JEAN KING BOWLIN v. ELEANOR L. BOWLIN, ADMINISTRATRIX OF THE ESTATE OF JOSEPH JAMES BOWLIN, AND JEFFREY JAMES BOWLIN, MINOR

No. 8128DC341

(Filed 15 December 1981)

1. **Declaratory Judgment Act § 3— status of plaintiff as widow—justiciable controversy**

A justiciable controversy determinable under the Declaratory Judgment Act was presented as to whether plaintiff is the widow of deceased and entitled to share in his estate with defendant, the son of deceased.

2. **Marriage § 2— common law marriage in South Carolina—sufficiency of evidence**

Plaintiff and deceased entered into a valid common law marriage in South Carolina, and plaintiff was the widow of deceased at the time of his death in 1980 and was entitled to share in his estate, where the evidence showed that deceased told plaintiff that he had been to his lawyer's office and received some papers and had torn them up; deceased and plaintiff were married in South Carolina the next day, 28 May 1976; on the day they were married, deceased stated in plaintiff's presence that he was divorced; deceased's divorce from his first wife was not effective until five days after his marriage to plaintiff; plaintiff did not learn that deceased wasn't divorced at the time of their marriage until she applied for social security benefits after his death; plaintiff and deceased resided in South Carolina as husband and wife from December 1977 until June 1978; and after the marriage in 1976, the couple represented to the various communities in which they lived that they were husband and wife, since plaintiff and deceased became husband and wife by (1) attempting in good faith to contract a lawful marriage in South Carolina, and (2) continuing the relationship and holding themselves out as husband and wife in South Carolina between December 1977 and June 1978 after the obstacle to their marriage had been removed.

Judge HEDRICK dissenting.

APPEAL by defendants from *Roda, Judge.* Judgment entered 2 February 1981. Heard in the Court of Appeals 12 November 1981.

Defendants appeal from a summary judgment granted in favor of plaintiff, declaring her the lawful wife of the deceased Joseph James Bowlin.

The record discloses the following facts:

On 28 May 1976, plaintiff and Joseph James Bowlin were married in Greenville, South Carolina. Joseph James Bowlin died

in Alaska, where he was working, on 18 February 1980. After his death, plaintiff applied for social security benefits and then learned for the first time that when she married Joseph James Bowlin he had not been granted a divorce from his first wife, Elaine Mildred Bowlin. The date of the divorce, 3 June 1976, was five days after his marriage to the plaintiff. A child, Jeffrey James Bowlin, was born of the first marriage.

Plaintiff testified in her deposition that after the marriage ceremony in 1976, the couple immediately returned to Buncombe County, North Carolina, where they lived until January 1977 when Bowlin went to work in Alaska. Plaintiff joined him there in February of 1977 and remained with him until the following November. When he returned from Alaska in December of 1977, the couple moved to Myrtle Beach, South Carolina, where they resided until June of 1978. Bowlin then left for Alaska and the plaintiff returned to Asheville, North Carolina. After the marriage in 1976, the couple represented to the various communities in which they lived that they were husband and wife.

Plaintiff was aware prior to their marriage that Bowlin was married to someone else. She stated, however, that he had told her he had gone to his lawyer's office one day, had been given "some kind of papers" and that "when he walked out, he just tore them up and the next day, we went and got married."

Eleanor Bowlin testified that her son, Joseph James, told her in the presence of plaintiff that he had been divorced before he married plaintiff. She stated that her son and the plaintiff had a reputation in the community as being husband and wife and that they had filed joint tax returns in North Carolina.

Gudger, Reynolds & Patton, by William Patton, for plaintiff appellee.

Riddle, Shackelford & Hyler, by John E. Shackelford, for defendant appellants.

MARTIN (Harry C.), Judge.

[1] At the outset, we note that this action was brought under the Declaratory Judgment Act, article 26 of chapter 1 of the General Statutes of North Carolina. Although the allegations might be more artfully stated, we find them sufficient to state a

claim under the statute. Plaintiff alleges facts that could support a finding that she is the widow of Joseph James Bowlin and thus entitled to share in his estate along with his son, Jeffrey James Bowlin. Jeffrey James Bowlin, through his guardian ad litem, denies those allegations, seeking to exclude plaintiff from participating in his father's estate. These allegations present a justiciable controversy between the parties over the status of plaintiff as the widow of Bowlin and their respective rights in the estate of Bowlin. *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404 (1949). Plaintiff and defendant Jeffrey James Bowlin have adverse interests in the matter in dispute, *i.e.*, the marital status of Bowlin at the time of his death. They are not merely fishing in the judicial pond. *Id.*

[2] Turning now to the merits of the appeal, although we are cognizant of the fact that this Court has recently decided a case on strikingly similar facts in *Parker v. Parker*, 46 N.C. App. 254, 265 S.E. 2d 237 (1980), we nevertheless find it necessary to review the law respecting common law marriages in South Carolina in order to determine its effect on the facts of this case.

In *Davis v. Whitlock*, 90 S.C. 233, 73 S.E. 171 (1911), the wife entered into a second marriage believing that, after seven years of absence, her first husband was dead. He was, in fact, still living. Mr. Davis did not know of the former marriage. However, plaintiff and defendant continued to cohabit after the first husband's death, at which point their marriage became a valid common law marriage. The court provided the following insight into its holding:

> [W]here the relation began as meretricious, it cannot be converted into a marriage by the mere removal of the obstacle to marriage without some subsequent agreement to be husband and wife. But the authorities are unanimous in holding that if a man and woman enter into a contract of marriage believing in good faith that they are capable of entering into the relation notwithstanding a former marriage, when, in fact, the marriage is still of force, and after the removal of the obstacle of the former marriage the parties continue the relation and hold themselves out as man and wife, such action constitutes them man and wife from the date of the removal of the obstacle.

Id. at 246, 73 S.E. at 175.

Distinguishing *Davis* from later cases, including *Bannister v. Bannister*, 150 S.C. 411, 148 S.E. 228 (1929), upon which defendants rely, is the fact that the marriage in *Davis* was contracted for in good faith. Neither civil nor criminal law forbade remarriage where the defendant wife's first husband had been absent for seven years. In *Bannister* the husband, Ivory, entered into a second marriage without obtaining a divorce from his first wife, Carrie, whom he knew to be alive and with whom he continued to have contact after the second marriage. Carrie later died. The court held that "[t]he second marriage being thus meretricious in its inception, the status thereby created continued, even though the obstacle was removed by Carrie's death, unless changed by some subsequent agreement on the part of Ivory and Mary to be husband and wife." *Id.* at 414, 148 S.E. at 229.

The South Carolina Supreme Court had an opportunity the following year, in *Lemon v. Lemon*, 158 S.C. 71, 155 S.E. 285 (1930), to further refine the "good faith" / "subsequent agreement" dichotomy advanced in *Bannister*. The court wrote:

> Under our view of the evidence in the case, we cannot escape the conclusion that, at the time of the alleged marriage of the woman, Sally, to Henry Lemon, Sally had a living husband, Elias Washington, to whom she was lawfully married several years prior to the time of the alleged marriage with Henry Lemon. Therefore, the marriage of Sally to Henry Lemon was unlawful. Later Elias Washington died, and it appears from the record that Sally and Henry Lemon continued to live together as man and wife for some time after the death of Elias Washington, but, so far as the record discloses, there was no subsequent marriage contract and no subsequent agreement between Sally and Henry to be husband and wife. Furthermore, there is nothing in the record tending to show that at the time of the alleged marriage of Sally and Henry these parties acted in good faith, believing that they were capable of entering into the marriage relation. On the other hand, it appears that they knew Sally had a living husband. There is no evidence that Elias Washington was at that time dead, or that either Sally or Henry had reason to believe he was dead.

Id. at 76-77, 155 S.E. at 287.

The law continued to evolve with the case of *Byers v. Mount Vernon Mills, Inc.*, 268 S.C. 68, 231 S.E. 2d 699 (1977), which implied that once the barrier to the marriage is removed, it is only possible to enter into a common law marriage arrangement by new mutual agreement.[1] Although the parties in *Byers* had continued to live together as man and wife after the husband's first wife had obtained a divorce, the court found no evidence of a new mutual agreement "either by way of civil ceremony or by way of a recognition of the illicit relation and a new agreement to enter into a common law marriage arrangement." *Id.* at 71, 231 S.E. 2d at 700.

The holding in *Byers* found support in the case of *Kirby v. Kirby*, 270 S.C. 137, 241 S.E. 2d 415 (1978), which was relied on by this Court in *Parker, supra.* In *Kirby*, the husband was aware that his wife was married to another man when they began residing together as husband and wife. Four years later she obtained a divorce. She testified that after her divorce "she and respondent agreed to obtain a ceremonial marriage but 'never got around to it.' " 270 S.C. at 141, 241 S.E. 2d at 417. The court found that this testimony was sufficient to establish the recognition of the "illicit relationship and an expression of intent to enter into a new martial arrangement." 270 S.C. at 142, 241 S.E. 2d at 417. The court also considered the fact that

> [t]he parties consistently represented themselves as husband and wife in their community. Respondent engaged in several real estate transactions between 1956 and 1976 and requested appellant to renounce her dower rights on each occasion. Respondent and appellant appear as husband and wife on their children's birth certificates. The parties filed joint federal income tax returns.

270 S.C. at 141, 241 S.E. 2d at 417.

1. In 1960, the Supreme Court of South Carolina, in a case with facts which do not control our present case, held that "[i]t is essential to a common law marriage that there shall be a mutual agreement between the parties to assume toward each other the relation of husband and wife. Cohabitation without such an agreement does not constitute marriage." *Johnson v. Johnson*, 235 S.C. 542, 550, 112 S.E. 2d 647, 651 (1960).

Armed with this background, it becomes clear that we must go back in time, revive the case of *Davis v. Whitlock, supra,* and rekindle the "good faith" / "subsequent agreement" dichotomy in order to resolve the issues presented in the case sub judice. As in *Byers, supra,* there is no evidence in this case that the plaintiff and Joseph James Bowlin ever entered into a civil ceremony or recognized their illicit relationship and mutually agreed to a common law marriage relationship after Bowlin's divorce was granted. In fact, as the plaintiff did not learn that there was a five-day overlap between her marriage and the divorce until after Bowlin's death, the evidence refutes any possibility of a subsequent mutual agreement. This is so even in light of *Kirby, supra,* and *Parker, supra,* which suggest that the agreement need not take the form of "a public unequivocal declaration of the parties," 270 S.C. at 140, 241 S.E. 2d at 416, but that the agreement "may be adduced from circumstances, such as the parties' representation to the community that they are husband and wife." 46 N.C. App. at 258, 265 S.E. 2d at 240. The fact remains that plaintiff never recognized their illicit relationship or consciously agreed to a common law marriage arrangement.

The evidence shows that Terry Jean and Joseph James Bowlin entered into the 28 May 1976 marriage in good faith. Terry Jean did not learn that Bowlin wasn't divorced at the time of their marriage until she applied for social security benefits. Bowlin had told her that he had been to his lawyer's office and received some papers and that he had torn them up. The next day they went to South Carolina and were married. On the day they were married, Bowlin said, in her presence, that he was divorced. Joseph James Bowlin's good faith belief that he was legally divorced on the date of his marriage is supported by his mother's testimony that Bowlin said that he was divorced. More importantly, there is no evidence to the contrary. We cannot imply wrong or fraud to Joseph James Bowlin and therefore hold that he and Terry Jean entered into the marriage ceremony on 28 May 1976 in good faith within the requirements of *Davis, supra.*

We further hold that Terry Jean and Joseph James Bowlin were husband and wife on 18 February 1980, by concluding that their cohabitation and holding out as husband and wife in South Carolina, between December of 1977 and June of 1978, was a sufficient continuation of their relationship after the removal of the

impediment to meet the *Davis* test. *Bloch v. Bloch*, 473 F. 2d 1067 (3d Cir. 1973); *Parker, supra.* We are persuaded by the fact that the parties attempted in good faith to contract a lawful marriage in South Carolina and subsequent to their marriage returned to that state and lived together publicly as husband and wife.

For the foregoing reasons we affirm the trial court's granting of plaintiff's motion for summary judgment. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

Affirmed.

Judge CLARK concurs.

Judge HEDRICK dissents.

HEDRICK, Judge, dissenting.

On the authority of *Kirkman v. Kirkman*, 42 N.C. App. 173, 256 S.E. 2d 264, *disc. rev. denied*, 298 N.C. 297, 259 S.E. 2d 300 (1979), and cases cited therein, I vote to vacate the judgment of the district court and remand the matter to that court for the entry of an order dismissing the proceeding. To what end has the court been called upon to declare whether the plaintiff, Terry Jean King Bowlin, is the "lawful, legal wife of Joseph James Bowlin, deceased"? The majority, in my opinion, reads too much into the pleadings when they say the plaintiff and the defendant, Jeffrey James Bowlin, have adverse interests in the *estate* of Joseph James Bowlin. The pleadings contain no allegations of a justiciable issue among the parties. Although it is alleged that the defendant, Eleanor L. Bowlin, has been appointed administratrix of the estate of Joseph James Bowlin, deceased, there is no allegation that the deceased owned any property, real or personal, or that the administratrix has done anything, or contemplates doing anything, toward the administration of the estate. Indeed, the administratrix, although made a party defendant, has not even filed an answer. The question of whether plaintiff was the lawful wife of Joseph James Bowlin at the time of his death, and thus his widow at the time this proceeding was commenced, insofar as the pleadings in this matter are concerned, is purely academic. I realize the act providing for declaratory judgments is to be construed liberally, but, in my opinion, this

does not mean that the courts should be called upon to adjudicate problems which do not exist and may never arise. I vote to vacate and remand.

JOHN GRAHAM, HILL POWELL, A. L. GOODWIN, AND MARK HOLZAPFEL v. THE CITY OF RALEIGH, MAMIE T. STEVENS, CHARLES A. STEVENS, JOHN D. LYON, BARBARA H. LYON, AND MAX O. BARBOUR

No. 8110SC616

(Filed 15 December 1981)

1. **Municipal Corporations § 30.3— zoning procedures—no requirement to make findings in support of purposes**

A zoning ordinance will be declared invalid only where the record demonstrates that it has no foundation in reason and bears no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense. It is not required that an amendment to a zoning ordinance accomplish or contribute specifically to the accomplishment of all of the purposes specified by a city's enabling act. Therefore, where the record demonstrates that a city council has reasonable grounds to believe that the rezoning of petitioners' property furthers one or more of the purposes for rezoning set forth in the enabling legislation, and plaintiffs fail to show the contrary, the zoning ordinance is presumed to be valid.

2. **Municipal Corporations § 30.22— rezoning—suitability for all permitted uses in new district**

In a suit to determine the validity of a rezoning ordinance, consideration of the minutes of the several commissions and the City Council showed that the City Council, by inference at least, determined that the tracts and the existing circumstances justified the rezoning so as to permit all uses permissible in the new district, including residential uses.

3. **Municipal Corporations § 30.9— contract zoning—failure to prove**

The plaintiffs failed to prove unlawful contract zoning was involved in the adoption of an ordinance where the record contained no representation by the petitioners as to their specific plans for development of the property.

4. **Municipal Corporations § 30.9— compliance with comprehensive plan**

The action of the City Council in rezoning an area fell within the purview of the city's comprehensive plan. The questioned amendment to the plan served not merely the function of amending the zoning ordinance, but also enunced a change in the comprehensive plan itself, thus bringing about the necessary conformity or harmony between the amendment and the comprehensive plan.

APPEAL by the plaintiffs from *Preston, Judge.* Judgment entered 27 April 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 18 September 1981.

This is a suit for a declaratory judgment to determine the validity of Ordinance No. 1980 551ZC73 of the City of Raleigh, wherein, it approved petition Z-53-80 as modified in accordance with the recommendation of the Law and Finance Committee. Petition Z-53-80 requested the rezoning of approximately 53.5 acres in north Raleigh extending northward on the west side of Six Forks Road from the intersection of such thoroughfare with Lynn Road. The petition requested the rezoning of 34.9 acres of such parcel to Office and Institution III District, 17.9 acres to Neighborhood Business District, and .7 acre to Conservation Buffer District.

Plaintiffs' complaint alleged that the rezoning authorized by the ordinance was invalid on the grounds that the rezoning was arbitrary and capricious; that the City Council failed to consider the general welfare of the citizens of the City of Raleigh in allowing the rezoning; that the rezoning was contrary to the enabling legislation; that the rezoning was in direct conflict with the comprehensive plan of the City of Raleigh; that the rezoning was in violation of the City of Raleigh's own zoning regulations; and that the rezoning constituted unlawful contract zoning and unlawful spot zoning.

On 1 July 1980 a public hearing with respect to petition Z-53-80 was held before Raleigh City Council and the Raleigh Planning Commission. Thereafter, the Planning Commission approved petition Z-53-80 but with the recommendation that the rezoning request be denied with respect to 7 acres of the 53.5 acre parcel and that 17.9 acres thereof be rezoned Office and Institution I, rather than Neighborhood Business District.

The City Council thereafter referred the petition to the Comprehensive Planning Committee and upon its report to the Council the petition was referred to the Law and Finance Committee.

The Law and Finance Committee approved petition Z-53-80 to include 16.7 acres zoned Office and Institution I District, 2.6 acres zoned Conservation Buffer District, and 11 acres zoned Office and Institution III District. It voted to deny rezoning the remaining

23.2 acres of Petitioners' property, which comprised the southern portion of the original 53.5 acre parcel. The City Council adopted an ordinance wherein it approved petition Z-53-80 in accordance with recommendations of the Law and Finance Committee.

From an order of the trial court granting defendants' motion for summary judgment and denying that of the plaintiffs, the plaintiffs appealed to this Court.

Skvarla, Boles, Wyrick & From by Samuel T. Wyrick, III, and Robert A. Ponton, Jr., for the plaintiffs.

Poyner, Geraghty, Hartsfield & Townsend by David W. Long and Lacy H. Reaves for defendants Stevens and Barbour; Hunter, Wharton & Howell, by John V. Hunter, III, for defendants Stevens and Barbour; Thomas A. McCormick, Jr., for defendant City of Raleigh; Rich and Warren by John M. Rich for defendants Lyon.

MARTIN (Robert M.), Judge.

This case involves a declaratory judgment action brought by the plaintiffs to determine the validity of Raleigh City Zoning Ordinance 80 551 ZC 73. It is settled law in North Carolina that such a zoning suit is a proper case for a declaratory judgment, and also that, in such a case, summary judgment may be entered when otherwise proper, upon motion of either plaintiff or defendant. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972).

Here, as plaintiffs set forth in their brief, the material facts are not in issue. The controversy is as to the legal significance of those facts. It is, therefore, a proper case for summary judgment determining the validity of Ordinance (1980) 551ZC73. We hold that the ordinance is valid and affirm the judgment of the superior court so declaring.

[1] Plaintiffs contend the City of Raleigh violated its established zoning procedures in enacting the challenged ordinance. They contend there is no evidence in the record to support a finding by the Council that rezoning Parcel Z-53-80 promotes the health, morals, or welfare of the people of the City of Raleigh required by Raleigh's own procedures. The court may inquire into procedures followed by the board at the hearing before it and determine whether the ordinance was adopted in violation of required

procedures, or is arbitrary and without reasonable basis in view of the established circumstances. *Blades v. City of Raleigh, supra.*

The procedures established under the General Statutes, Raleigh City Charter, and Raleigh City Code provide the basis for a legislative, rather than a judicial determination on the part of the City Council. Zoning petitioners are not required to offer evidence nor is the legislative body required to make findings that the requested rezoning promotes the health, morals, or general welfare of the people of Raleigh. A zoning ordinance will be declared invalid only where the record demonstrates that it has no foundation in reason and bears no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114 (1926); *In re Appeal of Parker*, 214 N.C. 51, 197 S.E. 706 (1938). It is not required that an amendment to the zoning ordinance in question accomplish or contribute specifically to the accomplishment of all of the purposes specified in the enabling act. It is sufficient that the legislative body of the city had reasonable grounds upon which to conclude that one or more of those purposes would be accomplished or aided by the amending ordinance. The legislative body is charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare. *Schloss v. Jamison*, 262 N.C. 108, 136 S.E. 2d 691 (1964). When the action of the legislative body is reviewed by the courts, the latter are not free to substitute their opinion for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body. *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E. 2d 325 (1968).

A duly adopted zoning ordinance is presumed to be valid. The burden is on the complaining party to show it to be invalid.

> When the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare. (Citations omitted.)

In re Appeal of Parker, supra at 55, 197 S.E. 709.

Evidence adduced at the public hearings and minutes of the Council and its committees sufficiently document that the following considerations were before the Council and formed the basis for its adoption of the zoning ordinance:

> (1) The property which is the subject of the Zoning Ordinance is located in a section of Raleigh which has experienced considerable growth and change in recent years, and there exists a significant demand for additional Office and Institution District zoning in such area.
>
> (2) Such property has a narrow and elongated configuration and is enclosed within Lynn and Six Forks Road, which buffer it from nearby residential neighborhoods.
>
> (3) With respect to traffic flow and considerations of safety, Petitioners' property can be best developed as rezoned in the Zoning Ordinance, rather than as originally zoned Residential 4 District.
>
> (4) In view of its specific location, geographical configuration, and other factors, such property could not be satisfactorily developed under its former Residential 4 zoning classification.

The record clearly establishes that the arguments offered on behalf of the petitioners in support of the petition complied with the city code. Those presenting the arguments discussed the need to rezone the property in accordance with the nodal concept of development of Raleigh's comprehensive plan. They argued that changed conditions in the immediate area of such property supported the rezoning. Moreover, the record includes in addition to the transcripts of a public hearing, nine meetings of the city council and Planning Commission, or their committees, at which the rezoning of the petitioners' property was discussed. Such transcripts demonstrate clearly that the circumstances and conditions concerning the questioned zone changes were peculiarly within the knowledge of the city council and that they considered all permissible uses available in the Office and Institution I and III Districts in enacting the questioned ordinance.

The record demonstrates that the city council had reasonable grounds to believe that the rezoning of petitioners' property fur-

thered one or more of the purposes for rezoning set forth in the enabling legislation. Plaintiffs failed to carry the burden of showing to the contrary.

[2] Plaintiffs argue there is no evidence in the record of such property's suitability for the residential uses available in Office and Institution I Districts. The legislative body of a municipality cannot rely exclusively on specific representations by the proponents with respect to the property's intended use. The circumstances must be such that the property should be made available for all uses permitted in the new zoning district. *Blades v. City of Raleigh, supra; Allred v. City of Raleigh,* 277 N.C. 530, 178 S.E. 2d 432 (1971).

The record shows that at the public hearing on July 1, 1980, an opponent of the rezoning cited the suitability of the subject property for existing residential use. Residential development of the property was also discussed by one of the plaintiffs at the meeting of the Planning Commission on August 25, 1980, and was the subject of a petition read at a meeting of the City Council on September 2, 1981. At the meeting of the Comprehensive Planning Committee of the City Council on September 10, many potential uses of the subject property were discussed, and a City Planner specifically noted a recommendation that petitioners' property be developed for "high density or multi-family" residential use. High density residential use of the property was also discussed at the meeting of the City Council on September 16, 1980. In addition, plaintiffs' attorney noted that the petitioners' property was suitable for "low density, multifamily use" at the meeting of the Law and Finance Committee of the City Council on September 23, 1980. At most, the arguments were conflicting as to whether the property was suitable for all uses permitted under the challenged zoning ordinance. Consideration of the minutes of the several commissions and the City Council show that the City Council, by inference at least, determined that the aforementioned tracts and the existing circumstances justified the rezoning so as to permit all uses permissible in the Office and Institution I and III Districts.

[3] Plaintiffs contend the rezoning of Parcel Z-53-80 constitutes contract zoning. They contend the Council relied on the promises of the developer that the property would be developed in a carefully conceived plan. In Allred, *supra,* the Court declared in-

valid a rezoning based upon the proponent's specific representation to the City Council that he would construct "luxury apartments . . . in twin high-rise towers" upon the rezoned property. Similarly, in *Blades v. City of Raleigh, supra*, the City Council acted upon the specific undertaking of the petitioner at the public hearing to build twenty "high class high rental townhome apartments" upon his property, and the rezoning was overturned. We fail to find in the record in the case before us any representation by the petitioners as to their specific plans for development of the subject property. There was no unlawful contract zoning involved in the adopting of the challenged ordinance.

[4] Finally, plaintiffs contend that rezoning of Parcel Z-53-80 is not in compliance with the Comprehensive Plan — City of Raleigh. The plan was adopted by the City Council in 1979 and is a general statement of policy which together with Raleigh's zoning procedures and regulations comprise the City's "Comprehensive Plan" for rezoning. The resolution of the Council in adopting the plan provides in Sections 3 and 4:

> [T]he elements of the comprehensive plan are adopted as the general policy of the city council . . . [T]he items included in the adopted plan are to be interpreted to represent the general character . . . of future City actions and are preempted by specific . . . ordinances and other specific actions taken by the city council.

Resolution No. (1979) 949, The Comprehensive Plan, City of Raleigh.

> Unquestionably, [a city's legislative body] has authority to rezone property when reasonably necessary to do so in the interest of the public health, the public safety, the public morals or the public welfare. Ordinarily, the only limitation upon this legislative authority is that it may not be exercised arbitrarily or capriciously. (Citation omitted.)

Allred v. City of Raleigh, 277 N.C. 530, 545, 178 S.E. 2d 432, 440 (1971); N.C. Gen. Stat. § 160A-383.

By necessity, a comprehensive plan must undergo changes. If any zoning plan is to be comprehensive, it must be kept up to date. It would become obsolete if the council refused to recognize the changing conditions in the community. From the minutes of

the council and its committees it appears the council considered the rezoning to be a logical extension of the commercial nodes or focus area at the intersection of Six Forks and Newton Roads identified in the plan adopted by the City Council in 1979.

In furtherance of the goals of the plan the zoning ordinance serves to more clearly define the boundaries of the Six Forks-Newton Road and Six Forks-Millbrook Road focus areas and to buffer residential uses from commercial nodes. The minutes of the council and its committee demonstrates that the subject property is located in a section of Raleigh which has experienced considerable growth and change in recent years and there exists a significant demand for additional office and institution districts zoning in such area.

The 1979 Resolution of the City Council adopting a comprehensive plan, resolved in Section 2 "[t]hat the Comprehensive Plan may be revised, amended or supplemented at any time as provided by law" and in Section 3 "[t]hat the elements of the Comprehensive Plan are adopted as the general policy of the City Council to be used as a guide for developing capital improvements, budgets, ordinances, and operating procedures to accomplish the plan."

Thus, the City recognized that the function of the comprehensive plan does not contemplate or require a plan which rigidly provides for or attempts to answer in minute detail every possible question regarding land utilization or restrictions or attempts to fix a zoning map in a rigid and immutable mold, but rather the plan sets out general guidelines for the guidance of zoning policy. Annot., 40 A.L.R. 3d 372 (1971). The questioned amendment serves not merely the functions of amending the zoning ordinance, but also enunces a change in the comprehensive plan itself, thus bringing about the necessary conformity or harmony between the amendment and the comprehensive plan.

We think there existed sufficient change in conditions which the Council could properly take into account in amending the zoning ordinance to meet the developing needs of the community. Undoubtedly, the action of the Council in rezoning the instant area falls within the purview of the comprehensive plan.

The record demonstrates that the plan, as well as such procedures and regulations, were afforded careful consideration dur-

ing the deliberations which resulted in enactment of the ordinance. We hold that the ordinance was adopted in accordance with a comprehensive plan as required by G.S. 160A-383 and the City Charter.

The Order of the trial court granting defendants' motion for summary judgment should be sustained.

Affirmed.

Judges MARTIN (Harry C.) and BECTON concur.

LAWRENCE O. LENZ v. RIDGEWOOD ASSOCIATES, A GENERAL PARTNERSHIP, AND WEAVER REALTY COMPANY, INC.

No. 8118SC289

(Filed 15 December 1981)

1. **Landlord and Tenant § 8.3— unsafe condition in common area—duty of landlord to tenant**

Under the applicable provision of North Carolina's Residential Rental Agreement Act, G.S. §§ 42-38, 42-40, 42-42, and 42-44, landlords are under a duty to keep the common area of their premises in a safe condition. A violation of the statute does not constitute negligence per se, rather a violation is only evidence of negligence. Therefore, in a personal injury action whereby plaintiff-tenant alleged defendant-landlord failed to maintain the common areas of his apartment complex in a safe condition resulting in an injury to plaintiff when he slipped and fell on an icy walkway in the apartment complex, and where plaintiff's evidence would permit a jury to find that plaintiff was defendant's tenant; that defendant allowed a natural accumulation of ice to remain on the common areas of their premises devoted to plaintiff's use; that such accumulation of ice was an unsafe condition; that defendant knew or in the exercise of ordinary care should have known of the presence of the ice; that defendant failed to exercise ordinary care to remove the unsafe condition; and that such failure was the proximate cause of plaintiff's injury, plaintiff's evidence was sufficient to overcome defendants' motion for directed verdict.

2. **Landlord and Tenant § 8.4— contributory negligence on part of tenant—jury question**

In an action where tenant was injured when he slipped and fell on an icy walkway in his apartment complex, it was a jury question whether plaintiff, as an ordinary prudent person, would be required to remain in his apartment rather than attempt to reach his car; or, whether plaintiff as an ordinary pru-

dent person, exercising reasonable care for his safety, might attempt to leave his apartment on a reasonably necessary mission.

APPEAL by plaintiff from *Helms, Judge.* Judgment entered 25 November 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 21 October 1981.

Plaintiff, a resident of the Ridgewood Apartments in Greensboro, brought this personal injury action against defendants, the owners and operators of Ridgewood Apartments. Plaintiff alleged that he was injured when he slipped and fell on an icy walkway in the apartment complex, and that his injuries were caused by the negligent failure of defendants to maintain the common areas of the apartment complex in a safe condition. After the pleadings were joined, defendants moved for summary judgment, which motion was denied by Judge Hal H. Walker. The case subsequently came on for trial before Judge Helms. At the close of plaintiff's evidence, defendants' motion for a directed verdict was granted by the trial court. From that judgment, plaintiff has appealed.

Donald K. Speckhard, for plaintiff-appellant.

Perry C. Henson, by Jack B. Bayliss, Jr., for defendant-appellees.

WELLS, Judge.

In one of his assignments of error, plaintiff contends the trial court erred in granting defendants' motion for a directed verdict at the close of plaintiff's evidence. We agree with plaintiff's argument and reverse.

The grounds stated by defendants in their motion clearly define the issues in the appeal. Defendants' motion asserted that because the evidence showed the ice on defendants' premises resulted from a natural accumulation, defendants had no duty to plaintiff; but that if there were a duty, defendants had not breached it; and that if there were evidence of a duty and a breach, plaintiff's own evidence showed him to be contributorily negligent as a matter of law.

[1] We first address the issue of duty. At the outset, we emphasize the residential tenant-landlord relationship between plain-

tiff and defendants in this case. The common law duty of a landlord to maintain premises in a safe condition so as to avoid injury to his tenants has been the subject of a number of decisions of our appellate courts. There are two lines of cases: one, those involving the condition of the premises occupied by the tenant, and two, those involving the condition of common areas, or those portions of the premises remaining under the control of the landlord. We are concerned here with the second line of cases, but emphasize that the two lines must be carefully distinguished. *See Thompson v. Shoemaker*, 7 N.C. App. 687, 173 S.E. 2d 627 (1970). In the first line—those cases dealing with the condition of the demised premises—our appellate courts have consistently held that the failure of the landlord to maintain the demised premises in a safe condition does not ordinarily give rise to an action by the tenant for personal injury arising out of a defective condition of the *demised* premises. *Robinson v. Thomas*, 244 N.C. 732, 94 S.E. 2d 911 (1956) (porch floor gave way); *Harrill v. Refining Co.*, 225 N.C. 421, 35 S.E. 2d 240 (1945) (service station door fell); *Leavitt v. Rental Co.*, 222 N.C. 81, 21 S.E. 2d 890 (1942) (ceiling plaster fell); *Jordan v. Miller*, 179 N.C. 73, 101 S.E. 550 (1919) (hole in stairway).[1] *Floyd v. Jarrell*, 18 N.C. App. 418, 197 S.E. 2d 229 (1973) (rat bite). *See also Knuckles v. Spaugh*, 26 N.C. App. 340, 215 S.E. 2d 825 (1975), *cert. denied*, 288 N.C. 241, 217 S.E. 2d 665 (1975); *Compare Flying Club v. Flying Service*, 254 N.C. 775, 119 S.E. 2d 878 (1961).[2]

In the second line of cases, however, our appellate courts have recognized the duty of a landlord to safely maintain those portions of rental property over which he maintains control, including so-called "common areas", such as hallways, steps, and sidewalks. In *Drug Stores v. Gur-Sil Corp.*, 269 N.C. 169, 152 S.E.

1. Injury to invitee, but frequently cited and quoted for general rule controlling injury to tenant.

2. We note that our courts have recognized a cause of action for injuries caused by the negligent acts of the landlord in making repairs to the *demised* premises. *See Livingston v. Investment Co.*, 219 N.C. 416, 14 S.E. 2d 489 (1941); *Haga v. Childress*, 43 N.C. App. 302, 258 S.E. 2d 836 (1979), *disc. rev. denied*, 299 N.C. 120, 261 S.E. 2d 923 (1980), and cases and authorities cited and discussed therein.

2d 77 (1967), plaintiff leased the basement of a building owned by defendants. Plaintiff's space was flooded after a heavy rain, causing damage to plaintiff's goods. Plaintiff alleged that defendant had failed to exercise ordinary care to provide proper drainage. The trial court sustained a demurrer to plaintiff's complaint. In overruling the court, our Supreme Court stated the rule in such cases as follows:

> Where a landlord leases only a portion of the premises to a tenant and retains the remainder under his control . . . he is bound to use reasonable and ordinary care in managing the part over which he retains control, and is liable for negligence in respect thereof proximately resulting in injury to his tenant.

In support of the quoted rule, the court in *Drug Stores* cited *Steffan v. Mieselman*, 223 N.C. 154, 25 S.E. 2d 626 (1943), where the court affirmed a judgment for plaintiff for damages to his restaurant resulting from the overflow of his landlord's second story toilet.

In *Hood v. Mitchell*, 206 N.C. 156, 173 S.E. 61 (1934), the Court upheld recovery by plaintiff-tenant for injuries he received as a result of defendant-landlord's negligent failure to properly maintain an elevator in the building where plaintiff's office was located.

Against this background of the common law as it has been applied in North Carolina, we now must consider the impact of the pertinent provisions of North Carolina's Residential Rental Agreement Act[3] on plaintiff's claim in this case. In pertinent part, the Act provides as follows:

> § 42-38. Application.—This Article determines the rights, obligations, and remedies under a rental agreement for a dwelling unit within this State.
>
> § 42-40. Definitions.—For the purpose of this Article, the following definitions shall apply:
>
> . . .

3. G.S. 42-38 through 44. For a thorough discussion of the Act, *see* Fillette, North Carolina's Residential Rental Agreements Act: New Developments for Contract and Tort Liability in Landlord-Tenant Relations, 56 N.C.L. Rev. 785 (1978).

(2) "Premises" means a dwelling unit, including mobile homes or mobile home spaces, and the structure of which it is a part and facilities and appurtenances therein and grounds, areas, and facilities normally held out for the use of residential tenants who are using the dwelling unit as their primary residence.

. . . .

§ 42-42. Landlord to provide fit premises.—(a) The landlord shall:

. . .

(3) Keep all common areas of the premises in safe condition;

. . . .

§ 42-44. General remedies and limitations.—(a) Any right or obligation declared by this Chapter is enforceable by civil action, in addition to other remedies of law and in equity.

. . .

(d) A violation of this Article shall not constitute negligence per se.

In support of their argument as to lack of defendants' duty or lack of a breach thereof in this case, defendants have cited a long line of invitee cases from our appellate courts.[4] We emphasize that invitee cases are not apposite in cases involving actions between landlords and tenants who are injured by the landlord's failure to maintain common areas in safe condition.

We note that neither are "duty to warn" cases apposite here. The duty we recognize in this case is not a duty to warn of unsafe conditions; it is the duty to *correct* unsafe conditions. If such natural accumulations of ice constitute an unsafe condition, the duty is to correct these conditions. By providing that a violation of the statute does not constitute negligence per se, the General

4. In one of these cases, *Harris v. Department Stores, Co.*, 247 N.C. 195, 100 S.E. 2d 323 (1957), the evidence seems to indicate that the plaintiff had the status of a tenant, but in its decision, the court treated plaintiff as an invitee and relied on invitee cases in resolving the case against the plaintiff.

Assembly left intact established common law standards of ordinary and reasonable care in such cases, the violation of such a statute being only evidence of negligence. *Cowan v. Transfer Co.* and *Carr v. Transfer Co.*, 262 N.C. 550, 138 S.E. 2d 228 (1964); *Kinney v. Goley and Crowson v. Goley and Noll v. Goley*, 4 N.C. App. 325, 167 S.E. 2d 97 (1969); *see also Mintz v. Foster*, 35 N.C. App. 638, 242 S.E. 2d 181 (1978).

Plaintiff's evidence tends to show that he fell and was injured at about 10:30 a.m. on 20 January 1978. At the place on defendants' sidewalk where plaintiff fell, there was ice which had formed during a previous ice storm a month before, and newer, "slicker" ice which had accumulated during the day and night of 19 January. The accumulation of ice covered all of the sidewalks between his apartment, his point of departure, and the apartment parking lot, his destination. Plaintiff made his way without mishap to the place where he fell, only a few feet from the parking lot. Plaintiff testified in pertinent part as follows:

> On the morning of January 20, 1978, I got up around 6:15 and saw that it was very icy outside. Ice had come from the previous night so I didn't plan to go to school. I thought Greensboro College would be closed since so many other schools were closed; but, just to make sure, I called Greensboro College and it had not closed. I called the college around 7:00 o'clock a.m. and told them I would be in a little later because of the ice situation. I wanted to wait but I had classes and the laboratory for the afternoon that I wanted to attend. I called the college again around 8:30 a.m. or quarter to nine and was told that classes were going on and everybody had to come in so there was no reason I shouldn't go. . . . . I waited until approximately 10:30 a.m. because I figured something would be done with the ice by then. The rain—the sleet had stopped early in the morning, I remember, right after I got up, about 6:30, you know—the rain had stopped then where we were at. So about 10:30 a.m. I decided to try to make it to my car and go to school. When I got to my front door I decided that I would take my usual route to my car and I walked very gingerly and carefully over the ice because I knew there was a lot of it and it was very slick. I was raised on it out in the midwest and up north and I was very much aware of what was out there. I had

covered most of the distance to my car and only had a very short distance to go. I had to cross over another patch of ice that was on a concrete base which was the worst part, the slickest part. It wouldn't give and it was on that part just before I got to my car that I slipped. The ice there was fairly uneven. In the place that I walked out, no sand, or anything had been put down on the ice. . . . .

On cross-examination, plaintiff testified that he could have taken an alternate route from his apartment to the parking lot, over a short span of sidewalk and hence through the grass to the parking lot; but that had he taken such route, he nevertheless would have been faced with negotiating some areas of ice-covered sidewalks.

An exhibit introduced by plaintiff, together with plaintiff's testimony, shows that the route plaintiff chose took him through some grass, but that he traversed more sidewalk on his chosen route than would have been involved on the alternate route.

Plaintiff's evidence, taken as true and considered in the light most favorable to him, *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1973), would permit but not require a jury to find that plaintiff was defendants' tenant; that defendants allowed a natural accumulation of ice to remain on the common areas of their premises devoted to plaintiff's use; that such accumulation of ice was an unsafe condition; that defendants knew or in the exercise of ordinary care should have known of the presence of the ice; that defendants failed to exercise ordinary care to remove the unsafe condition; and that such failure was the proximate cause of plaintiff's injury. Since plaintiff was defendants' tenant, defendants were under a duty to keep the common area of their premises in a safe condition. G.S. 42-42(a)(3). Since the duty to keep the common areas in a safe condition implies the duty to make reasonable inspection and correct an unsafe condition which a reasonable inspection might reveal, such a breach of duty would constitute actionable negligence on defendants' part and would support a verdict for plaintiff. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1978). We find that plaintiff's evidence was sufficient to overcome the first two grounds asserted in defendants' motion for directed verdict.

[2] This brings us to the third assertion of defendants, that plaintiff was contributorily negligent as a matter of law. Before a motion for a directed verdict at the close of plaintiff's evidence may be granted, plaintiff's evidence must establish plaintiff's negligence so clearly that reasonable minds may not differ, or so clearly that no other reasonable inference may be drawn therefrom. *Rappaport*, supra. *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1978); *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E. 2d 788 (1978); *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1975); *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969); *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980). Stated another way, such a motion may be granted only when plaintiff's evidence leads inescapably to the conclusion that plaintiff was guilty of contributory negligence. Defendants argue that plaintiff went where he knew he would encounter an unsafe or dangerous condition, that he knowingly assumed the risk of walking on slick ice, and that therefore his own negligence caused his injury. Our appellate courts have held that the law imposes upon a person the duty to exercise *ordinary care* to protect himself from injury and to avoid a known danger; and that where there is such knowledge and there is an opportunity to avoid such a known danger, failure to take such opportunity is contributory negligence. *See Williams v. Power & Light Co.*, supra; *Presnell v. Payne*, 272 N.C. 11, 157 S.E. 2d 601 (1967); *Wallsee v. Water Co.*, 265 N.C. 291, 144 S.E. 2d 21 (1965). The standard of care required, however, differs with the exingencies of the occasion. *Wallsee*, supra.

> "[T]he existence of contributory negligence does not depend on plaintiff's *subjective* appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an *objective* standard of behavior—the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." (Citations omitted)

Smith v. Fiber Controls Corp., 300 N.C. 669, 268 S.E. 2d 504 (1980). "[T]he determination of contributory negligence cannot be predicted on the automatic application of per se rules which do not take into account the particular state of facts presented." *Smith v. Fiber Controls Corp.*, supra.

Thus, contributory negligence per se may arise where a plaintiff knowingly exposes himself to a known danger when he

had a *reasonable* choice or option to avoid that danger, *Smith v. Fiber Controls Corp.*, supra; or when a plaintiff heedlessly or carelessly exposes himself to a danger or risk of which he knew or should have known. *Holland v. Malpass*, 266 N.C. 750, 147 S.E. 2d 234 (1966). But the case is clearly different where plaintiff, as in the case before us, undertakes a reasonably necessary journey or mission or engages in a reasonably necessary activity where there are no reasonable alternatives open to him even in the face of risk of harm to himself. *Rappaport*, supra. While we have not been able to find a previous North Carolina case exactly in point, the majority of cases from other jurisdictions reach the conclusion that plaintiffs in such situations are not contributorily negligent as a matter of law where they are attempting to enter or leave their leased premises, but their actions and choices must be weighed by the jury. *See* Anno., 49 A.L.R. 3d 387, Secs. 23 and 24. *Rappaport* also involves substantially similar circumstances and choices. We are persuaded that it was for the jury to decide in this case whether plaintiff, as an ordinarily prudent person, would be required to remain in his apartment rather than attempt to reach his car; or, whether plaintiff as an ordinarily prudent person, exercising reasonable care for his own safety, might attempt to leave his apartment on a reasonably necessary mission. We also find that it was for the jury to decide whether in the exercise of reasonable care for his own safety, plaintiff was required to use a different route from the one he took on the occasion in question.

Our decision makes it unnecessary for us to reach plaintiff's other assignments of error.

For the reasons we have stated, the judgment of the trial court must be and is

Reversed.

Judges MARTIN (Robert) and WEBB concur.

MARGARET H. ANDREWS v. AUGUST RICHARD PETERS, III

No. 813SC383

(Filed 15 December 1981)

Master and Servant § 87.1— injury from intentional tort—workers' compensation and common law actions

The Workers' Compensation Act does not preclude an employee who was injured by an intentional tort of a fellow employee from bringing a common law action against the fellow employee to recover for the intentional tort. Furthermore, the employee injured by the intentional tort may pursue both his workers' compensation and common law remedies, with the employer to be reimbursed to the extent sums recovered in the common law action duplicate sums paid under the Workers' Compensation Act.

APPEAL by plaintiff from *Reid, Judge.* Order entered 30 January 1981 in Superior Court, PITT County. Heard in the Court of Appeals 19 November 1981.

Plaintiff appeals from a dismissal of her action pursuant to Rule 12(b)(1).

Plaintiff and defendant are both employees of Burroughs Wellcome Corporation. On 27 September 1979, defendant, while in the course of his employment, walked up behind plaintiff and placed his right knee behind her right knee. Plaintiff fell to the floor and sustained personal injuries.

Subsequent to the injury, plaintiff received Workers' Compensation benefits amounting to $2,006.05 for medical expenses and $2,972.00 for 10% permanent partial disability. Plaintiff then asserted a tort action against defendant for intentional assault. In her complaint, she seeks compensation for medical expenses, loss of income, pain and suffering, and permanent disability. She also seeks punitive damages.

In his reply, defendant admits that he caused plaintiff to fall. He denies, however, that his conduct constituted an intentional assault and battery. Defendant moved to dismiss the action pursuant to Rule 12(b)(1) and 12(b)(6).

On 30 January 1981, the court granted defendant's motion pursuant to Rule 12(b)(1), concluding that plaintiff was precluded from bringing a tort action against defendant since she had

received benefits under Chapter 97 of North Carolina General Statutes.

James, Hite, Cavendish and Blount, by M. E. Cavendish and Hugh D. Cox, Jr., for plaintiff appellant.

Everett and Cheatham, by Edward J. Harper, II, for defendant appellee.

VAUGHN, Judge.

The first issue is whether North Carolina's Workers' Compensation Act is the exclusive remedy for an employee intentionally injured by a fellow employee. We hold that it is not.

An examination of the development of workers' compensation laws leads to this conclusion. Before the laws' advent, some employers voluntarily assumed financial responsibility for their injured employees. Often, however, the employees were relegated to common law tort actions. So many defenses were available to the employer—contributory negligence, assumption of risk, the fellow-servant rule—that it was difficult for an employee to succeed at a negligence action. S. Horovitz, Injury and Death Under Workmen's Compensation Laws (1944).

Workers' compensation laws were a statutory compromise. The new acts assured workers compensation for injuries arising out of and in the course of employment without their having to prove negligence on the part of the employer. In exchange for the employer's loss of common law defenses, however, the employee gave up his right to common law verdicts. 2A A. Larson, The Law of Workmen's Compensation § 72.20 (1976) [hereinafter cited as Larson]; *Smith v. Liberty Mut. Ins. Co.*, 409 F. Supp. 1211 (M.D. N.C. 1976). In effect, tort liability was replaced with no-fault liability.

All worker compensation acts contain some provision regarding the exclusivity of the remedy as applied to an employer. G.S. 97-10.1 states the following:

> "If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee . . . shall exclude all other rights and remedies of the employee . . . as

against the employer at common law or otherwise on account of such injury or death."

Our courts, therefore, have barred injured employees covered by the act from bringing negligence actions against their employers. *Johnson v. United States,* 133 F. Supp. 613 (E.D. N.C. 1955); *Bryant v. Dougherty,* 267 N.C. 545, 148 S.E. 2d 548 (1966); *Lovette v. Lloyd,* 236 N.C. 663, 73 S.E. 2d 886 (1953).

Jurisdictions differ as to whether such immunity should extend to co-employees. In most jurisdictions, courts have interpreted the third party statute of their state's workers' compensation act to allow common law negligence actions against co-employees. 2A Larson, § 72.00. One rationale is the doctrine that existing common law actions should not be abrogated except by direct enactment. Marks, Klein & Long, *Co-Employee Suits Under Workmen's Compensation,* 26 Fed'n. Ins. Counsel Q. 327, 331 (1976).

North Carolina, however, has construed its statutes to provide such enactment. G.S. 97-9 states "Every employer subject to the compensation provisions of this Article shall secure the payment of compensation to his employees . . . and while such security remains in force, he or those conducting his business shall only be liable to any employee for personal injury or death . . . in the manner herein specified." In *Altman v. Sanders,* 267 N.C. 158, 148 S.E. 2d 21 (1966), the Supreme Court interpreted the phrase "those conducting his business" to include fellow employees. By reading G.S. 97-9 in conjunction with G.S. 97-10.1, *supra, Smith v. Liberty Mut. Ins. Co.,* 409 F. Supp. 1211 (M.D. N.C. 1976), excluded fellow employees from common law liability. *Accord, Strickland v. King* and *Sellers v. King,* 293 N.C. 731, 239 S.E. 2d 243 (1977). G.S. 97-10.2 which provides for actions against "some person other than the employer" has been held inapplicable to the negligent employee. *Warner v. Leder,* 234 N.C. 727, 69 S.E. 2d 6 (1952). The third party statute applies only to persons who are *strangers* to the employment and negligently cause an injury. 234 N.C. at 732, 69 S.E. 2d at 9.

One can understand the extension of an employer's immunity to employees when one considers the industrial setting. Accidents are bound to happen. By accepting employment, a worker increases not only the risk of injuring himself but also the risk of

negligently injuring others. North Carolina has made a policy decision that employees should not bear the cost of such accidents. Rather, economic loss should be absorbed by industry and ultimately passed on to the consumer. W. Prosser, Handbook of the Law of Torts § 80 (4th ed. 1971).

Many state statutes, however, which contain grants of co-employee immunity, expressly exclude from that immunity specific types of behavior such as intentional or malicious acts.[1] 9 Cumberland L. Rev. 921 (1979). Other jurisdictions have judicially limited the express co-employee immunity provisions of their workmen compensation statutes to exclude intentional acts causing injury. *See, e.g., Elliott v. Brown*, 569 P. 2d 1323 (Alaska 1977); *Jablonski v. Multack*, 63 Ill. App. 3d 908, 380 N.E. 2d 924 (1978); *George Petro, Inc. v. Bailey*, 438 S.W. 2d 88 (Ky. 1968); *Mazarredo v. Levine*, 274 App. Div. 122, 80 N.Y.S. 2d 237 (1948); *Bryan v. Utah International*, 533 P. 2d 892 (Utah 1975). The conclusion in *Mazarredo v. Levine* is common to these decisions: "It seems unreasonable to suppose that the Legislature intended to give statutory protection in the form of immunity from suit for a deliberate and intentional wrongful act." 274 App. Div. at 127, 80 N.Y.S. 2d at 242.

We likewise conclude that an intentional tort is not the type of "industrial accident" to which our legislature intended to give a co-employee immunity. To hold otherwise is to remove responsibility from the co-employee for his intentional conduct. Epstein, *Coordination of Workers' Compensation Benefits with Tort Damage Awards*, 13 Forum 464 (1978). Why should he be concerned about the consequences of his acts if the cost of any intentionally-inflicted injury will be absorbed by the industry?

Earlier decisions by our courts have recognized that assaultive behavior may remove a co-employee from his immunity to common law actions. *Wesley v. Lea*, 252 N.C. 540, 114 S.E. 2d 350 (1960); *Warner v. Leder, supra; Essick v. Lexington*, 232 N.C. 200, 60 S.E. 2d 106 (1950). We now hold that such behavior does

1. Ariz. Rev. Stat. Ann. § 23-1022 (Supp. 1971-1980); Cal. Lab. Code § 3601 (a)(1) (West Supp. 1980); Conn. Gen. Stat. Ann. § 31-293(a) (West 1972); Haw. Rev. Stat. § 386-8 (1976); La. Rev. Stat. Ann. § 23:1032 (West Supp. 1980); Mont. Code Ann. § 39-71-413 (1981); N.J. Stat. Ann. § 34:15-8 (West Supp. 1981); Or. Rev. Stat. § 656.018(3)(a) (1979); Pa. Stat. Ann. tit. 77 § 72 (Purdon Supp. 1980); W. Va. Code § 23-2-6a (1981).

limit an employee's immunity under the Workers' Compensation Act. Chapter 97, therefore, does not preclude the present plaintiff from bringing an intentional tort action against the defendant.

The second issue is whether plaintiff is, nevertheless, foreclosed from her action because she has already received and accepted compensation benefits under the Act. We conclude that an injured employee is *not* held to an election in the case of an assault by a co-employee.

In so holding, we acknowledge the general rule in other jurisdictions that a successful compensation claim bars a subsequent damage suit. 2A Larson § 67.22. Courts have held that the common law and Workers' Compensation remedies are mutually exclusive. *See, e.g., Jones v. Jeffreys*, 244 S.W. 2d 924 (Tex. 1951). The mere fact, however, that an injury is termed "accidental" from the injured employee's viewpoint, requiring the employer to pay compensation under the Act, does not mean that the injury is accidental from the viewpoint of the intentional assailant.

Other state courts have allowed the injured employee to pursue both actions to a recovery. Utah's statute states that

> "[t]he right to recover compensation . . . by an employee . . . shall be the exclusive remedy against the employer *and* . . . *any* . . . *employee* of the employer . . . and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, . . . and no action at law may be maintained against an employer *or against any* . . . *employee* . . . based upon any accident. . . ."

Utah Code Ann. § 35-1-60 (1974) (emphasis added). Despite such express language, the Utah court allowed an employee to receive compensation benefits *and* pursue his tort action. *Bryan v. Utah International*, 533 P. 2d 892 (Utah 1975). Pointing out that an election is not required in the case of a third party who intentionally injures the employee, the court refused to hold plaintiff to an election when the intentional tortfeasor was his fellow employee. 533 P. 2d at 894.

In *Elliott v. Brown*, 569 P. 2d 1323 (Alaska 1977), the applicable statute read:

> "If on account of disability or death for which compensation is payable under this chapter the person entitled to the compensation believes that a third person *other than the employer or a fellow employee* is liable for damages, he need not elect whether to receive compensation or to recover damages from the third person."

Alaska Stat. § 23.30.015(a) (1972) (emphasis added). The court noted that by negative implication, Alaska's statute indicates an election is required between statutory and common law remedies when the worker is injured by a fellow employee. The court, nevertheless, reached a different conclusion. Since the exclusivity provision of Alaska's Workers' Compensation Act does not protect a fellow employee committing an intentional tort despite the terms "employer and any fellow employee," the court held that logically the co-employee must also be considered outside the purview of the election of remedies provision. 569 P. 2d at 1327.

North Carolina courts have only dealt with intentional assault by an *employer.* They have consistently held that such action removes the employer from his common law immunity:

> " 'Where the employer is guilty of a felonious or wilful assault on an employee he cannot relegate him to the compensation act for recovery. It would be against sound reason to allow the employer deliberately to batter his helper, and then compel the worker to accept moderate workmen's compensation benefits, either from his insurance carrier or from himself as self-insurer.' "

Horovitz, *supra,* at 336, as quoted in *Warner v. Leder,* 234 N.C. at 733-34, 69 S.E. 2d at 10; *Essick v. Lexington,* 232 N.C. at 210, 60 S.E. 2d at 113-14. The employee, however, must choose between suing his employer at common law or accepting compensation. *Id.*

One can readily understand the rationale for requiring an election when the employer is the intentional tortfeasor. Under the Workers' Compensation Act, either the employer himself or the insurance carrier to which he has paid premiums must bear the expense of defending the claim and satisfying any compensation awarded. Therefore, a tort action in addition to the statutory action means the employer must defend against the same claim in two separate forums.

One cannot use the same rationale, however, to justify requiring an election when the intentional tortfeasor is a co-employee. He has contributed neither to the defense of any compensation claim nor to the satisfaction of any award. In fact, if a plaintiff is barred from pursuing an intentional tort action because he has accepted compensation benefits, then we are again confronted with the situation of the co-employee insulated from the effects of his assaultive conduct.

We, therefore, hold that in cases of intentional misconduct by a co-employee, the injured worker is free to pursue both his common law and compensation remedies. *See also* Mont. Code Ann. § 39-71-413 (1981). Allowing an independent action against the assaultive co-employee will benefit industry and the injured employee. The employer (or his insurance carrier) can be reimbursed to the extent sums recovered duplicate sums paid under the Workers' Compensation Act. *Compare with* G.S. 97-10.2(f). *See also Bryan v. Utah International*, 533 P. 2d 892 (Utah 1975). The employee, on the other hand, has the opportunity to recover elements of damages not covered by workers' compensation, such as pain and suffering. *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865 (1943).

Defendant argues that *Warner v. Leder, supra*, suggests a contrary result. Since the injury complained of in that action, however, was negligently inflicted, the present issue was not before the Court. Furthermore, the authority quoted in *Warner* deals with election in the case of an assaultive *employer*, not assaultive *employee*. We conclude, therefore, that our present holding is not in conflict with the decision in *Warner*.

In summary, we adhere to past decisions that the Workers' Compensation Act is the exclusive remedy for negligently caused injuries arising out of and in the course of employment. The cost of such injuries should be borne by industry and the public, and no one worker should be liable. An intentionally inflicted injury, however, is not the type industrial accident which industry and the public should exclusively absorb. We, therefore, conclude that North Carolina's Workers' Compensation Act does not preclude an employee injured in the course of employment from seeking recovery from the co-employee who is the intentional tortfeasor.

We also conclude that the plaintiff in such a situation is not held to an election. He may recover both compensation benefits and damages, reimbursing the employer for any duplicative amounts received. There is one injury and still only one recovery. By allowing the injured employee to additionally pursue his assault action, however, we are providing him with the fullest recovery. The cost of the intentionally inflicted injury is shifted back to the assaultive co-employee, as it should be.

Reversed and remanded for trial.

Judges WEBB and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 DECEMBER 1981

IN RE FORECLOSURE No. 8119SC451	Cabarrus (80SP324)	Affirmed
IN RE HOWARD No. 8112DC611	Cumberland (80J418)	Affirmed
IN RE McNEIR No. 8112DC626	Cumberland (80J546)	Affirmed
IN RE RICHMOND No. 8112DC594	Cumberland (81J30)	Affirmed
IN RE TAITANO No. 8112DC610	Cumberland (80J489)	Affirmed
JOHNSON v. DUNLAP No. 8118SC25	Guilford (76CVS5407)	New Trial
RUSSELL v. RUSSELL No. 8128DC349	Buncombe (80CVD1913)	Reversed
SIMPSON v. SHERROD No. 813DC350	Pitt (80CVD613)	Affirmed
STATE v. ALLEN No. 8110SC435	Wake (80CRS31121)	No Error
STATE v. BAGLEY No. 8114SC614	Durham (78CRS15880)	Dismissed
STATE v. CHURCH No. 8127SC540	Gaston (74CRS17824)	Affirmed
STATE v. HAMRICK No. 8127SC528	Cleveland (80CRS2681) (80CRS2682) (80CRS2683) (80CRS2684)	No Error
STATE v. LOFTON No. 818SC542	Wayne (80CR10903)	No Error
STATE v. McNEIL No. 8112SC505	Cumberland (80CRS53863)	No Error
STATE v. MILES No. 8127SC575	Gaston (80CRS19676) (80CRS19677)	No Error
STATE v. ROITHMEIER No. 8126SC559	Mecklenburg (80CR71018)	No Error

STATE v. TAYLOR No. 8112SC551	Cumberland (79CR15959) (79CR15960)	No Error
STATE v. THORNTON No. 8112SC541	Cumberland (80CRS10695)	No Error
STATE v. WALTERS No. 8121SC603	Forsyth (80CR18042)	No Error

KIDDIE KORNER DAY SCHOOLS, INC., CHILD ACRE CULTURE AND DEVELOPMENT, INC., MINI-AMERICAN ASSOCIATES, INC., DOING BUSINESS AS LITTLE RED SCHOOL HOUSE, KIDDIE-LAND DAY CARE CENTER, INC., KINDERCARE LEARNING CENTERS, INC., ELLIE L. BROOKS, DOING BUSINESS AS BROOKS' DAY CARE, LAVERN M. RABB, DOING BUSINESS AS LITTLE LEARNERS DAY CARE, MELVIN HATLEY AND BARBARA HATLEY, DOING BUSINESS AS EASTWAY DAY NURSERY AND EASTWAY PLAZA DAY CARE, MARION S. BLYTHE AND MIGENE B. RAPPE, DOING BUSINESS AS LITTLE PEOPLE'S SCHOOL, BAILEY O. COOPER AND HENRY B. COOPER, DOING BUSINESS AS MARY MOPPET'S DAY CARE SCHOOLS OF CHARLOTTE, ROBERT L. EAGLE, ALBERT S. ROACH, AND MARY T. ROACH v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, A PUBLIC BODY CORPORATE

No. 8126SC212

(Filed 15 December 1981)

1. **Schools § 1— extended day program at school—uniform system of free public schools**

An extended day program formulated by defendant school board and operated at an elementary school by a school sponsored committee and for which a tuition fee is charged to the participants does not violate the mandate of Art. IX, §§ 1 and 2(1) of the N.C. Constitution requiring a uniform system of free public schools since (1) the mandate relates to the statewide scheme for public education and does not require every school within every county or throughout the State to be identical in all respects, and (2) a tuition fee may properly be charged for a supplemental school program.

2. **Schools § 4.1— extended day program—authority of school board—constitutional delegation of power**

A county board of education had authority under G.S. 115-133 to permit the operation of an extended day program at an elementary school by a school sponsored committee, and the legislature could constitutionally delegate to the board of education the power and authority to participate in such a program.

3. **Schools § 5; Taxation § 7.2— extended day program—school board's use of funds for heating and lighting building—public purpose—no necessity for vote**

The expenditure of funds by a county board of education for fuel and electricity to heat, air condition and light a school building while it is used for an extended day program operated by a school sponsored committee is for a public purpose and need not be approved by the voters.

4. **Attorneys at Law § 7.5; Costs § 4.2— action to enjoin school board from expending funds—allowance of attorney fees in equity**

Plaintiffs' action to enjoin defendant board of education from expending school funds for an extended day program does not fall within the equity exception to the rule that attorney fees are not allowable as part of the costs in the absence of contractual or statutory authority where plaintiffs, while tax-

payers and citizens of the State of North Carolina, brought the action primarily to protect their business interests and not to protect or preserve public funds or property.

5. Schools § 4.1— school board's participation in extended day program—no unauthorized competition with day care centers

A county board of education's participation in an extended day program does not place the board in unauthorized competition with owners and operators of day care centers or violate the personal and property rights of such owners and operators in violation of Art. I, § 19 of the N.C. Constitution or the Fourteenth Amendment to the U.S. Constitution.

APPEAL by plaintiffs from *Griffin, Judge.* Judgment entered 16 January 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 25 September 1981.

The plaintiffs appeal from an Order granting defendant's motion for summary judgment. Plaintiffs, corporate and individual day care center owners and operators, brought this action to enjoin defendant School Board from conducting its extended day program being operated at the Dilworth Elementary School in Charlotte, North Carolina.

Tucker, Hicks, Sentelle, Moon & Hodge, P.A., by John E. Hodge, Jr., for plaintiff appellants.

Weinstein, Sturges, Odom, Groves, Bigger, Jonas & Campbell, P.A., by Hugh B. Campbell, Jr., for defendant appellee.

BECTON, Judge.

I

Because of the complexity of this case, we detail the facts before proceeding with our analysis. The plaintiffs are owners and operators of day care centers in Charlotte, North Carolina. The defendant School Board is a duly authorized corporate body under the laws of our State.

This controversy revolves around the School Board's involvement in the initiation and operation of the Dilworth Extended Day Enrichment (DEDE) program, which was designed to alleviate the problem of the "latch key" child.[1] After consultation

1. "Latch key" children are students who are left without supervision between the time school closes and the time their parents come home from work.

with Dr. Mary E. Mayesky, an education specialist, and community persons, Dr. Jay M. Robinson, the School Superintendent, proposed the adoption of this program based on the successful implementation of a similar program in another city. The School Board, upon adopting the proposal, directed that a "representative from the Dilworth staff, parents, and the Dilworth Ministerial Association be included on the committee appointed to implement the proposed program." Such a committee was formed, and it is this group which actually administers the program. The program is operated at the Dilworth Elementary School and is open to all students enrolled there.

Instead of leaving school at the end of the regular school day, the students enrolled in the DEDE program remain at school where, under the supervision of program staff, they do homework or study, and engage in athletic or artistic activities. The program operates from 2:00 p.m. until 5:30 p.m. Students participating are not required to participate every day nor are they required to remain until 5:30. Parents are free to decide what days and until what times the children will participate.

The program is self-sufficient, the operating costs being covered by the $15.00 per week tuition charged to the participants. Arrangements are made for students who are unable to pay the tuition. A local church provides a van to transport students who need transportation home. The School Board provides the use of the Dilworth Elementary School. Although there are fuel and lighting costs associated with the use of the building, these costs are nominal and are considered by the School Board as an insignificant part of the school system's budget. None of the staff are compensated by the School Board for the services they render.

II

The plaintiffs argue that the trial court erred in granting the defendants' motion for summary judgment and in denying their motion for summary judgment. Specifically, they contend (1) that the program violates our Constitutional mandate requiring a general and uniform system of free public schools; (2) that school funds were used to establish, and are being used to maintain, the program; (3) that the expenditures for the program are not for public purposes and have not been approved by the voters; (4)

that the School Board is in unauthorized competition with the plaintiffs; (5) that the program violates personal and property rights of the plaintiffs; (6) that there is no statutory authorization for the program; and (7) that the legislature could not delegate to the School Board the power or authority to maintain the program. The plaintiffs also argue that they are entitled to an award of attorneys' fees. For the reasons set forth below, we reject the plaintiffs' assertions.

We note initially that on a motion for summary judgment the moving party has the burden of proving that there are no genuine issues of material fact. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974); *Askew's, Inc. v. Cherry*, 11 N.C. App. 369, 372, 181 S.E. 2d 201, 203 (1971); G.S. 1A-1, Rule 56(c). We also note that the DEDE program is not a day-care center. Our legislature has enacted statutes to protect children who are put in day-care facilities. These statutes outline a detailed plan for the licensing and regulation of these facilities. G.S. 110-85 *et seq.* G.S. 110-86(3) defines a day-care facility to

> [include] any day-care center or child-care arrangement which provides day care on a regular basis for more than four hours per day for more than five children, wherever operated and whether or not operated for profit, except that the following are not included: public schools; nonpublic schools whether or not accredited by the State Department of Public Instruction, which regularly and exclusively provide a course of grade school instruction to children who are of public school age. . . .

The DEDE program does not fit this definition. Our analysis of the program, therefore, will be in terms of an educational service operated by a school sponsored committee.

A.

[1] We reject plaintiffs' argument that the DEDE program is in violation of the uniform system requirement of our Constitution. Our Constitution declares that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries and the like means of education shall forever be encouraged." North Carolina Const. art. IX, § 1. The Constitution further provides that "[t]he General

Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." N.C. Const. art. IX, § 2(1).

Our Supreme Court has, on many occasions, interpreted the import of these provisions. Very early in the history of public education in our State, the Supreme Court stated:

> It will be observed that it is to be a "system," it is to be "general," and it is to be "uniform." It is not to be subject to the caprice of localities, but every locality, yea, every child, is to have the same advantage, and be subject to the same rules and regulations.

Lane v. Stanly, 65 N.C. 153, 157-58 (1871). Further, in *Board of Education v. Board of Commissioners*, 174 N.C. 469, 473, 93 S.E. 1001, 1002 (1917), the Court stated:

> The term "uniform" here clearly does not relate to "schools," requiring that each and every school in the same or other district throughout the State shall be of the same fixed grade, regardless of the age or attainments of the pupils, but the term has reference to and qualifies the word "system" and is sufficiently complied with where, by statute or authorized regulation of the public-school authorities, provision is made for establishment of schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support.

It is clear, therefore, that the constitutional mandate relates to the statewide scheme for public education. The mandate does not require every school within every county or throughout the State to be identical in all respects. Such a mandate would be impossible to carry out as there are differences within a given school as the caliber of teachers and students differ.

The School Board has not violated the constitutional mandate by formulating the DEDE concept or by allowing it to operate at Dilworth Elementary School. The School Board is required to provide a general and uniform education for the students in the Charlotte-Mecklenburg System. This it has done. There is no re-

quirement that it provide identical opportunities to each and every student. Since it is the Dilworth Committee, and not the School Board, which operates the program, we fail to see how the School Board can be held to violate the constitutional mandate of a general and uniform system. That the School Board, through its Superintendent, was initially involved in the development of the idea does not alter our opinion.

B.

The plaintiffs also argue that, because tuition is charged the participating students, the program is not free as is required by the Constitution. Our Constitution does not require that public education be completely free. Our Supreme Court, in *Sneed v. Board of Education*, 299 N.C. 609, 264 S.E. 2d 106 (1980), held that supplemental fees charged its students by the Greensboro Board of Education were not unconstitutional. There the Court stated:

> So long as public funds are used to provide the physical plant and personnel salaries necessary for the maintenance of a "general and uniform" system of basic public education, our public school system is "free" — that is, without tuition — within the meaning of our state constitution. That the administrative boards of certain school districts require those pupils or their parents who are financially able to do so to furnish supplies and materials for the personal use of such students does not violate the mandate of Article IX, Section 2(1). Nor do we perceive any constitutional impediment to the charging of modest, reasonable fees by individual school boards to support the purchase of *supplementary* supplies and materials for use by or on behalf of students. Accordingly, we hold today that the fee schedule adopted by the Greensboro City Board of Education and imposed upon those students and their parents who are financially able to pay contravenes neither the letter nor spirit of our constitutional requirement of "free public schools." [Emphasis in original.]

299 N.C. at 617, 264 S.E. 2d at 112.

The tuition charged here is in accord with *Sneed*. So long as the School Board offers tuition free basic education, it satisfies the constitutional mandate that education be free. The students enrolled in the DEDE program do not pay tuition for their basic education. The tuition they pay is for the purpose of covering the

costs of the DEDE program, a *supplemental* educational education experience. Since the DEDE program is not a part of their regular school day, the students are not being charged for their basic education.

III

[2] The plaintiffs argue that there is no statutory authority for the DEDE program and that the legislature could not delegate to the School Board the power or authority to maintain the program. We disagree.

A.

Public education in this State is the result of a constitutional mandate and the subsequent legislative enactments which fulfill that mandate. Our Constitution provides that there shall be a general and uniform system for which no tuition is charged. N.C. Const. art. IX, § 2(1). The means of achieving this mandate is left up to the legislature. *Coggins v. Board of Education*, 223 N.C. 763, 28 S.E. 2d 527 (1944). The legislature has established a State Board of Education and a position of State Superintendent of Public Instruction to carry out that constitutional mandate and to satisfy N.C. Const. art. IX, § 4. G.S. 115-2 and 12. Policies and procedures regarding public education in this State are determined by the State Superintendent of Public Instruction and the State Board of Education.

Local school boards, established on either a county or city-wide basis, are deemed agents of the State for the purpose of providing public education. *Parent-Teacher Assoc. v. Board of Education*, 4 N.C. App. 617, 621, 167 S.E. 2d 538, 541 (1969), *appeal dismissed* 275 N.C. 675, 170 S.E. 2d 473 (1969). Funds which are administered by the State are disbursed to these local entities for the purpose of meeting educational expenses. *See School Commissioners v. Board of Education*, 169 N.C. 196, 85 S.E. 138 (1915); N.C. Const. art. 9, § 6. These local entities operate under the directives of the State Superintendent of Public Instruction and the State Board of Education. *See Evans v. Mecklenburg County*, 205 N.C. 560, 172 S.E. 323 (1934); G.S. 115-27. They have, however, some degree of latitude in providing services as their particular schools may require. G.S. 115-27. Further, these local entities may supplement the funds administered by the State. *See*

Board of Education v. Henderson, 126 N.C. 689, 36 S.E. 158 (1900); N.C. Const. art. IX, § 2(2) and art. IX, § 7; *see Board of Education v. High Point*, 213 N.C. 636, 197 S.E. 191 (1938). G.S. 115-100.35 provides that "clear proceeds" or fines collected by the counties or cities for ordinance violations must be paid for the support of public education. *See Shore v. Edmisten, Atty. General*, 290 N.C. 628, 227 S.E. 2d 553 (1976).

The broad powers of the boards of education to run the schools within their districts were recognized in *Coggins v. Board of Education*, in which our Supreme Court stated:

> Each County Board of Education is vested with authority to fix and determine the method of conducting the public schools in its county so as to furnish the most advantageous method of education available to the children attending its public schools, . . . It may: (1) fix the time of opening and closing schools, . . . (2) determine the length of the school day, . . . (3) enforce the compulsory school law. . . . In addition it is given general control and supervision over all matters pertaining to the public schools within its county . . . and all powers and duties conferred and imposed by law respecting public schools, which are not expressly conferred and imposed upon some other officials, are conferred and imposed upon the county board of education.

223 N.C. at 767-68, 28 S.E. 2d at 530 (citations omitted). *See* also G.S. 115-27.

Generally, school facilities are the responsibility of the School Board and its employees and are to be used for school purposes. Until recently, school premises were to be used for school purposes only. Now, G.S. 115-133 and the Community Schools Act, G.S. 115-73.6 *et seq.*[2], provide that local school boards should allow the use of school premises to facilitate the needs of community groups.

The authority for the School Board's involvement in the development of the DEDE program is found in G.S. 115-133 which provides in relevant part that

2. The Community Schools Act is designed to allow greater community input into the operation of the public schools, including input into the curriculum, and to allow greater use of the public school facilities by community groups.

> [n]otwithstanding the provisions of G.S. 115-51, county and city boards of education shall have authority to adopt rules and regulations by which school buildings, including cafeterias and lunchrooms, may be used for other than school purposes so long as such use is consistent with the proper preservation and care of the public school property. No liability shall attach to any board of education, individually or collectively, for personal injury suffered by reason of the use of such school property.

We are convinced that the legislative scheme for public education accommodates the desire of the School Board to make available extended educational opportunities for its students. While the responsibility for providing a general and uniform system of education is primarily that of the legislature and State Board of Education, the local entities responsible for carrying out the policies of these bodies are required to consider the needs of the community in shaping its programs.

Under G.S. 115-133, the School Board was free to allow the committee running the DEDE program use of the Dilworth Elementary School building. The record indicates that the School Board devised a schedule of costs and rules and regulations regarding the use of school facilities. This was done even though the statute does not so require. The record also indicates that while the Dilworth Elementary School is used for the program, very little costs are incurred by the School Board thereby. We believe that the School Board's approval of the use of the building is statutorily permissible.

Moreover, we find no merit in the plaintiffs' position that the DEDE program is a special program within the meaning of G.S. 115-367. G.S. 115-367 was designed to provide special educational services for students with special needs; it was designed to facilitate the needs of students who have emotional, physical or mental handicaps or problems. "Children with special needs," by definition, includes children between "five and 18 who because of permanent or temporary mental, physical or emotional handicaps need special education, are unable to have all their needs met in a regular class without special education or related services, or are unable to be adequately educated in the public schools." G.S. 115-366. There is nothing in the record to indicate that the

students serviced by the DEDE program have special needs. They are like all other students their age. Once they leave school they require, because of their age, continued supervision and planned activities to challenge and direct their energies.

B.

The plaintiffs argue that the legislature may not constitutionally delegate to the School Board the power or authority to maintain the DEDE program. Based upon our interpretation of the statutes which allow the School Board to make available to community groups the facilities within the school system and upon our understanding of the legislature's power to delegate its duty, we reject this argument.

We hold today that the School Board has the power and authority under G.S. 115-133 to allow the operation of the DEDE program at Dilworth Elementary School.

> "It is settled and fundamental in our law that the legislature may not abdicate its power to make laws nor delegate its *supreme* legislative power to any other coordinate branch or to any agency which it may create. [Citation omitted.] It is equally well settled that, as to some *specific* subject matter, it may delegate a *limited* portion of its legislative power to an administrative agency *if* it prescribes the standards under which the agency is to exercise the delegated powers." *Turnpike Authority v. Pine Island*, 265 N.C. 109, 114, 143 S.E. 2d 319, 323, and cases cited. [Emphasis in original.]

Education Assistance Authority v. Bank, 276 N.C. 576, 589, 174 S.E. 2d 551, 561 (1970); *see also Foster v. Medical Care Committee*, 283 N.C. 110, 118-19, 195 S.E. 2d 517, 523-25 (1973).

The legislative duty to provide a general and uniform free public education system has been delegated, in part, to the State Board of Education and State Superintendent of Public Instruction. *See* Part III, A, *supra*. G.S. 115-133 is a delegation of a limited portion of the legislature's power to local school boards. Since local school boards operate as agents of the State Board of Education and since the legislature's power to establish the State Board of Education comes from our Constitution itself, we perceive no problem in the legislature's delegation of this authori-

ty to local school boards. This is particularly true since the delegation of the legislative power was not of the supreme power but was a delegation of a limited portion of its power. Further, the comprehensive statutory scheme for public education prescribes the standards under which the State Board of Education and its agents are to operate, negating the possibility that the delegation was arbitrary.

IV

[3] The plaintiffs further argue that school funds were used to establish the DEDE program and are being used to maintain the program. In conjunction with that argument, they contend that the expenditures of these school funds are not for a public purpose and have not been approved by the voters.

The record indicates that school funds are being used to help maintain the DEDE program in that the program uses the Dilworth Elementary School free of charge. Electricity and fuel for lighting, heating and air conditioning the school building for the three and one-half hours per day that the program is in operation is provided by the School Board. These costs have been deemed nominal. There is no separate appropriation in the School Board's budget for them. Further, whatever these costs, they do not appreciably increase the operating or maintenance costs of the school. We do not read the record to show that school funds were used to establish the program.

Although the exact costs of the program are incalculable at this time, they are still costs which are borne by our taxpayers. These costs will increase if the program is expanded and, undoubtedly, will manifest themselves in larger numbers. Because these costs are expenditures of tax funds to a private entity, they must satisfy the public purpose doctrine. *Hughey v. Cloninger*, 297 N.C. 86, 95, 253 S.E. 2d 898, 904 (1979).

Our Constitution requires that all expenditures of tax dollars be for a public purpose. *Nash v. Tarboro*, 227 N.C. 283, 42 S.E. 2d 209 (1947); N.C. Const. art. V, § 2(1). Whenever the constitutionality of an act or expenditure is raised, "it is the duty of the court to ascertain and declare the intent of the framers of the Constitution and to reject any legislative act which is in conflict therewith. [Citations omitted.] The presumption, however, is in

favor of constitutionality, and all doubts must be resolved in favor of the act." [Citations omitted.] *Mitchell v. Financing Authority*, 273 N.C. 137, 144, 159 S.E. 2d 745, 750 (1968).

> The power to appropriate money *from* the public treasury is no greater than the power to levy the tax which put the money in the treasury. Both powers are subject to the constitutional proscription that tax revenues may not be used for private individuals or corporations, no matter how benevolent.
>
> . . . .
>
> . . . Often public and private interests are so co-mingled that it is difficult to determine which predominates. It is clear, however, that for a use to be public, its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity.

Id. at 143-44, 159 S.E. 2d at 749-50.

We believe that the DEDE program satisfies the public purpose doctrine. Although a private benefit inures to the individual students enrolled in the program, the scheme and intent of the program is to further the educational achievements of these students. The record indicates a varied program designed to improve the educational achievements of the students enrolled. The record also contains evidence that the students enrolled improved in their studies. It is declared in both our Constitution and our statutes that the education of our citizens to their maximum capacities is the goal of our educational system, for education of our citizens is essential to good government, morality and a good economy. Consequently, any costs to the school system which result from the program are permissible since they are cloaked with a public purpose.

Further, the School Board has the statutory power to approve the use of the Dilworth buildings under G.S. 115-133. Because it has the authority to allow the use of the buildings, it has the power to spend money to effectuate that authority. In *Hughey v. Cloninger*, our Supreme Court stated that "under [arti-

cle V. section 2] subsection (7) *direct disbursement* of public funds to private entities is a constitutionally permissible *means* of accomplishing a public purpose provided there is statutory authority to make such appropriation." 297 N.C. at 95, 253 S.E. 2d at 904 (emphasis in original). Here we have an indirect disbursement of public funds to the committee which operates the DEDE program. The School Board has the authority to allow the program to operate at Dilworth. Consequently, it has the authority to expend funds for heating or air conditioning and lighting the building.

Because we hold that the School Board had the authority to absorb the fuel and electricity costs of the DEDE program, on the basis that the expenditure was for a public purpose, one of which was to improve the educational achievements of "latch key" children, we reject the plaintiffs' contention that this expenditure must be approved by the voters. *See School District v. Alamance County*, 211 N.C. 213, 223, 189 S.E. 873, 879 (1937) (expenditure of tax funds to operate public schools is a "necessary expense not requiring a vote of the people to make it effective"); *Parent-Teacher Assoc. v. Board of Education*, 4 N.C. App. 617, 621, 167 S.E. 2d 538, 541 (1969), *appeal dismissed* 275 N.C. 675, 170 S.E. 2d 473 (1969) (conversion of high school facility to technical and adult school was a part of school board's decision to provide public education not requiring vote of the people).

V

[4] The plaintiffs also argue that they are entitled to an award of attorneys' fees. We reject this argument on the following authority.

> The general rule is that, in the absence of any contractual or statutory liability therefor, attorney fees and expenses of litigation incurred by the plaintiff or which plaintiff is obligated to pay in the litigation of his claim against the defendant, are not recoverable as an item of damages . . . . The reason for the rule is that . . . to allow these expenses to the plaintiff, which are never allowed to a successful defendant, would give the former an unfair advantage in the contest.
>
> "The right to recover attorneys' fees from one's opponent in litigation as a part of the costs thereof does not exist at common law. Such an item of expense is not allowable in the absence of a statute or rule of court or in the absence of

some agreement expressly authorizing the taxing of attorneys' fees in addition to the ordinary statutory costs." 20 Am. Jur. 2d, Costs, § 72, p. 58.

Perkins v. Insurance Co., 4 N.C. App. 466, 468, 167 S.E. 2d 93, 95 (1969). "North Carolina has applied a rule of equity exception in various classes of cases, i.e. where a litigant at his own expense has maintained a successful suit for the preservation, protection or increase of a common fund or of common property." *Ingram, Commissioner of Insurance v. Assurance Co.*, 34 N.C. App. 517, 524-25, 239 S.E. 2d 474, 478 (1977) *citing Horner v. Chamber of Commerce*, 236 N.C. 96, 72 S.E. 2d 21 (1952). *See also Rider v. Lenoir County*, 238 N.C. 632, 78 S.E. 2d 745)1953); *Hopkins v. Barnhardt*, 223 N.C. 617, 27 S.E. 2d 644 (1943).

The plaintiffs argue that their action to stop the defendant School Board from expending school funds for the DEDE program falls within the equity exception above. We find no merit in this argument. The plaintiffs, while taxpayers and citizens of the State of North Carolina, brought this action primarily to protect their business interests, not to protect or preserve public funds or property.

VI

[5] The plaintiffs' remaining argument that the School Board is in unauthorized competition with them and that the DEDE program violates their personal and property rights are summarily rejected based on our foregoing analysis. Further, neither Art. I, section 19 of our Constitution, nor the Fourteenth Amendment to the United States Constitution is violated by the operation of the DEDE program. The plaintiffs have no vested property rights in providing after school care for the children of the Charlotte-Mecklenburg school system.

VII

Because we find that there is both constitutional and statutory authority for the School Board's involvement with the DEDE program, we uphold the summary judgment granted the School Board. The judgment below is

Affirmed.

Judge MARTIN (Robert M.) and Judge MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. RONALD TYREE FRONEBERGER

No. 8126SC53

(Filed 15 December 1981)

1. Kidnapping § 1— indictment—proper in form

The fact that the indictment charging the defendant with kidnapping failed to allege the element of lack of consent, the age of the victim, and failed to correctly spell the name of the defendant did not make it fatally defective. G.S. 14-39 and G.S. 15A-1446(d)(4).

2. Kidnapping § 1.1— evidence of murder—relevant to kidnapping

It was not error to admit evidence pertaining to the murder of a person whom defendant was to have aided in kidnapping as the State had the burden under G.S. 14-39 of proving that the victim was unlawfully confined, restrained or removed for the purpose of committing murder.

3. Criminal Law § 87.1— leading questions—date of crime

One of the guidelines which have developed which aid trial judges in determining when counsel shall be allowed to lead witnesses allows leading questions in order to direct attention to the subject matter at hand without suggesting answers. Therefore, the trial court did not err in permitting the district attorney to ask one of the State's witnesses to call his attention to the date of 13 July 1979 and asked him if he saw the victim that day and to relate what happened.

4. Criminal Law § 162.3— nonresponsive answer—failure to move to strike

When a defendant objects to an alleged improper response to a proper question, he must also move to strike said response. Defendant's failure to so move precludes him from raising the questions of admissibility on appeal.

5. Kidnapping § 1.1— relevancy of evidence after stipulation

In a prosecution for kidnapping for the purpose of facilitating murder, it was not error for the court to admit evidence that on the date the victim's body was found a receipt and bag from a restaurant were found at the scene even though it was stipulated that the body found was the body of the victim. The State's evidence tended to show that defendant and two other persons drove away from the same restaurant in a Cadillac on the morning of the kidnapping, and the bag and receipt from the restaurant were relevant in providing proof of the charge.

6. Criminal Law § 162— failure to object—waiver of right

Where the record on appeal reveals that no objection was made during the trial to certain questions which elicited testimony assigned as error, the testimony, even if incompetent, is not a proper basis for appeal.

7. Criminal Law § 126— request to poll jury—failure to make request prior to jury's discharge

Where the trial court read the jury's verdict, inquired whether or not that was actually their verdict, and the jury responded in the affirmative before

the trial court discharged the jury and recessed for lunch, a motion by defense counsel to poll the jury after the recess was not timely under G.S. 15A-1238 as defense counsel waived his right to request a polling of the jury by not making his request prior to the jury's discharge.

8. Criminal Law § 126.3— failure to allow juror to impeach her verdict—no error

The trial court did not err in failing to allow a juror, who called defense counsel's secretary indicating that she did not feel that the defendant was guilty and that three of the jurors had been "coerced" into their decision by the other jurors, to impeach her verdict as neither G.S. 15A-1240(c)(1) nor (2) mandates that the court was required to hear the juror's testimony, and as the testimony of the defense counsel's secretary was both incompetent and vague and was not sufficient to allow the alleged juror or any other juror to impeach his or her verdict.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 7 August 1980 in Superior Court, MECKLENBURG County.

This matter was initially heard in the Court of Appeals 6 May 1981. In an opinion filed on 18 August 1981 we reversed the judgment against defendant because of a fatal defect appearing on the face of the indictment. On 3 November 1981 the North Carolina Supreme Court ordered that the opinion be vacated and that the case be remanded to this Court for consideration of all assignments of error brought forward by defendant. Pursuant to this order, the case is once again before us.

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 of not less nor more than 25 years. From this sentence, defendant appeals.

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.

[1] Defendant has preserved ten of his fourteen assignments of error on appeal. He first assigns error to the bill of indictment alleging that it was fatally defective for failure to allege the elements of lack of consent, the age of the victim and 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 bill of 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 bill of 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 held that the victim's age is not an essential element of kidnapping. The Court 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). In light of a recent decision handed down by the Supreme Court, the failure to allege lack of consent of the victim is also not fatal. *State v. Sturdivant*, filed 3 November 1981. The Court emphasized, "By its very nature, the crime of kidnapping cannot be committed if one consents to the act in a legally valid manner." For the aforesaid reasons we find the bill of indictment to be proper in form.

[2] Prior to trial defense counsel filed a motion *in limine* requesting the trial court to prohibit the State from producing evidence that the alleged kidnapped victim, Ethell Wilson, was subsequently found deceased. He alleged that the State was cognizant of the fact that defendant did not participate in the actual murder of Wilson. The trial court denied the motion and informed defense counsel, "I will just have to rule on the evidence as it comes along as to the extent to which I will let the State proceed." Defendant assigns error to the denial of this motion and argues that the subsequent admission of evidence pertaining to the murder and the decomposed condition of Wilson's body, which was found 39 days after the kidnapping, was prejudicial. We find no error in the denial of defendant's motion. "One of the essential elements of kidnapping under G.S. 14-39 is that the confinement, restraint, or removal be for the purpose of, among other alternatives, 'facilitating the commission of any felony.'" *State v. Williams*, 295 N.C. 655, 659, 249 S.E. 2d 709, 713 (1978). In the case *sub judice*, the State had the burden of proving that Wilson was unlawfully confined, restrained or removed for the *purpose* of committing murder. To convict defendant of kidnapping, the State did not have to prove the actual commission of the murder. In his argument supporting the motion *in limine*, defendant merely alleged that "if any evidence relative to the subsequent murder of the victim of the kidnapping is brought out at this trial, it will do nothing other than inflame the jury." On the basis of this argument we do not feel that the trial court abused its discretion in denying defendant's motion. We further note that at trial the State presented testimony from the Mecklenburg County Medical Examiner and an investigator from his office that Wilson's decomposed and bullet-riddled body was found in the trunk of a Cadillac in Mecklenburg County on 21 August 1979. Defendant failed to object to any of this evidence and, in effect, waived any assignment of error as to the prejudicial effect of the denial of his motion *in limine*.

We note that defendant did object to the following question posed to a witness who was at the scene when the body was found: "And whether or not the body was decomposed(?)" We also note that the trial court sustained this objection. Defendant's allegation that this leading question by the district attorney was prejudicial is, therefore, groundless.

Defendant has abandoned Assignments of Error Nos. 3, 4 and 5.

[3] In Assignment of Error No. 6, defendant argues that the trial court committed prejudicial error by allowing the district attorney to lead a State's witness as to the alleged date of the crime. The district attorney specifically called James Pearson's attention to the date of 13 July 1979 and asked him if he saw the victim that day and to relate what happened. The prevailing rule gives the trial judge discretionary power to determine whether or not counsel shall be permitted to ask leading questions. This power will not be disturbed on appeal absent an abuse of discretion. Furthermore certain guidelines have developed which aid trial judges in determining when counsel shall be allowed to lead his witnesses. One of these guidelines allows leading questions in order to direct attention to the subject matter at hand without suggesting answers. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). The question at issue comes under this guideline. We finally note that no prejudicial error could have been caused by this leading question in light of defendant's later testimony that the kidnapping occurred on 13 July 1979.

[4] Defendant also assigns error to an alleged non-responsive answer given by Pearson. During direct examination by the State, Pearson indicated that on the day of the alleged crime, Charles Norwood and Wilson drove to Pearson's house in a green Cadillac. Pearson observed that Norwood was pointing a pistol at Wilson's head. Defendant was standing in Pearson's yard at the time. Pearson testified that when he started to enter his house to call the police, defendant "barred" him. The State continued to question Pearson as follows:

> Q. How did he bar you from the door?
>
> A. Well, you know, barred me. Well, he had his gun on his side, you understand, I started to go into my house.
>
> MR. REYNOLDS: OBJECTION AS NOT RESPONSIVE TO THE QUESTION.
>
> COURT: OVERRULED.
>
> A. I started to go into the house. He said, "Where are you going?" I took the second thought, that he was going to

> do something to me, and I said, "Nowhere." I backed up. That was to keep from getting hurt myself.

Defendant now argues that Pearson's answer should have been stricken because it constituted both a non-responsive answer and opinion testimony. The record on appeal indicates that defendant failed to move to strike Pearson's testimony. When a defendant objects to an alleged improper response to a proper question, he must also move to strike said response. Defendant's failure to so move precludes him from raising the question of admissibility on appeal. *State v. Cunningham*, 34 N.C. App. 442, 238 S.E. 2d 645 (1977).

[5] In Assignment of Error No. 9 defendant argues that two exhibits were erroneously admitted into evidence, because their sole effect was to inflame the jury. A State's witness testified that on the date Wilson's body was found in the green Cadillac, a receipt and bag from a Kentucky Fried Chicken Restaurant were found at the scene. The parties had previously stipulated "that the body found in the trunk of a Cadillac off Youngblood Road in South Mecklenburg County on August 21, 1979, was the body of Ethel (sic) Wilson." Defendant argues that because of this stipulation the evidence of the bag and receipt was irrelevant. We disagree. The State's evidence tended to show that defendant, Norwood and Wilson drove away from a Kentucky Fried Chicken Restaurant in a green Cadillac on the morning of the kidnapping. The bag and receipt from Kentucky Fried Chicken which was later found near the Cadillac containing Wilson's body was clearly relevant in providing proof of the charge against the defendant that he kidnapped Wilson for the purpose of murder. This is particularly true in light of the time which passed from the date of the kidnapping to the date Wilson's body was discovered. "Strictly speaking, 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). Finally we note that defendant has failed to show any prejudicial effect from the admission of these exhibits.

[6] In Assignments of Error Nos. 10 and 11, defendant has noted error in the testimony of the Mecklenburg County Medical Examiner and an investigator from his office involving the condition and identity of the body removed from the Cadillac. The record

on appeal reveals that no objection was made during the trial to any of the questions eliciting this testimony or the testimony itself.

> "It is well settled that with the exception of evidence precluded by statute in furtherance of public policy [which exception does not apply to this case], the failure to object to the introduction of the evidence is a waiver of the right to do so, and its admission, even if incompetent is not a proper basis for appeal." (Citations omitted.)

State v. Hunter, 297 N.C. 272, 278-79, 254 S.E. 2d 521, 525 (1979).

[7] After the jury found defendant guilty of kidnapping and recommended leniency, the trial court read this verdict to the jury and inquired whether or not that was actually their verdict. The jury responded in the affirmative. The trial court then discharged the jury and recessed for lunch. When court resumed, defense counsel informed the court that he had motions to make. The trial court agreed to hear them and the following ensued:

> MR. REYNOLDS: Yes, sir. For the record, I would move to poll the jury as things occurred very rapidly before lunch, and just before lunch, I did not myself have the opportunity to think of polling them at that time. I was in a state of shock.
>
> COURT: You are not suggesting that the Court in any way prevented you from doing that?
>
> MR. REYNOLDS: No sir. No, sir. I'm saying that if there was any reason for it, it was my state of mind at the time the verdict was reached.
>
> COURT: Show that the jury having been discharged at 12:30 and the request for poll coming at 2:20, having previously been made in chambers after the jury had been excused by the Court, had left not only the jury box but the courtroom, the motion to recall the jury and take a jury poll is denied. The defendant excepts.

Defendant has assigned error noting that the "court's failure to allow the jury to be polled constituted error prejudicial to the defendant's right to a fair and impartial trial, and a denial of his right to confront the witnesses against him." G.S. 15A-1238 re-

quires that the jury must be polled when a party so moves "after a verdict has been returned and before the jury has dispersed." Defense counsel waived his right to request a polling of the jury by not making his request prior to the jury's discharge. *See State v. Littlejohn*, 19 N.C. App. 73, 198 S.E. 2d 11, *cert. denied*, 284 N.C. 123, 199 S.E. 2d 661 (1973). This assignment of error is without merit and is overruled.

[8] Immediately following the trial court's denial of defense counsel's belated motion to poll the jury, defense counsel moved "to set aside the verdict as against the greater weight of the evidence or motion notwithstanding the verdict of the jury." He then requested the court to hear testimony from his secretary, Mrs. Betty Fuller, regarding members of the jury. Mrs. Fuller testified that a woman identifying herself as Cheryl Oberndorf called defense counsel's law office at 2:00 p.m. indicating she was one of the jurors in defendant's case. Mrs. Fuller continued:

> She was upset and crying and said that she did not want to cause trouble but that three of them were very, very upset and crying and that she did not feel that the defendant was guilty and that they had been "coerced" into their decision by the other jurors.

The trial court made the following response to this testimony:

> Let the record reflect that the Court refuses to permit this juror to be brought before the Court for the purpose of impeaching her verdict in the case. That the verdict was taken in open court. That all jurors, including this juror, were asked if this was their verdict. So say they all. That they all nodded affirmatively or said, "Yes." That the juror and any other juror had ample opportunity to state to the Court that this was not their verdict but they did not do so. That the verdict is in writing. It is signed by the Foreman of the Jury. That the verdict is consistent, precise, and that the second thoughts of this juror as to her own part in reaching a unanimous verdict are not sufficient grounds to justify an inquiry by the Court as to the manner and deliberative process through which the verdict was reached. That the jury, in addition to finding the defendant guilty of kidnapping, recommended leniency, which is not an unusual practice on the part of jurors, and that the verdict being otherwise consistent

with the law, evidence, and instructions in the case, will not now be disturbed by way of attack by members of the jury. The defendant excepts.

Defendant now argues that the trial court committed prejudicial error when it refused to hear the testimony of any alleged impropriety in regard to the jury's deliberation and verdict. He further argues that the court violated subsection (c) of G.S. 15A-1240. This statute, which became effective 1 July 1978, provides:

> Impeachment of the verdict.—(a) Upon an inquiry into the validity of a verdict, no evidence may be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.
>
> (b) The limitations in subsection (a) do not bar evidence concerning whether the verdict was reached by lot.
>
> (c) After the jury has dispersed, the testimony of a juror may be received to impeach the verdict of the jury on which he served, subject to the limitations in subsection (a), only when it concerns:
>
> (1) Matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him; or
>
> (2) Bribery, intimidation, or attempted bribery or intimidation of a juror.

We find no merit to defendant's argument that the court was required to hear the juror's testimony as mandated by either G.S. 15A-1240(c)(1) or (2). In a recent decision this Court emphasized: "The determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal. (Citations omitted.)" *State v. Gilbert*, 47 N.C. App. 316, 319, 267 S.E. 2d 378, 379 (1980). In the case *sub judice*, the testimony of defense counsel's secretary was both incompetent and vague. She referred to a telephone conversation from an alleged juror who indicated that she and two other unnamed jurors had been "coerced" into the verdict rendered. The caller gave no basis for this conclusion. In light of the written verdict

which had been signed by the foreman of the jury, the court's query to the jury as to whether this was actually their verdict and the jury's affirmative response to this query; the court did not err in refusing to permit the alleged juror to impeach her verdict. Prior to the enactment of G.S. 15A-1240, jurors were not allowed to attack or overthrow their verdict after they had been discharged. *See Selph v. Selph*, 267 N.C. 635, 148 S.E. 2d 574 (1966); *State v. Hollingsworth*, 263 N.C. 158, 139 S.E. 2d 235 (1964); *In re Will of Hall*, 252 N.C. 70, 113 S.E. 2d 1 (1960). The case law also indicated that one other than a juror could not testify as to what that juror had said. *Lambert v. Caronna*, 206 N.C. 616, 175 S.E. 303 (1934); *Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570 (1922). In the recent decision of *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 796, 100 S.Ct. 2165 (1980), our Supreme Court indicated that it was of the opinion that G.S. 15A-1240(a) "amounts to legislative recognition of the existing case law." *Id.* at 102, 257 S.E. 2d at 561. It appears that subsection (c) of G.S. 15A-1240 is in derogation of the common law. The statute, therefore, must be strictly construed. *Ellington v. Bradford*, 242 N.C. 159, 86 S.E. 2d 925 (1955). We hold that the vague hearsay evidence given by defense counsel's secretary, concerning "second thoughts" of a juror, was not sufficient to allow the alleged juror or any other juror to impeach his or her verdict.

Defendant received a fair trial free from prejudicial error.

No error.

Judges CLARK and HILL concur.

GENE ROLLINS AND VELMA ROLLINS D/B/A ROLLINS BODY WORKS v. JUNIOR MILLER ROOFING COMPANY AND THE MONROE COMPANY, INC.

No. 8118SC303

(Filed 15 December 1981)

1. **Principal and Agent § 5— written contract—notice of limitation on scope of agent's authority**

Where defendant, in its written contract of sale of roofing materials to plaintiff, disavowed responsibility for installation of the materials or supervision thereof, the selection of a roofing company to install the materials was beyond the scope of the authority of defendant's agent, and defendant may not be held liable to plaintiff for negligence of the agent in the selection of a roofing company to install the materials.

2. **Rules of Civil Procedure § 56.4— summary judgment—deposition contradicting admissions in pleadings**

A party may not defeat summary judgment by presenting deposition testimony which contradicts the prior judicial admissions of his pleadings.

3. **Parties § 3— failure to allege legal capacity of defendant—jurisdiction over individual**

Although the complaint named Junior Miller Roofing Company as defendant and failed to allege the legal capacity or status of defendant, the court had jurisdiction over the person of Junior Miller where the summons and complaint were served on Junior Miller Roofing Company "in the office of Junior Miller, owner, by leaving copies with Edna Miller, wife"; Junior Miller Roofing Company filed an answer and cross-claim under that name; Junior Miller filed an affidavit asserting that he was in the roofing business but that he was not incorporated as Junior Miller Roofing Company or in any other capacity; and in settling the record on appeal, Junior Miller stipulated that all parties were duly served and properly before the court.

4. **Negligence § 2— negligence in repairing roof—issues of material fact**

Genuine issues of material fact were presented in an action against a roofing contractor to recover damages for alleged breach of contract and negligence in repairing a roof, and the trial court erred in entering summary judgment for defendant contractor.

APPEAL by plaintiffs from *Walker, Judge*. Judgments entered 27 October 1980 and 29 October 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 October 1981.

Plaintiffs instituted this action to recover damages resulting from certain repair work done to the roof of a building owned by

them. They alleged that they purchased the materials for repairing the roof from defendant The Monroe Company; that The Monroe Company's representative, H. B. Lynch, arranged for defendant Junior Miller Roofing Company to provide the labor for the repair work; and that the work was done improperly. Plaintiffs charged The Monroe Company with negligence in the selection of Junior Miller Roofing Company, and they charged Junior Miller Roofing Company with breach of contract and negligence in connection with the repair work.

The Monroe Company filed an answer alleging, among other defenses, a disclaimer in the contract for the sale of the roofing materials to the plaintiffs. The Monroe Company counterclaimed for the balance due on the contract. Junior Miller Roofing Company answered and crossclaimed against defendant The Monroe Company for indemnity or contribution on grounds that The Monroe Company's agent supervised the repair work to the roof.

Both defendants moved for summary judgment as to the plaintiffs. They submitted affidavits in support of their motions, and the plaintiffs submitted their depositions in opposition. The trial court allowed both motions, dismissing plaintiffs' action against defendants and allowing The Monroe Company's counterclaim against the plaintiffs.

Samuel M. Moore for plaintiff appellants.

Smith, Moore, Smith, Schell & Hunter, by William L. Young, for defendant appellee The Monroe Company, Inc.

No brief for defendant appellee Junior Miller Roofing Company.

MARTIN (Harry C.), Judge.

A motion for summary judgment may only be granted where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *See, e.g., Yount v. Lowe*, 288 N.C. 90, 215 S.E. 2d 563 (1975); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972).

In order for a defendant's motion for summary judgment to be granted, the defendant must produce a forecast of the

> evidence which he has available for presentation at trial which is sufficient, if considered alone, to compel a verdict in favor of defendant as a matter of law. Failure of the plaintiff to counter the effect of defendant's forecast by his own forecast of evidence sufficient to create a genuine issue of material fact will result in a judgment against him. The test is whether plaintiff has presented evidence sufficient to survive a motion for a directed verdict if such evidence were offered at trial. *Cockerham v. Ward* and *Astrup Co. v. West Co.*, 44 N.C. App. 615, 262 S.E. 2d 651, *disc. review denied*, 300 N.C. 195, 269 S.E. 2d 622 (1980).

Smith v. Funeral Home, 54 N.C. App. 124, 125, 282 S.E. 2d 535, 536 (1981).

We affirm the summary judgment as to defendant The Monroe Company. Plaintiffs have not alleged any defects in the roofing materials supplied by The Monroe Company, and they stated in their depositions that they were satisfied with the materials. Plaintiffs seek to hold The Monroe Company liable on grounds that its agent, H. B. Lynch, was negligent in the selection of Junior Miller Roofing Company to perform the repair work. They have also alleged that Lynch was the agent of both The Monroe Company and Junior Miller Roofing Company, and they argue that the negligence of Junior Miller Roofing Company should be imputed to The Monroe Company. The evidence before the trial court will not support their claim.

[1] Plaintiffs alleged in their complaint that on 22 October 1975 they signed a contract with The Monroe Company for the purchase of the roofing materials and that the proposed contract was received by The Monroe Company and became binding on or about 28 October 1975. The Monroe Company admitted entering into this contract in its answer. It then alleged this same contract as the basis of its counterclaim and attached a copy as an exhibit. In their reply to the counterclaim, the plaintiffs admitted entering into the contract. A copy of the contract has been filed with this Court. It includes the following provisions:

> 2. This Acknowledgment contains the entire agreement of sale between the parties, and no other representations, agreements, estimates or other verbal statements or writing relating to this transaction or the goods hereinabove de-

scribed, except the aforesaid separate written Guaranty, shall be of any binding effect between the parties hereto.

3. Seller shall not be responsible for application or installation of the goods, or supervision thereof, unless otherwise agreed in a writing signed by Seller; any such application, installation or supervision performed for Buyer by any person also employed by Seller shall be solely for Buyer's account and at Buyer's responsibility and risk.

Gene Rollins admitted receiving a copy of the contract before the repair work commenced, and the plaintiffs stated that they did not enter into any other written agreement with The Monroe Company concerning installation of the roofing materials. The plaintiffs were therefore on notice that The Monroe Company disavowed responsibility for application or installation of the roofing materials or supervision thereof. Any such activity by Lynch, including his selection of Junior Miller Roofing Company, was beyond the scope of his authority as the agent of The Monroe Company, and The Monroe Company may not be held liable therefor. " 'Any apparent authority that might otherwise exist vanishes in the presence of the third person's knowledge, actual or constructive, of what the agent is, and what he is not, empowered to do for his principal.' " *Research Corporation v. Hardware Co.*, 263 N.C. 718, 723, 140 S.E. 2d 416, 420 (1965) (citations omitted). " 'One dealing with an agent or representative with known limited authority can acquire no rights against the principal when the agent or representative acts beyond his authority or exceeds the apparent scope thereof.' " *Investment Properties v. Allen*, 283 N.C. 277, 286, 196 S.E. 2d 262, 267 (1973) (citation omitted).

[2] Plaintiffs denied in their depositions that the signature on the contract was that of Gene Rollins; however, this deposition testimony fails to raise a genuine issue of material fact as to the contract. As noted above, the exhibit attached to The Monroe Company's counterclaim and filed with this Court was established by the pleadings as the contract between the parties. The terms of the contract, including the disclaimer of responsibility quoted above, were thus judicially admitted. "A party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive

as against the pleader. He cannot subsequently take a position contradictory to his pleadings." *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E. 2d 33, 34 (1964); *accord, Watson v. Clutts*, 262 N.C. 153, 136 S.E. 2d 617 (1964); *Markham v. Johnson*, 15 N.C. App. 139, 189 S.E. 2d 588, *cert. denied*, 281 N.C. 758, 191 S.E. 2d 356 (1972). The effect of a judicial admission is to establish the fact for the purposes of the case and to eliminate it entirely from the issues to be tried. 2 Stansbury's N.C. Evidence §§ 166 and 177 (Brandis rev. 1973). "Evidence offered in denial of the admitted fact should undoubtedly be rejected." Stansbury, *supra*, § 166. In *Mortgage Co. v. Real Estate, Inc.*, 39 N.C. App. 1, 249 S.E. 2d 727 (1978), *aff'd by an equally divided court*, 297 N.C. 696, 256 S.E. 2d 688 (1979), this Court held that a party may not create a genuine issue of material fact so as to avoid summary judgment by filing an affidavit contradicting his own prior sworn testimony in a deposition. We now hold that a party may not defeat summary judgment by presenting deposition testimony which contradicts the prior judicial admissions of his pleadings. Summary judgment was properly entered as to the plaintiffs' claim against defendant The Monroe Company. Summary judgment was also proper as to The Monroe Company's counterclaim against the plaintiffs. Although they denied that any balance was due in their reply, plaintiffs conceded in their depositions that they owed The Monroe Company the balance it claimed for sale of the roofing materials.

[3] We reverse the summary judgment as to defendant Junior Miller Roofing Company. Plaintiffs alleged in their complaint that Junior Miller Roofing Company was a North Carolina corporation. Junior Miller Roofing Company filed an answer asserting, among other defenses, "that there does not exist an entity known as Junior Miller Roofing Company and that the alleged Junior Miller Roofing Company is not incorporated in the State of North Carolina nor in any other place." At the summary judgment hearing, the plaintiffs moved to amend their complaint in order to strike the allegation of incorporation. This motion to amend was "allowed and considered allowed in hearing the motion for summary judgment of the defendant, Junior Miller Roofing Company." The motion for summary judgment was then allowed in favor of this defendant. Although the trial court did not state the grounds for its ruling, the plaintiffs assume in their brief that

summary judgment was granted because of the improper designation of Junior Miller Roofing Company in the complaint. We find no basis for summary judgment.

N.C.G.S. 1-75.2(3) defines the term "defendant" as "the person named as defendant in a civil action." Subsection (1) of this statute defines the term "person" as "any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society which may sue or be sued under a common name." The defendant in a civil action must be an existing legal entity, either natural or artificial. *Nelson v. Relief Department*, 147 N.C. 103, 60 S.E. 724 (1908). However, it is not necessary to allege in the complaint what type of legal entity the defendant is. *See* N.C. Gen. Stat. § 1A-1, Rule 9(a) (1969). "[A] person may be sued under a trade name." 59 Am. Jur. 2d Parties § 46 (1971). In *Thune v. Hokah Cheese Co.*, 260 Iowa 347, 149 N.W. 2d 176 (1967), the plaintiff sued defendant Hokah Cheese Company as the registered owner of a truck involved in a traffic accident with the plaintiff. Plaintiff merely alleged that the defendant was a duly licensed business having the capacity to be sued; she did not allege whether the defendant was a corporation, a partnership or a trade name. Service was made on "Willard Potter, owner of Hokah Cheese Company." Defendant challenged jurisdiction on grounds that it was not a legal entity capable of being sued. The trial court agreed, but the Supreme Court of Iowa reversed. The court held that Willard Potter was before the court at all times under his trade name. It wrote:

> As long as the real party receives proper notice of the action, we are unable to see any prejudice in permitting him to be sued in a trade or fictitious name alone. However, a careful practitioner should continue to bring suit against the individual as well as the fictitious name in which he may be doing business.

Id. at 353, 149 N.W. 2d at 179.

In the present case plaintiffs, having amended their complaint in order to delete the allegation of incorporation, were left with no allegation as to the legal status of Junior Miller Roofing Company. The summons and complaint were served on Junior Miller Roofing Company "in the office of Junior Miller, owner, by leaving copies with Edna Miller, wife . . .." Junior Miller Roofing

Company filed an answer and cross-claim under that name. Junior Miller himself filed an affidavit asserting "[t]hat I am in the roofing business and have had fifteen years experience but that I am not incorporated as Junior Miller Roofing Co. or incorporated in other capacity." In settling the record on appeal, Junior Miller signed a stipulation to the effect "[t]hat all parties were duly served and properly before the court." Although we do not recommend the form of plaintiffs' complaint, we find that jurisdiction has been established over the person of Junior Miller.

[4] Genuine issues of material fact exist with respect to the plaintiffs' claim against Junior Miller. Junior Miller's affidavit was to the effect that the plaintiffs' roof was so deteriorated that he advised tearing it off and replacing it with an entirely new roof; that Lynch told him that Gene Rollins did not want a new roof and that he should do the best job that he could; and that Lynch instructed him on how to perform the work. However, the plaintiffs' depositions tended to show that Lynch acted as agent for Junior Miller and was present and was supervising while the repair work was being done; that Junior Miller did not follow Lynch's directions; that the sprayer used to apply the roofing materials did not work properly; that Junior Miller's crew made holes in the roof where there had not been holes before and did not repair the holes; that the crew did not install new gravel stops and rehang a gutter as they were supposed to; and that the roof leaked worse after the repair work. The issues raised should be decided by a jury.

As to defendant The Monroe Company, Inc., affirmed.

As to defendant Junior Miller Roofing Company, reversed and remanded.

Judges HEDRICK and CLARK concur.

GLYK AND ASSOCIATES v. WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY

No. 8121SC226

(Filed 15 December 1981)

1. **Appeal and Error § 6.2— appeal from preliminary injunction**

A preliminary injunction is a temporary order from which no appeal lies unless the order deprives the restrained party of a substantial right. G.S. 1-277(a); G.S. 7A-27(d).

2. **Injunctions § 13.4— temporary injunction restraining trespass**

Where there is a continuing trespass or wrongful interference with the present right of possession of realty, the court will ordinarily give relief by temporary injunction, pending the action, with such reasonable restrictions as the exigencies of the case may require.

3. **Appeal and Error § 43— additions to record on appeal—motion after oral argument**

While the Appellate Court will not ordinarily allow a motion to enlarge the record under Appellate Rule 9(b)(6) if the motion is made during or after oral argument, a motion made after oral argument in this appeal from a temporary injunction to add to the record on appeal orders entered subsequent to the temporary injunction is allowed for the limited purpose of recognizing that restrictions were imposed to the temporary injunction and that the injunction was stayed pending appeal.

4. **Appeal and Error § 6.2— premature appeal from temporary injunction**

Plaintiff had no right to appeal from a temporary injunction restraining plaintiff, its tenants and customers from trespassing upon the disputed lands where defendant railroad offered evidence of record title, the location of the disputed parcels on the ground, its use and possession of the parcels, and continuing trespass by defendant, its tenants and customers, and plaintiff offered no evidence but merely alleged ownership and possession of the parcels and trespass by defendant railroad, since plaintiff's allegations, though sufficient to raise the issue of title at trial, were insufficient to show that plaintiff was deprived of a substantial right by the temporary injunction.

APPEAL by plaintiff from *Collier, Judge.* Order entered 10 December 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 13 October 1981.

Plaintiff (referred to as "GLYK"), in this action to recover damages for recurring trespass, alleged ownership of a parcel of land in Winston-Salem, North Carolina, on which is located a multi-story building fronting South Liberty Street for 200 feet on the east and having a depth of 87 feet. Plaintiff further alleged

that the parcel includes a strip of land to the west and in the rear of the building, 33-1/2 feet by 199 feet, on which are located two sets of railroad tracks, the easternmost track being only 5 to 7 feet behind the building. Plaintiff alleged that defendant (referred to as "Railway") had parked two large gondola cars on the tracks immediately behind plaintiff's building, thereby blocking the use by its tenants of freight elevator and loading dock. Plaintiff also asserted an easement over defendant's land to a door on the south side of the building which was blocked by defendant. Plaintiff sought compensatory and punitive damages.

In its answer defendant asserted fee simple title to the disputed lands and denied any easement in plaintiff. Defendant counterclaimed that plaintiff and its tenants had used the southern and western parcels without its permission; that one tenant had constructed concrete steps which extended to within one foot of the railroad tracks; and that plaintiff was installing balconies which would protrude three feet from the building walls. By motion for preliminary injunction defendant sought to restrain these acts of continuing trespass by plaintiff.

At the hearing on defendant's motion for preliminary injunction the defendant offered in evidence 29 deeds, three maps and a "Chart Showing Chains of Title" to both defendant's and plaintiff's lands.

In his affidavit, Mr. J. W. Hamilton, Assistant Vice-President of defendant, averred that the deeds to the southern and western parcels were kept with the records maintained by defendant; that defendant was using the property for railroad purposes and would continue to do so; that plaintiff's agents and tenants have walked, driven and parked cars on defendant's property without its permission; that plaintiff had allowed one of its tenants to construct concrete steps which encroached upon defendant's property and prevented the railroad from using the southernmost 75 feet of its tracks; that plaintiff had placed a large trash receptacle across the tracks; that defendant had never given plaintiff permission to do any of these acts; and that defendant has paid all taxes on said property.

Defendant also presented the testimony of Mr. Harris B. Gupton, a licensed land surveyor. Mr. Gupton testified that the deeds to defendant encompassed the property here in question.

Plaintiff argues that the deed to the western parcel is void for vagueness in that the description refers to a plat which was not attached to the deed as recorded in the office of the Register of Deeds. Mr. Gupton stated that by using only the deed, he would be unable to place the land on the earth's surface. However, he was able to do so by using both deed and plat. The plat was attached to the original deed kept with defendant's records.

In his order dated 10 December 1980 Judge Collier found that defendant had made a *prima facie* showing of fee simple ownership in the two parcels, that plaintiff had not shown it had any easements, and that plaintiff and its tenants were continuously trespassing upon defendant's property. The order granting preliminary injunction for defendant prohibited plaintiff and its tenants from going on the southern and western parcels. Plaintiff appealed.

Badgett, Calaway, Phillips, Davis, Stephens, Peed & Brown, by Chester C. Davis; and Weston P. Hatfield for plaintiff appellant.

Craige, Brawley, Liipfert & Ross by William W. Walker for defendant appellee.

CLARK, Judge.

[1] GLYK seeks to appeal from the order of the trial court granting a preliminary injunction, which restrains GLYK, its tenants, or its customers from going over or upon lands identified as the western parcel and the southern parcel pending trial on the merits. G.S. 1A-1, Rule 65. A preliminary injunction is a temporary order from which no appeal lies unless the order deprives the restrained party of a substantial right. G.S. 1-277(a) and G.S. 7A-27(d). *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348 (1975); *Setzer v. Annas*, 286 N.C. 534, 212 S.E. 2d 154 (1975); *Gunkel v. Kimbrell*, 29 N.C. App. 586, 225 S.E. 2d 127 (1976).

The first question presented is whether GLYK is deprived of any substantial right by the order granting the preliminary injunction to Railway. At the hearing on Railway's motion for preliminary injunction GLYK did not offer evidence. GLYK takes the position that Railway failed in its burden of establishing its right to a preliminary injunction. G.S. 1A-1, Rule 65(b). *Setzer v.*

Annas, supra. This burden required Railway to offer evidence at the hearing on its motion sufficient to satisfy the trial judge that (1) there is probable cause that Railway will be able to establish the rights which it asserts and (2) there is reasonable apprehension of irreparable loss unless injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect Railway's rights during the litigation. *Pruitt v. Williams, supra.* At the hearing Railway offered in evidence 29 deeds, 3 plats, and a "Chart Showing Chain of Title," apparently to the lands claimed by both Railway and GLYK. Railway also offered the affidavit of its Assistant Vice-President, J. W. Hamilton, who averred in substance that Railway had deeds to and was the owner of both the western and southern parcels and was using that property, and that GLYK began trespassing in September 1979 on both parcels and had continued the trespass since that time. In addition Railway called as a witness Harris B. Gupton, a licensed land surveyor, who testified that deeds to Railway encompassed the disputed parcels.

[2] After hearing, Judge Collier granted Railway's motion for preliminary injunction, finding that Railway had shown *prima facie* title to the parcels in dispute, that GLYK had no easement in the southern parcel, and that GLYK was continually trespassing on Railway's lands. Railway was requested to post a bond of $75,000. Judge Collier based the preliminary injunction on his finding that Railway established *prima facie* record title and that GLYK was engaged in recurring or continuous acts of trespass. Judge Collier's ruling and injunction is supported by the rule of law that where there is a continuing trespass or wrongful interference with the present right of possession, the court will ordinarily give relief by temporary injunction, pending the action, with such reasonable restrictions as the exigencies of the case may require. *Young v. Pittman,* 224 N.C. 175, 29 S.E. 2d 551 (1944); *Conrad v. Jones,* 31 N.C. App. 75, 228 S.E. 2d 618 (1976); 7 Strong's N.C. Index 3d *Injunctions* § 13.4 (1977).

After the records and briefs were filed and after hearing in this Court, on 18 October 1981, GLYK filed a Motion to Enlarge Record on Appeal to include the following orders of the trial court:

1. An Order signed by Judge Collier on 15 December 1980, which suspended the temporary injunction as to Electric Supply,

Inc., a GLYK tenant, until 31 January 1981, so that its employees and customers would have access to its premises.

2. An Order to Reconsider signed by Judge Collier on 22 January 1981, which directed any Superior Court Judge holding the Courts of the Twenty-First District to hear GLYK's Motion to Reconsider the preliminary injunction of 10 December 1980.

3. An Order signed by Judge Wood on 30 January 1981, which again suspended the temporary injunction as to Electric Supply, Inc., until 15 March 1981 so that it could relocate its business.

4. An Order Staying Preliminary Injunction Pending Appeal signed by Judge Seay on 3 February 1981, after a hearing consisting of oral argument by counsel for GLYK and Railway. The hearing was held on GLYK's Motion for Stay pending appeal made on 12 December 1980. *See* G.S. 1A-1, Rule 62(c), and Appellate Rules 8 and 36. The order noted that Railway in its answer alleged a continuous trespass by GLYK, its tenants and its tenants' customers without compensation, and that the fair market rental value of the disputed lands was $200 per month. The preliminary injunction of 10 December 1980 was stayed "pending a decision by the appropriate appellate court. . . ." The order further required GLYK to post a stay bond of $1,000. Railway excepted to the stay order and gave notice of appeal. On 4 February 1981 Railway filed with this Court (1) Petition for Writ of Mandamus seeking to have the orders of Judge Wood and Judge Seay vacated, and (2) Petition for Temporary Stay of said orders and Supersedeas. All of the petitions were denied by this Court. Railway has not perfected its appeal from the order of Judge Seay.

In determining whether to allow GLYK's motion to enlarge the record, we have considered the original record on appeal and devoted much time in the examination and study of the many deeds and various maps offered in evidence by Railway at the December 1980 hearing in an attempt to determine if they show title or easements in GLYK to the parcels in dispute. The record on its face, without supporting evidence, reveals none. The wisdom of GLYK in failing to offer evidence at this hearing was questionable. We note that in its appeal brief GLYK argues that it and its various tenants have no access to its building if en-

joined from access over the disputed western and southern parcels of land. Yet there is nothing in the original record on appeal to support this argument.

[3] This Court does not ordinarily allow a motion to enlarge the record under Appellate Rule 9(b)(6) if the motion is made during or after oral argument. The circumstances are somewhat unusual in this case because at issue on appeal is an interlocutory order, a temporary injunction issued by the trial court for the purpose of enforcing its equity jurisdiction. Injunction is reversed for extraordinary cases. 43 C.J.S. Injunctions § 2. In this kind of case the Court should not be restricted by rigid application of procedural rules. We allow the motion to enlarge, but in doing so the added orders are accepted for the limited purpose of recognizing that restrictions were imposed to the temporary injunction and that the injunction was stayed pending appeal. The added orders are not to be considered on their merits since they are not at issue on appeal and no evidence has been added to the record in support of the orders.

[4] In light of the enlarged record on appeal, we return to the issue of whether we should entertain this appeal from an interlocutory order, which depends upon whether GLYK has shown that it was deprived of any substantial right. GLYK offered no evidence at the hearing on Railway's motion for temporary injunction. Railway offered evidence of record title, the location of the disputed parcels and the ground, its use and possession of the parcels, and continuing trespass, Under these circumstances, the allegations of ownership, possession, possession by GLYK and trespass by Railway in its pleadings, though sufficient to raise the issue of title at trial, are not sufficient to show that GLYK was deprived of a substantial right by the order granting the temporary injunction.

The orders added to the record on appeal indicate that the injunction deprived one of GLYK's tenants of access to its business premises. The order of Judge Seay staying appeal and requiring a stay bond of only $1,000 indicates that for some reason, not appearing in the record as enlarged, some right or rights of GLYK would be adversely affected if the injunction was not stayed. We can only assume that evidence or information, which does not appear in the record on appeal, was submitted to

and considered by the trial judges, but we cannot base on this assumption the finding that GLYK has carried the burden of showing the deprivation of a substantial right.

We concur wholeheartedly in the following statement in Railway's brief: "The Railroad agrees that a preliminary injunction is not a proper device to try title to real property or to oust a party in possession. *Freemont v. Baker*, 236 N.C. 253, 72 S.E. 2d 666 (1952); *Jackson v. Jernigan*, 216 N.C. 401, 5 S.E. 2d 143 (1939)." In the case before us it appears that the issue involving important property rights could best be determined by trial on the merits.

GLYK having failed to show that the preliminary injunction deprived it of any substantial right, the appeal is dismissed. The stay ordered by Judge Seay would expire under Appellate Rule 32 with the mandate issued by this Court twenty days after this opinion has been filed. The injunction has been stayed more than ten months. Since the injunction was entered on 10 December 1980, it was changed to allow access by GLYK's tenant, Electric Supply, Inc., until 15 March 1981, but the stay order of Judge Seay was entered before that date. Electric Supply, Inc. or a successor tenant may be occupying GLYK's building without access upon expiration of the stay. There may be other conditions which have changed since the stay order of 3 February 1981 and other rights which would be adversely affected by such abrupt expiration of the stay order. Between the time of filing this opinion and the mandate, it is ordered that GLYK may proceed by motion in the Superior Court, if it so elects, to restrict the preliminary injunction, to stay the injunction pending hearing, or to otherwise proceed to protect its rights, if any, from any inequitable adverse effects of the preliminary injunction.

The appeal is, subject to the foregoing order,

Dismissed.

Judges HEDRICK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. JOSEPH DONALD CRABB

No. 8118SC534

(Filed 15 December 1981)

1. **Automobiles § 113.1— involuntary manslaughter—sufficiency of evidence**

The charge of involuntary manslaughter was properly submitted to the jury where the evidence tended to show that defendant was driving on a curvy road at such a speed that other occupants of the car were screaming and begging him to slow down; the road was posted with traffic signs warning of curves; defendant had been drinking; the car driven by defendant ran off the road and collided with a tree; the car and the site of the accident revealed extensive damage; there were skid marks totaling 141 feet, 3 inches; the body of deceased was found twenty-six feet from the car soon after the accident occurred; and the cause of death was determined to be a fractured skull.

2. **Automobiles § 131.1— failure to render assistance after an automobile accident —sufficiency of evidence**

The trial court properly denied defendant's motion to dismiss the charge of failure to render assistance after an automobile accident, a violation of G.S. § 20-166, where defendant's testimony alone was sufficient to provide the inference that defendant knew the victim was injured and willfully failed to render assistance.

3. **Automobiles § 114— negligent driving—incorrect summary of evidence**

In a criminal case in which defendant was charged with involuntary manslaughter and failure to stop the vehicle he was driving at the scene of an accident, among other things, the trial court erred in its summary of the evidence by placing before the jury a defense to excuse any wrongful driving by defendant when he had alleged that he was never behind the wheel of the car. However, the trial judge made it clear that defendant foremost maintained that he was not driving the car, and the portion of the charge objected to appeared favorable to the defendant by presenting a defense to the crimes; therefore, there was no prejudicial error.

4. **Criminal Law § 117.4— instruction on accomplice—error but not prejudicial**

The trial court erred in instructing the jury that one of the State's witnesses was an accomplice rather than instructing the jury to make its decision based upon what the evidence showed; however, as (1) the charge read as a whole showed that the effect of the instruction was to inform the jury that the witness had an interest in the case, and (2) an instruction requiring the jury to make a finding that the witness was an accomplice was specifically tendered by defendant, the instruction did not constitute prejudicial error.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 4 February 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 November 1981.

Defendant was indicted for manslaughter, careless and reckless driving, failure to stop the vehicle he was driving at the scene of an accident, and failure to leave his name and render medical assistance to the person injured in the accident.

At trial State presented Linda Milam, *nee* Lawson, who testified that she picked up defendant in her car in Danville, Virginia, at about 2:00 p.m. on 16 May 1980. Tony Mitchell and another female friend joined them and they all went to Hyco Lake. They later decided to go shopping in Greensboro but got lost and were still riding around late that night. Defendant had been driving the car the whole time except for a short period before and after a license check. All four occupants of the car had been drinking beer. Shortly before 12:00 that night, they were on McConnell Road outside of Greensboro when the accident occurred. Milam testified that the road was curvy, the car was going fast, and the others were begging and screaming for defendant to slow down the car but he would not. She stated that all she remembered was hitting her head on the dashboard but other evidence showed that the car had veered off the road on a curve and collided with a tree. Defendant pulled Milam and the other girl out of the car but they could not locate Tony Mitchell after searching for five to ten minutes in the dark. Upon leaving the scene to seek aid, Milam asked defendant if he was going to get Tony some help and he replied, "No," that they were going to Danville. The two girls, followed by defendant, then ran to a house where they were allowed inside and defendant told the occupants that they had been hitchhiking. Milam overheard defendant tell his mother, "I have been driving Linda's car. . . . I wrecked it. . . . I killed Tony." Defendant's mother picked them up and was returning to Danville when they were stopped by the highway patrol. Milam told the officer that she was driving the car because she was scared that she had let defendant drive the car without having a driver's license.

A passing motorist saw the wrecked car, described as a total loss, and a body lying by the road at approximately 12:15 a.m. and called the police. Highway Patrolman Gary Brown investigated the scene of the accident at approximately 12:45 that night and found the body of Tony Mitchell, lying flat on its back, about twenty-six feet from the wrecked vehicle. The car had body damage on most of its parts with a large dent in the driver's

door, windows broken and the windshield just slightly "popped out." The officer found a section of earth removed from the ditch embankment, skid marks on the road of forty-five feet, two inches and marks from the ditch embankment to the trees of ninety-six feet, one inch. Bark had been knocked off the trees and one tree had been partially uprooted in the vehicular path. McConnell Road is a paved, two-lane road with several sharp curves which have been marked by advance curve signs. The medical examiner who was summoned to the scene testified that in his opinion the death of Tony Mitchell was due to a fractured skull.

Officer Brown testified that he had pulled defendant's mother's car after his investigation and that Ms. Milam informed him that she had been driving the car involved in the accident. Defendant concurred in her story that she ran off the road when something ran in front of the car. Two days later, Ms. Milam, defendant and his mother came to the police station to change their statement. Defendant and Milam told the police that in fact defendant had been driving the car when the accident occurred. Defendant stated that when they came to the curve, the brakes gave out. Officer Brown later tested the brakes which had indications that they were possibly in a faulty condition.

Defendant's testimony was that Milam was driving the car when something ran out in front of her and they wrecked. He stated that he pulled the two girls out of the car but could not find Tony Mitchell even though he went up and down the road shining a cigarette lighter. He acknowledged telling the occupants of the house from which he called his mother that they were hitchhiking but stated that he told this story at the urging of Linda Milam. He stated that they were actually looking for the accident site in his mother's car when they were pulled over by the highway patrol. Defendant acknowledged changing his statement to the police but said that he was told by the Lawsons that Ms. Milam's brothers were going to beat him up if he did not tell the police that he was driving the car.

The jury returned a verdict of guilty of involuntary manslaughter and failure to render assistance at the scene of an accident. From a judgment sentencing defendant to a prison term of two years as a "Committed Youthful Offender," defendant appealed.

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

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for defendant appellant.

HEDRICK, Judge.

[1] In his first assignment of error, defendant contends that the court erred in denying his motion to dismiss and submitting the charge of involuntary manslaughter to the jury. He presents a two-fold argument: that the State failed to prove that defendant's driving was the proximate cause of Mitchell's death and that there was insufficient evidence presented that the driving was done in a culpably negligent manner.

Involuntary manslaughter is the

> unlawful and unintentional killing of another human being without malice and which proximately results from the commission of an unlawful act not amounting to a felony or not naturally dangerous to human life, or from the commission of some act done in an unlawful or culpably negligent manner, or from the culpable omission to perform some legal duty.

State v. Everhart, 291 N.C. 700, 702, 231 S.E. 2d 604, 606 (1977).

In ruling upon a motion for nonsuit, the trial judge considers the evidence in the light most favorable to the State and gives every reasonable inference in favor of the State. *State v. Everhart, supra.* The motion must be denied if there is evidence —direct, circumstantial, or a combination of both—from which the jury can find that the charge contained in the bill of indictment or warrant was committed by the defendant. *State v. Marr*, 26 N.C. App. 286, 215 S.E. 2d 866, *cert. denied and appeal dismissed*, 288 N.C. 248, 217 S.E. 2d 673 (1975).

In the case at hand the following evidence, viewed most favorably to the State, was presented: At approximately midnight, defendant was driving on a curvy road at such a speed that other occupants of the car were screaming and begging him to slow down. The road was posted with traffic signs warning of curves. Defendant had been drinking. The car driven by defendant ran off the road and collided with a tree. At the site of the

accident were found a torn-up earth embankment, skid marks totaling 141 feet 3 inches, one partially uprooted tree, bark removed from several other trees, and a car which had been extensively damaged. The deceased was not found in the car immediately after the accident. The body of the deceased was found twenty-six feet from the car soon after the accident occurred and the cause of death was determined to be a fractured skull.

We find the above evidence sufficient to permit the inference that the fatal injury to Tony Mitchell was a proximate result of the automobile accident which occurred due to the culpably negligent driving of defendant. The motion for nonsuit was properly denied.

[2] In his next assignment of error defendant argues that the court erred in denying his motion to dismiss the charge of failure to render assistance after an automobile accident, a violation of G.S. § 20-166. Again, we hold the evidence, viewed in the light most favorable to the State, sufficient to have been submitted to the jury. Defendant himself testified that "I figured that [Tony Mitchell] was knocked out or something. . . . I did not tell the [occupants of the house] that there might be a man injured nor did I tell them I wanted to call the police or an ambulance." Defendant stated that he knowingly lied about hitchhiking, rather than disclose the accident, because he was scared. This evidence alone is competent to provide the inference that defendant knew that Tony Mitchell was injured and willfully failed to render assistance. This assignment of error is overruled.

[3] Defendant next contends the court committed prejudicial error in its summary of the evidence and statement of defendant's contentions by placing before the jury a defense to excuse any wrongful driving by defendant, when in fact he has steadfastly alleged that he was never behind the wheel of the car. That portion of the charge objected to reads in its entirety as follows:

> On the other hand, the defendant says and contends that you ought not to be so satisfied beyond a reasonable doubt that he is guilty of driving at a speed greater than was reasonable and prudent. In the first place, he says and contends that he wasn't driving this car. And, in the second place, he says and contends if he was driving, forty to fifty miles per hour is reasonable speed on any blacktop road in

the State of North Carolina, but it was not because of the speed that caused him to have that wreck, but because somebody ran out in the road or somebody pulled on the steering wheel, and that he was driving as a reasonable and prudent person would operate an automobile under those existing circumstances.

As a general rule, any misstatement of defendant's contentions must be brought to the court's attention before the jury retires in order for the error to be considered on appeal, unless the misstatement was so gross that an objection at trial was unneeded. *State v. Lankford,* 28 N.C. App. 521, 221 S.E. 2d 913 (1976).

Defendant asserts that the court's instruction had to mislead and divert the jury from his sole assertion at trial that he was not the operator of the accident vehicle. Defendant is correct that the only evidence of his driving the car is his recanted statement to Trooper Brown that he was driving when the brakes failed and the testimony of Linda Milam in which she stated that defendant was driving when, alternately, the deceased grabbed the wheel or something ran in front of the car. However, the trial judge makes it clear that defendant foremost has maintained that he was not driving the car. The latter part of this instruction, being preceded by the phrase "if he was driving," further bolsters defendant's position. Furthermore, the portion of the charge objected to simply appears favorable to the defendant by presenting a defense to the charge. *State v. Bush,* 289 N.C. 159, 221 S.E. 2d 333, *death penalty vacated,* 429 U.S. 809, 97 S.Ct. 46, 50 L.Ed. 2d 69 (1976). We find no prejudicial error.

[4] Defendant also argues that the court erred in instructing the jury that Linda Lawson [Milam] was an accomplice. He contends that by this statement the court implied to the jury that the crimes were in fact committed and the defendant was the principal. The instruction given by the court is as follows:

> Now, there is evidence which shows that Linda Lawson, who was a witness, was also an accomplice in the commission of the crimes that are charged in this case.
>
> An accomplice is a person who joins with another in the commission of the crime. An accomplice may actually take

part in acts necessary to accomplish the crime or she may knowingly help or encourage another in the crime, either before or during its commission. An accomplice is considered by law to have an interest in the outcome of the case.

Since this witness was an accomplice, you should examine every part of her testimony with the greatest care and caution. If after doing so, however, you believe this testimony in whole or in part, you should treat what you believe the same as any other believable evidence. [Emphasis added.]

The testimony of an accomplice testifying for the prosecution is ordinarily regarded as that of an interested witness. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). Upon timely request, the trial judge is required to instruct the jury to carefully scrutinize the accomplice testimony and it is his duty to correctly state the law on this principle. *Id.*

Although we agree that the better practice to be followed in this type of charge is for the trial judge to instruct the jury to make its decision based upon what the evidence shows, not every poorly stated instruction constitutes such prejudicial error as to require a new trial. *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977). An instruction as to the credibility of a witness is a subordinate feature of the case. *State v. Eakins*, 292 N.C. 445, 233 S.E. 2d 387 (1977). In the case at hand, although the trial judge did improperly charge the jury that the witness was an accomplice, he was not instructing that a fact that was in issue had been established. *See, State v. Spicer*, 299 N.C. 309, 261 S.E. 2d 893 (1980). We find the error, if any, to be harmless since the charge read as a whole clearly shows that the effect of the instruction was to inform the jury that the witness had an interest in the case and to urge them to weigh her testimony in a careful manner. *State v. Saults*, 294 N.C. 722, 242 S.E. 2d 801 (1978). Additionally we note that the instruction on accomplice testimony, which would have in fact required the jury to make the finding that the witness was an accomplice, was specifically tendered by defendant. Defendant obviously at the time of his request for this instruction did not consider it prejudicial for the witness to be found an accomplice and therefore any error which occurred was invited by defendant. *State v. Hardy, supra.* This assignment of error is overruled.

Defendant next contends that he was prejudiced by the court's ruling which limited his cross-examination of the husband of Linda Milam and thereby prevented him from establishing the bias of the witness. We do not agree. The witness later answered the very question defendant was prevented from asking upon objection and testified that he was married to Linda Milam, was worried about the case and wanted to help his wife. We find no error.

Finally, defendant assigns error to the court's ruling which prevented him from presenting evidence of the character and reputation of Linda Milam through another witness. Even if this ruling was in error, it would not be prejudicial error. The record contains abundant evidence to apprise the jury that the testimony of Ms. Milam should be carefully scrutinized for possible bias or fabrication and the trial judge further instructed the jury to this effect. This assignment of error is also overruled.

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

No error.

Judges CLARK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. RICHARD SURLES

STATE OF NORTH CAROLINA v. BENJAMIN ALVIN BARNES

STATE OF NORTH CAROLINA v. EDWIN LEE WILLIAMS, JR.

STATE OF NORTH CAROLINA v. JAMES SUTTON

No. 8110SC617

(Filed 15 December 1981)

1. Criminal Law §§ 18, 149.1; Mandamus § 1— no appeal by State from not guilty verdict in district court—writ of mandamus

Although the State had no right to appeal from a verdict of not guilty of a misdemeanor charge in the district court, the actions of the district court

judge in setting aside guilty verdicts and entering verdicts of not guilty some five months after the guilty verdicts were entered were reviewable by way of petition for writ of mandamus in the exercise of the appellate court's general authority to supervise and control the proceedings of the district court pursuant to G.S. 7A-32(c) and Appellate Rule 22.

2. Criminal Law § 132— nonjury trial—power of court to set aside its verdict

The district court had the authority on its own motion to set aside guilty verdicts it had previously rendered while sitting as a jury as being contrary to the weight of the evidence where the court had continued prayer for judgment and no judgment had been entered on the verdict. However, the better practice required the court to state its reason and basis for so doing. G.S. 15A-1420(d).

3. Criminal Law § 133— effect of setting aside verdict in district court

A district court judge does not have the authority to enter verdicts of not guilty after setting aside previous guilty verdicts it has entered sitting as a jury; rather, upon setting the verdicts aside, the cases must be remanded for new trials.

APPEAL by the State of North Carolina from *Godwin, Judge.* Order signed 6 March 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 18 November 1981.

The four defendants were charged in proper warrants with the misdemeanor of violating the lottery and gambling laws by participating in a pyramid or chain scheme called the "Circle of Gold Club."

On 13 August 1980, the cases were called for trial and were consolidated for that purpose. After the presentation of evidence and argument of counsel, the district court judge entered a verdict of guilty as to each defendant. The judge then continued prayer for judgment until 15 January 1981.

When the cases came on for judgment on 15 January 1981, the same district court judge set aside the guilty verdicts and entered a verdict of not guilty in each case. In due time the state gave notice of appeal to the Superior Court of Wake County.

Defendants moved that the appeal be dismissed, and after hearing in the superior court, the judge concluded that the state could not appeal from a verdict of not guilty in the district court and dismissed the appeal for lack of jurisdiction. From this order, the state appeals.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Alan S. Hirsch, for the State, appellant.

Bass & Willoughby, by Gerald L. Bass, for defendant appellees.

MARTIN (Harry C.), Judge.

This appeal presents three questions for review:

1. Can the state appeal from the actions taken by the district court?

2. Did the district court err in setting aside the verdicts of guilty?

3. Did the district court err in entering the verdicts of not guilty?

STATE'S RIGHT TO APPELLATE REVIEW

[1] It is true that the state cannot appeal from the district court to the superior court upon a verdict of not guilty in a misdemeanor case. *State v. Harrell*, 279 N.C. 464, 183 S.E. 2d 638 (1971); N.C. Gen. Stat. § 15A-1432 (1978). Here, however, we are not concerned with a simple case of the court entering a verdict of not guilty and the state then attempting to appeal. In this case the court entered verdicts of guilty. The court then continued prayer for judgment until 15 January 1981, a period of some five months. At that time, the court set aside the guilty verdicts and entered verdicts of not guilty. These uncontroverted facts raise questions as to the lawfulness of the trial court's actions in setting aside the verdicts and in entering the verdicts of not guilty. If the not guilty verdicts were unlawful, they would be void as a matter of law.

Although the state cannot appeal from a verdict of not guilty, it may seek a writ of mandamus to compel a trial court to set aside action taken in excess of its authority. N.C.R. App. P. 22(a); N.C. Gen. Stat. § 7A-32(c) (1981); 8 Strong's N.C. Index 3d Mandamus § 1 (1977). "An action for a writ of mandamus lies only where the plaintiff shows a clear legal right to the action demanded and has no other adequate remedy." *Snow v. Board of Architecture*, 273 N.C. 559, 570, 160 S.E. 2d 719, 727 (1968); *State ex rel. Haas v. Schwabe*, 276 Or. 853, 556 P. 2d 1366 (1976). We treat

the appeal to this Court as a petition for writ of mandamus pursuant to N.C.G.S. 7A-32(c) and App. R. 22, and review the merits of the issues presented by the actions of the district court judge.

DID THE DISTRICT COURT ERR IN SETTING ASIDE THE VERDICTS OF GUILTY?

[2] In the trial of misdemeanor cases the district court sits as the trier of the facts. No jury is employed. N.C. Gen. Stat. § 7A-196(b) (1981). The district court has exclusive original jurisdiction of all criminal offenses below the grade of felony. N.C. Gen. Stat. § 7A-272(a) (1981). The effect of a verdict of guilty by the district court in the trial of a misdemeanor is tantamount to a verdict of guilty returned by a jury. After a jury verdict has been rendered and received by the court and the jury discharged, the jurors will not be allowed to attack or overthrow their verdict. *State v. Cherry,* 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied,* 446 U.S. 941 (1980). Such a practice would be replete with dangerous consequences. *State v. Hollingsworth,* 263 N.C. 158, 139 S.E. 2d 235 (1964). *See* N.C. Gen. Stat. § 15A-1240 (1978).

The same reasoning applies to verdicts by the court without a jury. The trial judge's authority over its non-jury verdict is no greater than the authority of the trial judge over a jury verdict. *Commonwealth v. Meadows,* 471 Pa. 201, 369 A. 2d 1266 (1977). To allow a trial judge to change a verdict is even more fraught with dangerous consequences than allowing a jury to change its verdict. This is especially true after the session of court has expired and a period of several months has passed.

Although the defendants did not move pursuant to N.C.G.S. 15A-1414(b)(2) to set the verdicts aside as being contrary to the weight of the evidence, the court had authority to do so on its own motion. N.C. Gen. Stat. § 15A-1420(d) (1978). Such motion must be made after verdict and within ten days of entry of judgment. Here, no judgment had been entered and the court had authority to set the verdicts aside. The court did not specify the basis upon which it set the verdicts aside. Better practice requires that the court set out the grounds upon which the order is based;[1] however, such an order is entered in the discretion of the

1. This is necessary so that the appellate court can know that the district court was acting in its capacity as judge and not simply the court as fact finder changing

court, and absent a manifest abuse of discretion, it will not be disturbed upon appeal. *State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979), *cert. denied*, 446 U.S. 911 (1980); *State v. Watkins*, 45 N.C. App. 661, 263 S.E. 2d 846 (1980).

We hold that the district court had authority to set the verdicts aside and that it did not commit error in so doing.

DID THE DISTRICT COURT ERR IN ENTERING THE VERDICTS OF NOT GUILTY?

[3] This question appears to be of first impression in North Carolina. Accordingly, we find cases from other jurisdictions instructive. In *Commonwealth v. Brown*, 192 Pa. Super. Ct. 498, 162 A. 2d 13 (1960), the Pennsylvania court, sitting without a jury, found defendant guilty of larceny by bailee. Sentencing was deferred by the court pending the hearing of motions by defendant. Over a month later, the court vacated the verdict of guilty and entered a verdict of not guilty. The commonwealth appealed this action, and the court held that the trial judge had no authority to "change his mind over a month later and enter a finding of not guilty." *Id.* at 501, 162 A. 2d at 14. No error was found in vacating the prior verdict of guilty, and the appellate court ordered a new trial. The court noted that a verdict rendered by the trial court sitting without a jury was a general verdict, and after recording such a verdict, the authority of the trial judge over it is the same as in the case of a verdict by a jury. *See also Commonwealth v. Meadows, supra.*

In *State v. Deets*, 195 N.W. 2d 118 (Iowa 1972), the Supreme Court of Iowa was faced with a similar question. In *Deets* there was a jury verdict of guilty. Defendant moved for arrest of judgment or a new trial. Although the trial court denied this motion, it entered a judgment of acquittal. The supreme court held that the trial court was without authority to enter the judgment of acquittal and that it was void. The court remanded the case for entry of judgment on the guilty verdict returned by the jury.

The Supreme Court of Oregon considered an analogous question in *State ex rel. Haas v. Schwabe, supra.* After a jury verdict

its mind as to the verdict returned. As fact finder the court has no authority to change its verdict after it has been announced in open court and recorded by the court.

of guilty, the court entered an order setting aside the verdict and entered a judgment of acquittal. Under the law of Oregon, the state did not have a right of appeal from a judgment of acquittal, but the trial court's action could be reviewed upon petition for writ of mandamus to compel the trial court to set aside its unlawful action. The supreme court held that the trial court had no authority to enter the post-verdict judgment of acquittal, and that the same was void. The Oregon court relied upon *Deets, supra.*

We hold that the district court did not have power or authority to enter the verdicts of not guilty after it had set aside the original verdicts of guilty. The entry of the verdicts of not guilty was totally void. We find support for our holding in *State v. Bonds*, 45 N.C. App. 62, 262 S.E. 2d 340, *disc. rev. denied*, 300 N.C. 376, *cert. denied*, 66 L.Ed. 2d 107 (1980), as well as the above authorities. In *Bonds*, this Court held that where no error of law appears upon the face of the judgment, the trial court does not have authority to resentence a defendant for discretionary reasons after the expiration of the session of court in which he was originally sentenced. In *Bonds*, the trial judge, after the expiration of the session, had set aside the original judgment and proceeded to resentence defendant. This Court held that the original sentence was lawful and without error on its face and that the trial judge had no authority to vacate the judgment and resentence defendant after the expiration of the session in which the judgment was entered.

In summary, we hold:

1. Although the state does not have a right of appeal from a verdict of not guilty of a misdemeanor charge in district court, under the facts of this case the actions of the district court judge are reviewable by way of petition for writ of mandamus in the exercise of this Court's general authority to supervise and control the proceedings of the district court.

2. Under the facts of this case, the district court had the authority to set aside the guilty verdicts it had previously rendered while sitting as a jury; but better practice requires the court to state its reasons and basis for so doing.

3. A district court judge does not have authority to enter verdicts of not guilty after setting aside previous guilty verdicts it has entered sitting as a jury; upon setting the verdicts aside, the cases must be remanded for new trials.

As these cases are being remanded for new trials, we note that it would be improper for Judge Bullock to preside at the new trials because he has twice expressed an opinion as to the guilt or innocence of the defendants. The not guilty verdicts entered on 15 January 1981 are vacated, and the cases are remanded to the District Court of Wake County for trial.

Vacated and remanded.

Judges ARNOLD and WELLS concur.

IN THE MATTER OF THE ESTATE OF JOHN JUNIOR LUCAS, DECEASED; KENNETH E. CONRAD, TANYA R. CONRAD, AND MILLICENT A. CONRAD v. OLA MAE JARRETT, ADMR. OF JOHN JUNIOR LUCAS

No. 8121SC310

(Filed 15 December 1981)

1. **Descent and Distribution § 8— intestate succession—illegitimates—constitutionality of G.S. 29-19(b)(1)**

In an action by illegitimate children of decedent to establish their right, pursuant to G.S. 29-19, to take from decedent's estate, their right to take property by descent or distribution arose after the death of the intestate and not in 1959 and 1962 when decedent was adjudged to be plaintiffs' father. Therefore, their rights vested after the enactment of G.S. 29-19(b) and the application of the statute was not an unconstitutional retroactive application of a change in substantive law.

2. **Bastards § 3.2— putative father's right to counsel—individual right**

The right of an indigent putative father in a paternity suit brought by the State to have counsel appointed to represent him is individual to the father and cannot be asserted by his estate after his death.

3. **Descent and Distribution § 8— claim of inheritance by illegitimates—complaint as notice**

Plaintiffs' verified complaint alleging the basis of their claim of entitlement to inherit from decedent as decedent's illegitimate children satisfied the notice requirement of G.S. 29-19(b) which requires illegitimate children to give

written notice of their claims of inheritance to the personal representatives of their putative fathers' estates within six months after the first publication or posting of general notice to creditors. Once the plaintiffs satisfied the notice requirement of G.S. 29-19(b), and showed that decedent had been adjudged their father under G.S. 49-1 through 49-9, their right to inherit was established as a matter of law.

4. Executors and Administrators § 5.5— removal of estate's administratrix for false representation

Where the court found the administratrix of an estate had obtained her letters of administration by false representation or mistake and the administratrix took no exception to this finding, the finding sufficed to support the conclusion that the administratrix should be removed under G.S. 28A-9-1. G.S. 28A-9-4.

APPEAL by plaintiffs and defendant from *Lupton, Judge.* Judgment entered 30 December 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 22 October 1981.

David B. Hough for plaintiffs.

Kennedy, Kennedy, Kennedy & Kennedy, by Harvey L. Kennedy, Harold L. Kennedy, Jr., and Harold L. Kennedy III, for defendant.

WHICHARD, Judge.

John Junior Lucas died intestate on 17 May 1980. On 27 May 1980 defendant Ola Mae Jarrett, pursuant to renunciation by decedent's mother of her alleged right to administer and to her request that defendant be appointed, applied for letters of administration from the clerk of superior court. In her application defendant listed decedent's mother as the sole heir and distributee and stated that no children were born to decedent. The clerk authorized issuance of letters of administration to defendant on 27 May 1980.

On 6 June 1980 plaintiffs initiated a G.S. 28A-9-1 proceeding before the clerk to revoke the letters of administration issued to defendant and to establish their right, pursuant to G.S. 29-19, to take from the estate as illegitimate children of decedent. Plaintiffs alleged the following in a verified complaint: They were born out of wedlock to their mother, Florence Virginia Conrad, and to their natural father, decedent. Decedent was finally adjudged to be their father in 1959 and 1962 non-support proceedings under

G.S. 49-1 through 49-9. G.S. 29-15 entitled them, rather than decedent's mother, to take from decedent's estate. They, as decedent's heirs, had a right to administer the estate superior to that of decedent's mother or defendant; and they had not renounced that right. Defendant obtained her letters through false representation or mistake regarding the existence of potential heirs and distributees other than decedent's mother.

The clerk issued an order that defendant appear to show cause why she should not be removed as administratrix. At the hearing, attended by plaintiffs and defendant, Florence Virginia Conrad testified for plaintiffs that she had lived out of wedlock with decedent from 1956 until 1980, and had borne nine children by decedent, of whom three were the plaintiffs. She had sworn criminal warrants against decedent for nonsupport of plaintiffs, and the court had adjudged decedent to be their father. Defendant testified that she was decedent's sister and she knew the plaintiffs as the children of decedent.

The clerk ordered defendant removed as administratrix, based upon findings of fact that plaintiffs were the natural children of decedent entitled to take by, through, and from him pursuant to G.S. 29-19(b)(1), that plaintiffs were qualified and entitled to administer the estate (G.S. 28A-4-1(b)(3)), and that letters of administration had been issued to defendant due to a false representation or mistake. Defendant appealed to the superior court, but made no specific exceptions to the findings of fact or conclusions. Defendant then filed a motion for summary judgment in which she raised for the first time issues concerning the sufficiency of plaintiffs' notice of their claim to satisfy G.S. 29-19(b), and the constitutionality of 29-19(b)(1) on its face and as applied to decedent's estate. Plaintiffs filed a response, together with affidavits of Tanya R. Conrad, Millicent A. Conrad, and Florence Virginia Conrad. They also filed a second notice of the basis of their claim of entitlement to inherit from decedent.

The superior court concluded that plaintiffs' verified complaint and second notice each satisfied G.S. 29-19(b) and therefore plaintiffs, as the natural children of decedent, who had been adjudged their father, were entitled to take by, through, and from his estate. It declared G.S. 29-19(b)(1) to be constitutional both on its face and as applied. Finally, it found insufficient competent

evidence to support the finding that issuance of letters to defendant resulted from false representation or mistake of the defendant. It therefore reversed the clerk's order of removal and adjudged that defendant was properly serving as administratrix.

Plaintiffs and defendant appeal.

DEFENDANT'S APPEAL

Defendant presents two questions: (1) whether the court erred in declaring G.S. 29-19(b) constitutional, both on its face and as applied to decedent's estate; and (2) whether the court erred in declaring that plaintiffs were entitled to take from the estate. We affirm on both questions.

A. Constitutionality of G.S. 29-19(b)

[1] G.S. 29-19, in pertinent part, provides:

> (b) For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from:
>
> (1) Any person who has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;
>
> . . . .
>
> Notwithstanding the above provisions, no person shall be entitled to take hereunder unless he has given written notice of the basis of his claim to the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to creditors.

G.S. 29-19(b) (Cum. Supp. 1979). Defendant asserts that application here of G.S. 29-19(b) constitutes an unconstitutional retroactive application of a change in substantive law. She argues that decedent's rights with respect to intestate succession vested in 1959 and 1962 when he was adjudged to be plaintiffs' father, and therefore that the laws in effect in 1959 and 1962 should apply. Under those laws children born out of wedlock who were not legitimated, either through marriage of their parents or legitimation proceedings, could not inherit from their fathers. *See Jolly v. Queen*, 264 N.C. 711, 142 S.E. 2d 592 (1965).

While it is true that an act cannot be applied so as to interfere with rights which had vested or liabilities which had ac-

crued prior to its enactment, *see Booker v. Medical Center*, 297 N.C. 458, 467, 256 S.E. 2d 189, 195 (1979), application of G.S. 29-19(b) here does not interfere with vested rights or accrued liabilities. The right to take property by descent or distribution does not arise until the death of the intestate. *See Vinson v. Chapell*, 275 N.C. 234, 166 S.E. 2d 686 (1969). Such right is not natural or inherent, but arises purely by operation of law. *Id.* The legislature has the power to make and change the law relative to descent and distribution of property within the state. *See e.g. Wilson v. Anderson*, 232 N.C. 212, 59 S.E. 2d 836 (1950). Accordingly, the disposition of the property of a person who dies intestate is governed by the law as it exists at the time of that person's death. *Vinson*, 275 N.C. 234, 166 S.E. 2d 686; *Wilson*, 232 N.C. 212, 59 S.E. 2d 836. Hence, a person has no right to have his property distributed upon his death intestate according to any law of intestacy other than that in effect at his death. Likewise, a person has no right to the disposition of the property of his ancestor who dies intestate according to any law other than that in effect at the ancestor's death.

All rights regarding descent and distribution of decedent's estate thus vested upon his death intestate in 1980. Those rights vested, therefore, *after* the enactment of G.S. 29-19(b) as it existed at the time of his death. The court, then, properly determined that application of G.S. 29-19(b) to decedent's estate did not interfere with vested rights or accrued liabilities.

Defendant contends *Wilson v. Anderson*, 232 N.C. 212, 59 S.E. 2d 836 (1950), dictates a contrary result. We disagree. The *Wilson* court held that the right of an adopted plaintiff to inherit from the estate of her adoptive father's brother had been established at the time of her adoption. The result in *Wilson* obtained because the final order of adoption, which had the force and effect of a judgment, specifically incorporated the law regarding inheritance by adopted children then in effect. Thus, although the court recognized that disposition of an intestate's property generally is governed by the law in force at the time of his death, when the right of a person to inherit is prescribed and limited by court order that order will control. *Wilson*, 232 N.C. at 220, 59 S.E. 2d at 843. The rights of plaintiffs here to inherit were not so prescribed by court order or judgment prior to decedent's

death. Consequently, the statutes in effect at his death control their rights.

[2] Defendant also asserts that G.S. 29-19(b)(1) cannot constitutionally be applied here because decedent was not represented by counsel when he was adjudged the father of plaintiffs. Although this court in *Wake County ex rel. Carrington v. Townes*, 53 N.C. App. 649, 281 S.E. 2d 765 (1981), has recognized the state constitutional right of an indigent putative father in a paternity suit brought by the state to have counsel appointed to represent him, the question of retroactive application of that decision has not been passed upon. Even if that decision were to be applied retroactively, however, the right there found is individual to the putative father and cannot be asserted by his estate after his death. *See e.g. Stanley, Edwards, Henderson v. Dept. Conservation & Development*, 284 N.C. 15, 199 S.E. 2d 641 (1973).

The court properly concluded that G.S. 29-19(b)(1) was constitutional on its face and as applied to decedent's estate.

B. Declaration that plaintiffs were entitled to take from the estate

[3] Defendant contends the court incorrectly concluded that plaintiffs complaint of 6 June 1980 and a subsequent paper writing of 15 July 1980 each satisfied the notice requirement of G.S. 29-19(b). She argues that G.S. 29-19(b) creates a condition precedent to plaintiffs' standing to enforce their statutory rights, and that neither the complaint nor the July writing constituted the requisite notice.

G.S. 29-19(b) requires that illegitimate children give written notice of their claims of inheritance to the personal representatives of their putative fathers' estates within six months after the first publication or posting of general notice to creditors. This notice requirement is a condition precedent to an illegitimate child's right to receive a distribution from the estate of a father who meets the description in G.S. 29-19(b)(1) or (2). G.S. 29-19(b) does not specify any particular form the required notice must take, however. Plaintiffs' verified complaint seeking revocation of defendant's letters fully alleged the basis of their claim of entitlement to inherit from decedent. The record establishes that defendant, as personal representative of the estate, received the

complaint within the statutory period for notice. We hold that the court correctly concluded that the complaint, timely received, satisfied the notice requirement. We thus do not reach the question of the effect of the subsequent paper writing.

Defendant also contends the court erred in determining plaintiffs' right to inherit from decedent because plaintiffs did not request such a determination in their prayer for relief. Once the plaintiffs satisfied the notice requirement of G.S. 29-19(b), and showed that decedent had been adjudged their father under G.S. 49-1 through 49-9, their right to inherit was established as a matter of law. It did not depend upon a declaration in a court order or judgment. The court's statement that plaintiffs were entitled to inherit was merely an accurate expression of the law as it applied to plaintiffs, and it was proper without a specific request by plaintiffs. Defendant's contention that the court erred in declaring plaintiffs' entitlement is therefore without merit.

PLAINTIFFS' APPEAL

Plaintiffs present the question whether the court erred in reversing the clerk's decision to remove defendant as administratrix. We hold that it did.

[4] Letters of administration, once issued, are subject to revocation, *inter alia*, on the ground that issuance was obtained by false representation or mistake. G.S. 28A-9-1. Any interested person may appeal to the superior court from the clerk's order granting or denying revocation. G.S. 28A-9-4. *See also In Re Estate of Galloway*, 229 N.C. 547, 50 S.E. 2d 563 (1948). Absent exceptions to specific findings of fact by the clerk, however, a general exception to the judgment presents only the question whether the facts found support the conclusions of law. *In re Taylor*, 293 N.C. 511, 519, 238 S.E. 2d 774, 778 (1977); *In re Estate of Lowther*, 271 N.C. 345, 355-356, 156 S.E. 2d 693, 702 (1967).

Defendant here took no exception to the clerk's findings of fact, but merely excepted to the order in her notice of appeal. In the order revoking defendant's letters the clerk found the following:

> The defendant . . . obtained Letters of Administration . . . by the false representation or mistake of the defendant when she reported to the clerk . . . that the deceased . . . had no

other persons entitled, as heirs and distributees, to the property of the said deceased other than the deceased's mother . . . .

Because defendant took no exception to this finding, her contentions regarding its alleged erroneous nature were not properly before the superior court and are not properly before us. The sole question presented is whether the finding suffices to support the conclusion that defendant should be removed as administratrix. We hold that, under G.S. 28A-9-1, it does; and that the superior court thus erred in reversing the clerk's decision.

RESULT

In defendant's appeal, affirmed.

In plaintiffs' appeal, reversed.

Judges VAUGHN and HILL concur.

STATE OF NORTH CAROLINA v. MARK WAYNE CARTER

No. 818SC475

(Filed 15 December 1981)

1. **Larceny § 7.4— possession of recently stolen property—sufficiency of evidence**

Based upon the doctrine of recent possession, the State's evidence was sufficient to create a jury question as to defendant's guilt of larceny where it tended to show that defendant took officers to the hiding place of some stolen silver and later brought more of it to them. The evidence was also sufficient to create a jury question as to his guilt of possession of stolen property.

2. **Constitutional Law § 30— violation of pretrial discovery rights**

The trial court did not abuse its discretion in failing to order a mistrial when an officer's testimony concerning the content of defendant's oral statement following arrest differed from the written report of that statement given to defendant's counsel. G.S. 15A-902(a) and G.S. 15A-910.

3. **Criminal Law § 101— contact with jury—father of witness**

The trial court did not abuse its discretion in denying defendant's motion for a mistrial after one witness's father talked to jurors on two occasions during recesses as one juror who acknowledged having heard the witness's father

talk about the case was excused, and he did not speak with the other jurors about the case.

4. **Criminal Law § 126.3— juror's statement of doubt about defendant's guilt after verdict rendered**

The court properly denied defendant's motion for appropriate relief under G.S. 15A-1414 where the juror called the defense attorney the morning after the jury rendered its verdict to tell him she was not satisfied with the verdict on a larceny charge and that she felt she had been under pressure when she agreed to it as her doubts reflected nothing more than the normal jury deliberation process through which individual doubts are resolved and a group consensus is reached. G.S. 15A-1240(c)(2).

5. **Criminal Law § 26— double jeopardy—felonious larceny and felonious possession of stolen property**

By relying exclusively on the doctrine of recent possession, the State depended upon the same evidence to prove both the charge of felonious larceny and the charge of felonious possession of stolen property. Consequently, the State cannot punish defendant separately for each offense.

Judge VAUGHN concurring in part and dissenting in part

APPEAL by defendant from *Small, Judge.* Judgments entered 11 December 1980 in Superior Court, WAYNE County. Heard in the Court of Appeals 20 October 1981.

Defendant appeals from judgments entered upon convictions of felonious larceny and felonious possession of stolen goods.

Attorney General Edmisten, by Assistant Attorney General George W. Lennon, for the State.

Dees, Dees, Smith, Powell & Jarrett, by Michael M. Jones, for defendant.

WHICHARD, Judge.

Defendant was indicted and tried on charges of felonious breaking or entering, felonious larceny, and felonious possession of stolen goods.

The State's evidence tended to show that sometime between 3 July 1980 and 7 July 1980 the home of Mildred Smith Maxwell was broken and entered. Numerous pieces of silver valued at more than $400 were taken from the house. Several of the stolen silver items were located on 8 July 1980 at a local coin shop. The coin shop proprietor testified that two young men, whom she

later identified as Mike Nance and Craig Carter, had come into her shop on 7 July 1980 and attempted to sell the silver. She did not purchase the silver the first time they came in because neither young man had brought identification. The two returned later that day with defendant, and Nance used defendant's identification to sell the silver. Nance told the proprietor he had inherited the silver from his grandmother and needed to sell it to have a ring made. The proprietor paid for the silver with a check which she made payable to defendant because she used defendant's identification. Defendant signed a receipt for the silver.

A bank teller testified that three young men, identified in court as Mike Nance, Craig Carter, and defendant, came into the bank to cash the coin shop check. Nance presented the check and received the cash; defendant and Craig Carter "had backed off" from the teller's window.

An investigating officer testified that after locating the silver at the coin shop he arrested defendant and his brother and took them to police headquarters. The officer read Miranda warnings to the two. Defendant stated that he could tell the officer where some of the silver was, but that he wished to talk with his brother first. After talking with his brother for about two minutes, defendant made a statement that he would take the officer to some of the silver. He also told the officer that Nance had come to him and said he had some silver and needed someone with identification to sell it because he had no identification. Nance offered defendant $100 to sell the silver for him. Defendant took the officer to some of the stolen silver. When they were back at police headquarters the officer told defendant that some silver was still missing and asked for his help in recovering it. The following day defendant and his brother brought some silver to the officer. The officer testified that of the 21 identifiable fingerprints found on the silver 14 were positively identified as belonging to either Mike Nance or Craig Carter. The other seven prints were not identified, but none of them matched defendant's fingerprints.

Defendant called Edward Spence, an employee of Talton Jewelers, who testified that Craig Carter and Mike Nance had come to his store to sell silver and that defendant was not with them. Spence did not purchase any silver.

George Thomas Fields testified for defendant that on or about 6 July 1980 he accompanied Mike Nance and Craig Carter to a house and helped them steal some silver. Nance and Craig Carter had told Fields they had been to the house before and stolen some silver. Fields stated that defendant was first shown the silver the afternoon of 7 July 1980 when Nance told defendant he had inherited it from his grandmother. Fields stated that he gave about one-third of the stolen silver to defendant the night of the day defendant was arrested. Fields had not been charged with any offense relating to the breaking or entering and larceny.

Helen Grady testified that defendant and his brother lived with her because their mother had left them. Defendant was at her home the evening of 6 July 1980. Early that evening he played cards with her son. Defendant had been sick and was taking medication. He went to bed early and did not leave the home any time during the night.

MOTIONS TO DISMISS

[1] Defendant assigns error to the trial court's failure to dismiss the charges against him on motions made both at the close of the State's evidence and at the close of all of the evidence. The assignments present the question whether the State offered sufficient evidence that defendant possessed the stolen goods to require submission of the charges to the jury. We hold that it did.

To obtain the conviction of larceny the State relied entirely upon the doctrine of recent possession. Under that doctrine, upon an indictment for larceny evidence of possession of recently stolen property raises an inference of the possessor's guilt of the larceny of such property which the jury may consider, together with the other evidence in the case, to determine whether the State has carried its burden of satisfying the jury of defendant's guilt beyond a reasonable doubt. *State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981). The inference arises when the State shows beyond a reasonable doubt that: (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of persons not party to the crime, though not necessarily in defendant's hands or on his person as long as he had the power and intent to control them; and (3) the defendant possessed the stolen goods recently after the larceny. *Id.*

Defendant contends the State failed to produce evidence that he had custody of and power and intent to control the stolen silver sufficient to support submission of the charges to the jury under the doctrine of recent possession. The State's evidence showed that defendant took the officers to the hiding place of some of the stolen silver, and later brought more of it to them. Such evidence, though not conclusive, was sufficiently indicative of defendant's custody of and power and intent to control the stolen goods to create a jury question, based upon the doctrine of recent possession, as to his guilt of larceny. It also sufficed to create a jury question as to his guilt of possession of stolen property. The court therefore properly denied defendant's motions to dismiss the charges.

MOTIONS FOR MISTRIAL

Defendant assigns error to the court's failure to declare a mistrial on each of two occasions during his trial. He contends his motions should have been granted for (1) prejudicial violation of his pre-trial discovery rights, and (2) jury tampering.

[2] Defendant first moved for mistrial when the officer's testimony concerning the content of defendant's oral statement following arrest differed from the written report of that statement given to defendant's counsel pursuant to his request for voluntary discovery under G.S. 15A-902(a). G.S. 15A-910 authorizes a variety of sanctions which a court may impose when it determines that a party has failed to comply with discovery. Defendant moved only for mistrial. The choice of sanction, if any, rests within the discretion of the trial court and will not be disturbed on appeal absent a showing of abuse. *State v. Stevens*, 295 N.C. 21, 243 S.E. 2d 771 (1978). We find no abuse of discretion in the court's denial of defendant's motion.

[3] Defendant's second mistrial motion stemmed from evidence presented during voir dire that the father of witness George Thomas Fields talked to jurors on two occasions during recesses. Following the first voir dire the court questioned the jurors individually as to whether Mr. Fields spoke with them. The court excused a juror who acknowledged having heard Mr. Fields talk about the case. The second voir dire disclosed that although Mr. Fields did talk briefly to another juror, he did not talk about the case. In light of the court's action in excusing one juror because

of contact with Mr. Fields, and of the fact that Mr. Fields' second statement to a juror did not relate to the trial, we can find no abuse of discretion in the court's denial of the motion. *See State v. Johnson*, 295 N.C. 227, 244 S.E. 2d 391 (1978).

MOTION FOR APPROPRIATE RELIEF

[4] The day after the jury rendered its verdict defendant moved for appropriate relief, pursuant to G.S. 15A-1414, based upon a statement by a juror that she had reasonable doubt of defendant's guilt of larceny. In a hearing on the motion defendant offered the testimony of this juror, who stated that she called the defense attorney the morning after the jury rendered its verdict to tell him she was not satisfied with the verdict on the larceny charge and that she felt she had been under pressure when she agreed to it. She further testified that she had expressed her doubts to the members of the jury. She also testified, however, that the jury had voted by the raising of hands; that she had raised her hand making the vote unanimous for a verdict of guilty on both counts; that she had heard the verdict read in the courtroom and had made no objection at that time; that there was no "force and coercion" outside the jury room of any type; and that "it was just the personality of the jury" which caused her to vote as she did.

Generally, after the jury renders a verdict and has been discharged, the court will not receive the testimony of jurors to impeach their verdict. *State v. Cherry*, 298 N.C. 86, 100, 257 S.E. 2d 551, 560 (1979) *cert. denied* 446 U.S. 941, 64 L.Ed. 2d 796, 100 S.Ct. 2165 (1980). G.S. 15A-1240 codified this general rule and provided exceptions as follows:

> *Impeachment of the verdict.*—(a) Upon an inquiry into the validity of a verdict, no evidence may be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.
>
> (b) The limitations in subsection (a) do not bar evidence concerning whether the verdict was reached by lot.
>
> (c) After the jury has dispersed, the testimony of a juror may be received to impeach the verdict of the jury on which he served, subject to the limitations in subsection (a), only when it concerns:

(1) Matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him; or

(2) Bribery, intimidation, or attempted bribery or intimidation of a juror.

Defendant relies on subsection (c)(2), which allows testimony of a juror concerning intimidation. The juror's testimony contained no evidence of specific incidents of intimidation, however. It is reflective of nothing more than the normal jury deliberation process through which individual doubts are resolved and a group consensus is reached. The court therefore properly denied defendant's motion for appropriate relief.

DOUBLE JEOPARDY

[5] Defendant finally contends the court's imposition of consecutive sentences upon convictions of felonious larceny and felonious possession of the same stolen property which was the subject of the larceny conviction violates his constitutional right not to be punished twice for the same offense. We agree.

When the State proves what could be two offenses by the same evidence, as when it proves both robbery and murder under the felony murder doctrine, it cannot punish the defendant separately for each offense. *Harris v. Oklahoma*, 433 U.S. 682, 53 L.Ed. 2d 1054, 97 S.Ct. 2912 (1977). Here the State proved both larceny and possession of stolen goods under the doctrine of recent possession by producing evidence that defendant possessed the stolen goods after the larceny took place. It offered no other evidence, direct or circumstantial, that defendant took and carried the stolen goods from the victim's home. By relying exclusively on the doctrine of recent possession, the State depended upon the same evidence to prove both the charge of felonious larceny and the charge of felonious possession of stolen property. Consequently, the State cannot punish defendant separately for each offense; and the judgment on the possession charge must be vacated and the case remanded for entry of a judgment of dismissal. *See State v. Perry*, 52 N.C. App. 48, 278 S.E. 2d 273 (1981); *but see State v. Andrews*, 52 N.C. App. 26, 277 S.E. 2d 857 (1981).

RESULT

As to the felonious larceny conviction, no error.

As to the possession of stolen property conviction, vacated and remanded for entry of judgment of dismissal.

Judge HILL concurs.

Judge VAUGHN concurs in part and dissents in part.

Judge VAUGHN concurring in part and dissenting in part:

I concur in that part of the opinion finding no error in the larceny conviction.

I dissent from that part of the opinion vacating the possession of stolen goods judgment. I would follow, in general, the reasoning in *State v. Andrews*, 52 N.C. App. 26, 277 S.E. 2d 857 (1981), and that found in the cases cited therein.

SNUG HARBOR PROPERTY OWNERS ASSOCIATION v. MARTIN CURRAN AND WIFE, CHRISTINE CURRAN, CHARLES C. FLOYD AND WIFE, BARBARA FLOYD

No. 811DC355

SNUG HARBOR PROPERTY OWNERS ASSOCIATION v. ALBERT F. WILLIAMS AND WIFE, BLANCHE W. WILLIAMS

No. 811DC354

(Filed 15 December 1981)

Deeds § 20— assessment covenants—indefiniteness—unenforceability by property owners' association

Covenants in deeds to owners of lots in a subdivision requiring the owners to be members of a property owners' association and to pay an annual fee of $35 to the association "for the maintenance and improvement of Snug Harbor Beach and its appearance, sanitation, easements, recreation areas and parks, and all utility expenses" or "for the maintenance of the recreation area and park" are not sufficiently certain and definite to be enforceable since the property to be maintained is not described with sufficient particularity and there is no standard by which the maintenance is to be judged. Furthermore, bylaws of the association requiring owners of lots in the subdivision to pay an

annual fee of $35 to the association "for the maintenance of roads and recreational facilities and as to the owners of camping lots, for maintenance of a comfort station" are unenforceable for the same reasons.

APPEAL by plaintiff from *Chaffin, Judge.* Order entered 10 November 1980 in District Court, PERQUIMANS County. Heard in the Court of Appeals 13 November 1981.

These cases were heard and appealed separately, although they have nearly identical facts and records. Pursuant to Rule 40 of the N.C. Rules of Appellate Procedure, we have consolidated these cases for purposes of this appeal.

Plaintiff is the owner of several parking lots, a park, comfort station, electrical system, and water system in the Snug Harbor Beach development. Plaintiff initiated these actions to recover arrearages of annual maintenance fees from defendants, owners of residential lots in Snug Harbor Beach. After reviewing plaintiff's verified complaints and exhibits (seven corporate documents which plaintiff incorporated by reference into its complaints) Judge Chaffin granted defendants' Rule 12(b)(6) motions to dismiss the actions for failure to state claims upon which relief could be granted.

In its complaints, plaintiff first alleges that defendants are obligated to pay an annual maintenance fee of $35.00 under restrictive covenants between defendants and the grantor in defendants' deeds, Yeopim Beach Corporation (YBC). The restrictive covenants originally provided, in pertinent part:

DECLARATION OF RESTRICTIVE COVENANTS

> [I]f any person subsequently acquiring title to or possession of any lot or lots within said subdivision, or his or her heirs or assigns, shall violate any of the restrictions hereinafter set out, it shall be lawful for any person owning real property situated in said subdivision to institute legal proceedings against the person or persons violating any of said restrictions, and either to prevent him from so doing or recover damages for such violations or both. Invalidation of any of these covenants by judgment or court order shall in no wise affect any of the other provisions, which shall remain in full force and effect.

. . . .

12. Owners and purchasers of lots in this subdivision shall be required to pay to Yeopim Beach Corporation, its successors or assigns, the sum of $18 per year on the first day of May of each year for the maintenance of the recreation area and park, which sum shall be a lien on all of the property owned [by] Yeopim Beach Corporation in this subdivision subject to foreclosure as provided by law for sales under mortgages, etc., if not paid by June 15th of each year.

13. These covenants shall run with the land and shall be binding on all parties claiming under them for a period of 20 years and shall be extended for successive periods of ten years unless and prior to the expiration of any such 10 year period, an instrument signed by the owners of record of a majority of lots in the subdivision has been recorded changing or modifying said covenants in whole or in part.

14. Invalidation of any one of these covenants by judgment or decree shall no way affect any of the other provisions hereof which shall remain in full force and effect.

Subsequent amendments to the restrictive covenants were adopted and recorded by the members of the Property Owners Association. The amendment applicable to defendants' lots states:

MAINTENANCE ASSESSMENT: The owner of any lot shall pay to "Owner — Snug Harbor Property Owners Association", or its successors, or assigns, the sum of Thirty-five ($35.00) Dollars per lot per year on the first day of March of each year, for the maintenance and improvement of Snug Harbor Beach and its appearance, sanitation,

DEED BOOK 73, PAGE 173.

easements, recreation areas and parks, and all utility expenses, for the payment of which sum shall be a lien on all of the property owned by each respective property owner for his respective assessments in this subdivision, enforceable by sale as provided by law for sales under mortgages and foreclosures, if not paid by June 15th of each year.

Plaintiff's complaints also allege that defendants are obligated to pay their dues by a provision of the amended by-laws of the Snug Harbor Property Owners Association, a non-profit corporation.

> Article III, Sec. 5 *Assessments and Privileges.* Upon purchasing one or more lots in the subdivision, Owner Members become obligated to pay to the Corporation the following sums annually:
>
> a. Owners of camping lots in Section "P", the sum of $60.00.
>
> b. All other Owner Members, the sum of $35.00.
>
> such dues being for the maintenance of roads and recreational facilities and as to the owners of camping lots, for maintenance of a comfort station. Such annual dues are payable per lot. Such dues may be revised from time to time as determined by the Board of Governors, and approved by a majority vote of members at any general or special meeting where notice of such revision has been made to the membership. Only those members in good standing will be allowed to vote by written ballot with their name affixed. Any other ballots cast shall be void. . . .

From Judge Chaffin's granting of defendants' G.S. 1A-1, Rule 12(b)(6) motions to dismiss, plaintiff appeals.

William J. Bentley, Sr., for plaintiff-appellant.

White, Hall, Mullen, Brumsey & Small, by Gerald F. White, for defendants-appellees.

WELLS, Judge.

Plaintiff contends that the trial court erred in ruling that plaintiff's complaints failed to state claims upon which relief could be granted. We find that the rulings were proper and affirm.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. The rule generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery. *Newton v. Insurance Co.*, 291 N.C.

105, 229 S.E. 2d 297 (1976); *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); *Winborne v. Winborne*, 41 N.C. App. 756, 255 S.E. 2d 640 (1979), *disc. rev. denied*, 298 N.C. 305, 259 S.E. 2d 918 (1979). For the purposes of ruling on a motion to dismiss, the well-pleaded material allegations of the complaint are taken as admitted. *Grant v. Insurance Co.*, 295 N.C. 39, 243 S.E. 2d 894 (1978). Recognizing these established rules of pleadings, the question presented on this appeal is whether plaintiff has any right of recovery against defendants under either the restrictive covenants or the association's charter and by-laws.

The first question we address is whether the restrictive covenants are sufficiently certain and definite to be enforceable.[1]

> [J]ust as covenants restricting the use of property are to be strictly construed against limitation on use, *Hege v. Sellers*, 241 N.C. 240, 84 S.E. 2d 892 (1954), and will not be enforced unless clear and unambiguous, *Hullett v. Grayson*, 265 N.C. 453, 144 S.E. 2d 206 (1965), even more so should covenants purporting to impose affirmative obligations on the grantee be strictly construed and not enforced unless the obligation be imposed in clear and unambiguous language which is sufficiently definite to guide the courts in its application.

Property Owner's Assoc. v. Seifart, 48 N.C. App. 286, 269 S.E. 2d 178 (1980). This is in accord with general principles of contract law, that the terms of a contract must be sufficiently definite that a court can enforce them. 3 Strong's N.C. Index 3d (1976), Contracts, § 3; 1 *Corbin on Contracts*, (2nd ed. 1963 and Supplement Part 1, 1980), § 95.

In determining the validity of these restrictive covenants, we look first to the purposes for which the dues are to be used. While the records before us appear to be identical, the wording of "Exhibit A—DECLARATION OF RESTRICTIVE COVENANTS" differs in each. In the Williams complaint, paragraph nine of the covenants lists the purposes to which the covenanted dues are to be applied as: "[m]aintenance and improvement of Snug Harbor

1. Plaintiff asserts that by majority vote of the membership of the Property Owners Association, it amended the restrictive covenants to reflect the change in dues from $18.00 to $35.00. To incorporate the purported amendments, the deeds would have had to have been re-executed, reacknowledged and redelivered. *Hege v. Sellers*, supra.

and its appearance, sanitation, easements, recreation areas and parks". The purposes stated in the covenants in the Curran complaint are even less specific. Paragraph 12 of the covenants provides that the dues shall be "[f]or the maintenance of the recreation area and park . . .".

This Court recently held in *Seifart*, supra, that the restrictive covenants of the Beech Mountain resort area were too vague to be enforceable[2] because: (1) there was no sufficient standard by which to measure liability for assessments, (2) the property to be maintained was not described with particularity, and (3) there was no means by which a court could review a determination by the Property Owners' Association as to which facilities it chose to maintain. Applying that analysis to this case, we find that although a specific dollar amount of annual dues was stated, the property to be maintained was described with even less particularity, and there is no standard by which the maintenance is to be judged. Accordingly, we find that these restrictive covenants are too vague to be enforceable. *Property Owner's Assoc. v. Seifart*, supra. Because we find these covenants to be unenforceably vague, it is not necessary for us to determine whether they are actually personal covenants, or real covenants which run with the land, as they are asserted to be. *Seifart*, supra.

Plaintiff also alleges that defendants are obligated to pay annual dues under the by-laws of the Property Owners Association, which were enacted pursuant to plaintiff's Articles of Incorporation. G.S. 55A-14. The statement of purpose in plaintiff's Charter suffers from the same lack of particularity with respect to the

2. The assessment provision applicable to Beech Mountain Condominium sites provided:

[I]t is agreed that each unit owner will join the "Beech Mountain Property Owners' Association" and shall maintain such membership so long as he owns the property, and shall pay reasonable annual assessment charges for road maintenance, recreational fees, and other charges assessed by the Association. . . .

The assessment provision applicable to Chalet sites stated: [T]he owner of any lot subject to these restrictions shall join the Beech Mountain Property Owners' Association, and shall pay all dues, fees, charges and assessments made by that organization, but not limited to charges for road maintenance, fire protection, and security services. The failure to pay these charges shall result in a lien upon the lot subject to foreclosure.

properties to be maintained and lack of standards as to maintenance as did the restrictive covenants themselves:

ARTICLE III

> The purposes for which the Corporation is organized are to protect the value and usefulness of the property known as Snug Harbor Beach, developed by Yeopim Beach Corporation in Bethel Township, Perquimans County, North Carolina; to establish, maintain and operate nonprofit social and recreational facilities for the mutual advantages to be derived therefrom by the owners of property at Snug Harbor Beach; and to engage in such other activities as may be to the mutual benefit of the owners of property in said subdivision.

Plaintiff's by-laws were written with the same invalidating indefiniteness. Although "[b]ylaws are, in a sense, a contract among the shareholders", Robinson, *N.C. Corporation Law and Practice* (2nd ed. 1974), § 4-9, these fee provisions contain no clear standard by which a court could determine which roads and recreational facilities were to be maintained, or to what degree, and for this reason, they are unenforceable.

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

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

STATE OF NORTH CAROLINA v. LOUIS C. ROSEBORO

No. 8114SC550

(Filed 15 December 1981)

1. Constitutional Law § 67— identity of informant—refusal to reveal proper

In a prosecution for five different drug related charges, the trial court did not err in failing to disclose the identity of a confidential informer whose information led to the issuance of a search warrant as the informer's information was not the basis of defendant's conviction and defendant could not have used the informer to counter the case made out against him.

2. Narcotics § 4— possession—sufficiency of evidence

The evidence was sufficient to convict defendant of possession of marijuana and cocaine where the evidence tended to show that law enforcement officers found both marijuana and cocaine in plain view in a bedroom, cocaine in the pocket of a suit in the bedroom closet, and marijuana in the water heater located in the kitchen of a house; that defendant was in the house; that his pants and wallet were lying on the bed in the bedroom where the marijuana and cocaine were found; and that a letter addressed to defendant and a savings book in his name were found on the headboard of the bed and in a closet of the bedroom. Defendant's possession can be based upon his control of the premises and upon the close juxtaposition of defendant to those drugs.

3. Narcotics § 4— possession with intent to sell marijuana—sufficiency of evidence

In a prosecution for possession with intent to sell marijuana, the evidence of the quantity of marijuana as well as the presence of drug paraphernalia including two sets of scales and an abundance of Ziploc bags, was sufficient for the charge to go to the jury.

4. Narcotics § 4— manufacture of marijuana—sufficiency of evidence

The evidence was sufficient for the issue of manufacturing marijuana to go to the jury under G.S. 90-87(15) where there was evidence of plastic bag corners, two sets of scales, and of Ziploc bags found with marijuana in a water heater.

APPEAL by defendant from *Braswell, Judge*. Judgments entered 19 January 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 10 November 1981.

Defendant was charged in five separate bills of indictment, proper in form, with (1) manufacture of marijuana; (2) felonious possession of marijuana, a Schedule VI controlled substance, with intent to sell; (3) felonious possession of more than 100 dosage units of cocaine, a Schedule II controlled substance; (4) felonious possession of cocaine with intent to sell; and (5) manufacture of cocaine. To all of these charges, defendant entered pleas of not guilty.

At trial, the State presented evidence tending to show that on 23 May 1980, law enforcement officers, with a warrant, searched a house at 705 Bacon Street in Durham and discovered a total of approximately 900 grams of marijuana, .35 grams of cocaine, and several items (pouch, scales, Ziploc bags, and bag corners) commonly associated with drug manufacture. Defendant, one of four persons present at the time the house was searched, was arrested and charged. Other evidence adduced at trial and

necessary for an understanding of this case will be set forth in the opinion.

Defendant was found guilty as charged on all counts except felonious possession of cocaine. On that count, he was found guilty of misdemeanor possession. From the imposition of active prison terms, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Lucien Capone III, for the State.

Elisabeth S. Petersen for defendant-appellant.

HILL, Judge.

[1] Before the trial of this case, defendant made a motion that the State be ordered to disclose the identity of a confidential informer whose information led to the issuance of the search warrant for 705 Bacon Street. That motion was denied, and defendant now argues that the trial court's action violated his constitutional right to confront witnesses against him. We do not agree.

In *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957), the Supreme Court dealt with the question of revealing the name of an informer where petitioner had been charged with the sale of heroin to "John Doe," and the government refused to disclose John Doe's true identity. In reversing petitioner's conviction, the Court stated:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Id. at 62, 77 S.Ct. at 628-29, 1 L.Ed. 2d at 646. The *Roviaro* court held that disclosure is required when the informer participated in the alleged crime and, as a material witness, might have been helpful to the defense. The opinions of our courts have reflected the requirement that, where an informer participates in the al-

leged crime, the State must disclose the identity of the informer. *See, e.g., State v. Hodges*, 51 N.C. App. 229, 275 S.E. 2d 533 (1981).

In the instant case, the information provided by the confidential informer had no connection with the crimes with which defendant was charged. The informer's information provided the basis for the search warrant, but his allegation that he had purchased drugs from someone, possibly defendant, at 705 Bacon Street, was not introduced as evidence at the trial. That information was not, therefore, the basis of defendant's conviction. Simply put, the informer did not, as defendant argues, participate in the drug activities with which defendant was charged. We do not find that defendant could have used the informer to counter the case made out against defendant by the State. The trial court correctly denied defendant's motion to disclose the informer's identity.

[2] Defendant also assigns as error the trial court's denial of his motion for a directed verdict. He contends that the State failed to present sufficient evidence of defendant's possession of the two drugs, his intent to sell, or his manufacture of the drugs. We find that the State did present sufficient evidence on all charges and that the court did not err in denying defendant's motion for a directed verdict.

In *State v. Harvey*, 281 N.C. 1, 12-13, 187 S.E. 2d 706, 714 (1972), the Supreme Court discussed the question of possession of narcotics:

> An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. Also, the State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused "within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession." (Citations omitted.)

The fact that other persons also have access to contraband does not exonerate a defendant. *State v. Lofton*, 42 N.C. App. 168, 256 S.E. 2d 272 (1979); *State v. Sutton*, 14 N.C. App. 161, 187 S.E. 2d 389, *cert. denied*, 281 N.C. 515, 189 S.E. 2d 35 (1972).

Our determination of the issue raised by defendant is governed by the principle of law that, upon consideration of a motion for directed verdict, the State's evidence is deemed to be true and the State is entitled to all reasonable inferences which may be drawn from the evidence. *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974). *See also* 4 Strong's N.C. Index, Criminal Law § 104, p. 541-42, and cases cited therein. In the instant case, the State presented evidence tending to show that, during the search, law enforcement officers found both marijuana and cocaine in plain view in the left bedroom, cocaine in the pocket of a suit in the bedroom closet, and marijuana in the water heater located in the kitchen of the house. The record does not disclose that anyone in the house had drugs on his person. Defendant's possession, therefore, can be based upon his control of the premises.

There was evidence which tended to link defendant to the house at 705 Bacon Street. At the time of the search, defendant was in the house. His pants and his wallet were lying on the bed in the left bedroom. A letter addressed to defendant (at another address) was discovered on the headboard of the bed, and a savings book in his name was found in a closet off the left bedroom. Furthermore, defendant had been seen at the premises before. In late April or early May of 1980, defendant was seen around an old gray Chevrolet which was being worked on. Before the search of the premises on 23 May, a law enforcement officer saw defendant driving the same gray Chevrolet.

Defendant's possession of the marijuana and cocaine also can be based upon the close juxtaposition of defendant to those drugs. Drugs and drug paraphernalia were found in several places in the house. Scales and a pouch containing cocaine were found on top of the television in the left bedroom. Cocaine was found on the headboard of the bed. Marijuana was found in a water heater in the kitchen. Cocaine was found in the vest pocket of a suit hanging in the closet where defendant's savings book was found. Defendant was in the hallway near the left bedroom when the officers entered. This evidence is more than sufficient for the jury to find

the defendant was in close juxtaposition to the contraband. *See State v. Harvey, supra.*

While defendant in the instant case presented evidence tending to negate and explain away the State's evidence, we cannot take that into account in this review. After considering the evidence in the light most favorable to the State, we hold that the State presented sufficient evidence to allow the case to go to the jury on the question of defendant's possession of the controlled substances.

[3] Likewise, we find that the evidence considered in the light most favorable to the State was sufficient to go to the jury on defendant's possession of the two drugs with the intent to sell. While the quantity of a drug is an indicator of intent to sell, *State v. Cloninger*, 37 N.C. App. 22, 245 S.E. 2d 192 (1978), it is not the only factor relevant to that intent. Evidence of the location of the drugs, the packaging used, and the existence of paraphernalia used to measure and package drugs also is relevant to the question of intent to sell. *See generally State v. Mitchell*, 27 N.C. App. 313, 219 S.E. 2d 295 (1975), *disc. rev. denied*, 289 N.C. 301, 222 S.E. 2d 701 (1976).

In the instant case, while the quantity of cocaine was small, there was evidence of the presence of drug paraphernalia (two sets of scales, one beside a pouch of cocaine, and an abundance of Ziploc bags) sufficient for the charge of possession with intent to sell to go to the jury. The evidence of the quantity of marijuana, as well as of the paraphernalia, also was sufficient for the charge of possession with intent to sell marijuana to go to the jury.

[4] Finally, we hold that there was sufficient evidence of manufacture of the two drugs to permit that issue to go to the jury. The prohibited manufacture of controlled substances "includes any packaging or repackaging of the substance or labeling or relabeling of its container except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use . . .." G.S. 90-87(15). The evidence of plastic bag corners, two sets of scales, and of the Ziploc bags found with the marijuana in the water heater was sufficient for the issue of manufacturing to go to the jury.

In defendant's trial, we find

No error.

Judges VAUGHN and WHICHARD concur.

STATE OF NORTH CAROLINA v. JAMES WILLIAM BISHOP

No. 8128SC568

(Filed 15 December 1981)

1. Automobiles § 126.1— drunken driving—opinion testimony as to intoxication

In a prosecution for operating a motor vehicle on a street or highway while under the influence of intoxicating liquor, the trial court properly allowed the investigating patrolman and the breathalyzer operator to state opinions that defendant had consumed alcoholic beverages in sufficient quantity to impair appreciably his mental and/or physical faculties where each witness testified as to when he observed defendant and the observations upon which his opinion was based, and the court fully instructed regarding these times and observations.

2. Automobiles § 127.1— drunken driving—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for driving under the influence of intoxicants where it tended to show that defendant, while operating a motor vehicle on a U.S. highway in Buncombe County, drove the vehicle into the rear of another vehicle on that highway; immediately following the collision, defendant's eyes looked a little glassy; when the investigating patrolman arrived, he detected an odor of alcohol about defendant's breath and person and observed that defendant's eyes were glassy and red and his face was flushed; defendant advised the patrolman he had been drinking; defendant failed the finger to nose test; defendant received a breathalyzer test approximately one and one-half hours after the collision and the reading showed a blood alcohol content of .18 percent; and when defendant took the test his face was flushed, he had an odor of alcohol about his person, his eyes were red, and his speech was slow, deliberate and slurred.

3. Automobiles § 129— drunken driving prosecution—question by juror about blood alcohol content

In this prosecution for driving under the influence of intoxicants, the trial court did not err in refusing to answer a question submitted by a juror as to what percent of alcohol in the blood is considered intoxicating where the court informed the juror that she need not be concerned about the question posed and then fully and adequately instructed as to the elements of the offense charged and its lesser included offenses.

4. Automobiles § 129.1— drunken driving prosecution—instructions—contention that liquor consumed after accident

In a prosecution for driving while under the influence of intoxicants, the trial court sufficiently instructed on defendant's contention that his consumption of intoxicating liquor occurred subsequent to his operation of the vehicle and before he took a breathalyzer test where the court twice in the charge referred to testimony by defendant's sister that she gave defendant a drink of coke and Black Velvet after the collision occurred in order to prevent diabetic shock. Furthermore, the trial court's *lapsus linguae* in stating that defendant did not have a drink before the officer arrived was an immaterial misstatement which was not prejudicial to defendant.

5. Automobiles § 130— operating vehicle with .10 percent or more blood alcohol—sufficiency of verdict

The jury's verdict finding defendant "guilty of operating a motor vehicle with .10 percent or more blood alcohol" was not inadequate in failing to find that defendant was operating a vehicle on a highway or public vehicular area when interpreted in the light of the evidence showing that defendant was operating his vehicle on a public highway located in Buncombe County and the court's charge which fully and adequately informed the jury that, in order to find defendant guilty, it had to find defendant was driving on a highway of or within this State.

APPEAL by defendant from *Cornelius, Judge.* Judgment entered 7 January 1981. Heard in the Court of Appeals 12 November 1981.

Defendant was involved in an automobile accident and was cited for operating a motor vehicle on a street or highway while under the influence of intoxicating liquor. He was found guilty in district court. Upon his appeal to the superior court, a mistrial was declared when the jury was unable to reach a verdict. Upon re-trial the jury returned a verdict of guilty "of operating a motor vehicle with .10 percent or more blood alcohol."

From a judgment of special probation pursuant to G.S. 15A-1351, defendant appeals.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin and Associate Attorney Jane P. Gray, for the State.

Lawrence C. Stoker, Assistant Public Defender, 28th Judicial District, for defendant appellant.

WHICHARD, Judge.

Defendant first contends the court erred in allowing the investigating patrolman and the breathalyzer operator to offer opinions that he had consumed alcoholic beverages in sufficient quantity to impair appreciably his mental and/or physical faculties. He argues that the questions and answers did not relate to a specific time; and that the issue was his condition at the time of the accident, not at the subsequent times when these witnesses observed him.

This court has held such testimony admissible, its weight being for the jury under appropriate instructions. *State v. Griffith*, 24 N.C. App. 250, 210 S.E. 2d 431 (1974) *cert. denied* 286 N.C. 546, 212 S.E. 2d 168 (1975). *See also State v. Lloyd*, 33 N.C. App. 370, 235 S.E. 2d 281 (1977). Each witness here testified as to when he observed defendant and the observations upon which his opinion was based. The court fully instructed regarding these times and observations. The probative value of this evidence was thus for the jury to determine. *State v. Gurley*, 257 N.C. 270, 125 S.E. 2d 445 (1962), the sole authority cited by defendant for this argument, is inapposite.

[2] Defendant next contends the court erred in denying his motions for nonsuit. By introducing evidence defendant waived his motion for nonsuit at the close of the State's evidence and is precluded from urging it as a ground for appeal. G.S. 15-173; *see State v. Mendez*, 42 N.C. App. 141, 256 S.E. 2d 405 (1979). His motion at the close of all the evidence presents the question whether all the evidence, deemed true and considered in the light most favorable to the State, disregarding discrepancies and contradictions, and giving the State the benefit of every inference of fact which may reasonably be deduced therefrom, sufficed to show commission of the offense charged, or of a lesser offense included therein, and defendant as the perpetrator. *State v. Snead*, 295 N.C. 615, 247 S.E. 2d 893 (1978); *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977).

The evidence, so considered, showed the following: Defendant, while operating a motor vehicle on U.S. Highway 191 in Buncombe County, drove the vehicle into the rear of another vehicle on that highway. When the other driver observed defendant immediately following the collision, defendant's "eyes looked a little

glassy." When the investigating patrolman arrived, he detected an odor of alcohol about defendant's breath and person and observed that defendant's "eyes were glassy and red and his face had a flushed condition." Defendant advised the patrolman he had been drinking. When defendant walked, "[h]e was swaying." "[H]is balance was swaying, his turning was unsure. On the finger to nose test he completely missed." He received a breathalyzer test approximately one and one-half hours after the collision. The breathalyzer machine was working correctly, and the reading showed a blood alcohol content of .18 percent. When defendant took the test his face was flushed; he had an odor of alcohol about his person; his eyes were red; and his speech was slow, deliberate, and slurred. This evidence, viewed in the light most favorable to the State, fully justified a jury finding that defendant was intoxicated at the time of the collision. *Snead*, 295 N.C. 615, 247 S.E. 2d 893; *State v. Cummings*, 267 N.C. 300, 148 S.E. 2d 97 (1966).

[3] Defendant next contends the court erred in refusing to answer the following question submitted by a juror:

> What percent of alcohol in the Blood is considered intoxicating?
>
> General facts about blood alcohol levels.

The court informed the juror it would instruct as to the violation charged, and that she need not be concerned about the question posed. It then fully and adequately instructed as to the elements of the offense charged and its lesser included offenses.

Further, the arguments in defendant's brief with regard to the instructions he contends the court should have given have not been properly brought forward, in that defendant has not complied with Rule 10(b)(2), Rules of Appellate Procedure, which in pertinent part provides: "An exception to the failure to give particular instructions to the jury . . . shall identify the omitted instruction . . . by setting out its substance immediately following the instructions given . . . ." We find no merit in this contention.

[4] Defendant next contends the court erred in failing to instruct as to his contention that his consumption of intoxicating liquor occurred subsequent to his operation of the vehicle and before he took the breathalyzer test. Defendant and his sister had testified

that defendant was diabetic; and that to prevent diabetic shock, his sister had given him a drink of Coke and Black Velvet *after* the collision occurred.

Defendant again has not set out in the record the substance of the instruction which he contends was improperly omitted. Appellate Rule 10(b)(2). Further, the court twice in the charge referred to the sister's having given defendant a drink with Black Velvet after the collision. In light of these instructions the *lapsus linguae* in which the court stated "that he did not have a drink before the—did not have a drink before the officer arrived" was an immaterial misstatement which was not prejudicial to defendant. "Ordinarily a misstatement of fact must be brought to the court's attention by counsel for defendant in apt time to afford opportunity for the court to correct it." *State v. Brown*, 280 N.C. 588, 598, 187 S.E. 2d 85, 92, *cert. denied*, 409 U.S. 870, 34 L.Ed. 2d 121, 93 S.Ct. 198 (1972). The misstatement here was not brought to the court's attention. The charge sufficiently met the mandatory requirements of G.S. 15A-1232. This contention is without merit.

[5] Defendant's final contentions relate to the alleged inadequacy of the verdict finding him "[g]uilty of operating a motor vehicle with .10 percent or more blood alcohol." He asserts it is unlawful "to operate any vehicle *upon any highway or any public vehicular area* within this State when the amount of alcohol in [the operator's] blood is 0.10 percent or more by weight," G.S. 20-138(b) (emphasis supplied); the verdict failed to find that he was operating a vehicle on a highway or public vehicular area; he thus has not been found guilty of a criminal offense; and the court therefore erred in entering judgment against him.

Defendant relies on *State v. Medlin*, 15 N.C. App. 434, 190 S.E. 2d 425 (1972), in which the jury returned a verdict of "guilty of driving automobile under the influence" with no finding that defendant drove on a public highway. The court noted that a verdict of "guilty" or "guilty as charged" suffices, but that "when the jury undertakes to spell out its verdict without specific reference to the charge . . . it is essential that the spelling be correct." *Id.* at 436, 190 S.E. 2d at 426. The award of a new trial, however, was based on the cumulative effect of other errors, not on inadequacy of the verdict.

A verdict is to be interpreted in light of the evidence and the charge. *State v. Bunton*, 27 N.C. App. 704, 220 S.E. 2d 354 (1975).

> When, and only when, an incomplete, imperfect, insensible, or repugnant verdict or a verdict which is not responsive to the issues or indictment is returned, the court may decline to accept it and direct the jury to retire, reconsider the matter, and bring in a proper verdict. . . .
>
> A verdict is not bad for informality or clerical errors in the language . . . if it is such that it can be clearly seen what is intended. It is to have a reasonable intendment and is to receive a reasonable construction and must not be voided except from necessity. . . .
>
> Although defective in form, if it substantially finds the question in such a way as will enable the court intelligently to pronounce judgment thereon according to the manifest intention of the jury, it is sufficiently certain to be received and recorded.

State v. Perry, 225 N.C. 174, 176, 33 S.E. 2d 869, 870 (1945).

All the evidence here indicated defendant was operating his vehicle on Highway 191 when the collision from which this charge arose occurred, and that Highway 191 is a public highway located in Buncombe County, North Carolina. Defendant himself testified he was driving on Highway 191 when the collision occurred. The charge fully and adequately informed the jury that, to return a verdict of guilty of the offense charged or a lesser included offense, it had to find defendant was driving on a highway of or within this state; and that Highway 191 is such a highway. The verdict, interpreted in light of the evidence and the charge, clearly reflects the manifest intention of the jury to find defendant guilty of operating a motor vehicle "upon a highway . . . within this State when the amount of alcohol in [his] blood [was] 0.10 percent or more by weight." G.S. 20-138(b). There was, then, no ambiguity in the verdict; and interpreted in light of the evidence and charge, it was sufficient to support the judgment. *Bunton*, 27 N.C. App. at 710-711, 220 S.E. 2d at 358. *See State v. Jones*, 211 N.C. 735, 190 S.E. 733 (1937) (verdict of "guilty of driving under the influence of liquor" held sufficient in light of evidence and admissions).

No error.

Judges VAUGHN and HILL concur.

FRANK W. BARR v. MARGARET I. BARR

No. 8126DC382

(Filed 15 December 1981)

Divorce and Alimony § 19.5— consent judgment—reciprocal consideration—not modifiable

The trial court did not err in finding a consent judgment to be a complete property settlement rather than separate alimony and property division provisions where: (1) the preamble to the order stated that "the parties had settled their differences . . .," and (2) both parties were ordered to convey certain property interests under the judgment. The foregoing factors outweighed language in the judgment which indicated an intention to treat the support provisions as alimony. G.S. 50-16.1, G.S. 50-16.2, G.S. 50-16.9(a) and (b).

APPEAL by plaintiff from *Black, Judge.* Order entered 30 December 1980 in District Court, MECKLENBURG County. Heard in the Court of Appeals 19 November 1981.

Joseph L. Barrier for plaintiff-appellant.

James, McElroy & Diehl, by William K. Diehl, Jr., for defendant-appellee.

HILL, Judge.

Plaintiff and defendant entered into an agreement on 23 August 1978 which represented "that the parties had settled their differences . . .." With their consent, the court ordered, *inter alia*, that plaintiff transfer title to certain real and personal property to defendant and that plaintiff pay to defendant "monthly alimony" which "shall continue . . . until the defendant remarries or dies." Defendant likewise was ordered to convey her interest in certain other personal property to plaintiff. A judgment of absolute divorce was entered for plaintiff against defendant on 24 August 1978.

On 13 October 1980, defendant alleged that plaintiff had failed to abide by the provisions of the August 1978 order and was

then $7,200.00 in arrears on "alimony" payments to defendant. Defendant prayed the court jail plaintiff, in exercise of its civil contempt powers, "until he purges himself of such contempt." A month later, plaintiff moved the court to modify its August 1978 order "for permanent alimony" pursuant to G.S. 50-16.9(c) because of changed circumstances bearing upon defendant's financial needs and plaintiff's reduction in income.

On 24 November 1980, defendant replaced her October motion with allegations that plaintiff had willfully disobeyed the provisions of the August 1978 order "in that he has ceased making any alimony payments, having made no payments for the past five months and being currently in arrears, as of the time this motion is filed, in the amount of $9,000.00." Defendant further alleged that plaintiff "has willfully depressed his income in order to justify a reduction in alimony payments . . .." Again, defendant prayed the court jail plaintiff for contempt until his obligations are brought current.

At the hearing, defendant withdrew her motion for contempt and moved for judgment respecting the arrearages and plaintiff's motion to modify the August 1978 order. The court found facts and concluded, *inter alia*, the following:

> 2. The Order of this Court dated August 23, 1978, is a consent judgment, not subject to modification as to monthly support payments from Plaintiff to Defendant, absent the mutual consent of the parties.
>
> * * *
>
> 4. The support provisions in the Order of August, 1978, constituted reciprocal consideration with respect to the property settlement of the parties.
>
> * * *
>
> They are not separable.
>
> * * *
>
> Defendant has carried such burden as imposed in WHITE v. WHITE, 296 NC 661, 252 SE 2d 698 (1979) to show by a preponderance of the evidence that the terms of the Order are not separable and thus, not subject to modification.

Plaintiff's motion to modify the August 1978 order was denied, and defendant's request that the arrearages under that order be recovered and reduced to judgment was allowed. Plaintiff appeals from this order.

The August 1978 order is a consent judgment which may be modified if it is an order of the court to pay alimony. *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979); *Walters v. Walters*, 54 N.C. App. 55, 284 S.E. 2d 151 (1981). *See* G.S. 50-16.9(a).

> Even though denominated as such, support payment provisions may not be alimony, and thus modifiable, if those provisions and other provisions for a property division between the parties constitute "a *complete* settlement of all property and marital rights between the parties . . .." *Bunn v. Bunn*, 262 N.C. 67, 70, 136 S.E. 2d 240, 243 (1964) (emphasis original). Furthermore, where those provisions "constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties." *Id.*, *quoted in White v. White*, *supra* at 666-67, 252 S.E. 2d at 701.

Walters v. Walters, *supra* at 547-48, 284 S.E. 2d at 153.

The question here, as in *Walters*, is whether the payment provisions of the August 1978 order are modifiable alimony provisions independent of and separate from its property division provisions. "The answer depends on the construction of the consent judgment as a contract between the parties." *White v. White*, *supra* at 667, 252 S.E. 2d at 702. Thus, where the consent judgment is ambiguous, "the intentions of the parties must be determined from evidence of the facts and circumstances surrounding [its] entry . . ., just as the intentions of the parties to an ambiguous written contract must be determined from the surrounding circumstances." *Allison v. Allison*, 51 N.C. App. 622, 627, 277 S.E. 2d 551, 554-55 (1981), *quoted in Walters v. Walters*, *supra* at 548, 284 S.E. 2d at 154.

Two factors indicate that the parties intended the August 1978 order to be a complete property settlement, and its provisions reciprocal consideration for them, as the court below con-

cluded, rather than separate alimony and property division provisions. First, the preamble to the order states that "the parties had settled their differences . . .." This language is subject to the interpretation that the agreement was considered a complete settlement by the parties. *Cf Walters v. Walters, supra.* Further, plaintiff testified by deposition that "the entire understanding as between myself and my wife is set forth in the [August 1978 order]."

Second, defendant was ordered to convey her interest in certain personal property to plaintiff. Likewise, plaintiff was ordered to transfer his interest in certain other real and personal property, together with "monthly alimony," to defendant. These provisions constitute reciprocal consideration, one for the other. Thus, the provisions of the August 1978 order are related, evincing a complete property settlement between the parties.

On the other hand, the word "alimony" and the provision that plaintiff's support payments to defendant would continue "until the defendant remarries or dies" appear in the August 1978 order. This language is evidence, albeit inconclusive, of the parties' intention to treat the support provisions as alimony. *See* G.S. 50-16.9(b); *see also Walters v. Walters, supra.* In addition, plaintiff testified that he deducted "for tax purposes" the amount of the support payments he paid to defendant. However, there is no language in the order finding defendant to be a "dependent" spouse and plaintiff to be a "supporting" spouse. Such designations are indicative of the payment and receipt of alimony. *See* G.S. 50-16.1 and G.S. 50-16.2. This Court has considered the absence of such findings as supportive of an interpretation that the payment provisions are not alimony. *See Walters v. Walters, supra; Allison v. Allison,* supra.

When the foregoing factors are weighed together, we find that the court below was correct in concluding that the provisions of the August 1978 order constitute reciprocal consideration, and therefore are not separable and modifiable without the parties' consent.

We note that the court applied the presumption of separability of alimony and property division provisions announced in *White v. White, supra,* in construing the August 1978 order. It found that defendant, who opposed the modification of the order,

discharged her burden to prove by a preponderance of the evidence that the provisions of the order are not separable and subject to modification. We agree; the evidence and our foregoing analysis support this conclusion.

The record reveals that the facts as found are supported by the evidence, and the conclusions of law are supported by the facts. For these reasons, the order of the court below is

Affirmed.

Judges VAUGHN and WEBB concur.

STATE OF NORTH CAROLINA v. FRED W. CROMARTIE, SR.

No. 8112SC563

(Filed 15 December 1981)

1. **Arrest and Bail § 3— warrantless arrest—no entry into vehicle**

G.S. 15A-401(e)(1), which prevents entry into private premises or vehicles for the purpose of effecting an arrest without a warrant is not applicable where an officer does not enter a defendant's vehicle in order to effect an arrest.

2. **Searches and Seizures § 8— warrantless seizure of discarded aspirin box containing drugs**

The trial court did not err in concluding that defendant discarded an aspirin box containing three or four packets of heroin and that he abandoned it for purposes of the law of search and seizure where the evidence tended to show that an officer stopped defendant pursuant to an outstanding order for his arrest; that defendant stopped his car and got out; that the officer stated that he was going to arrest defendant and the officer had defendant put his hands on the car for a search; that during the search there was a "rumble" in which defendant threw his right hand out to his side; and that the aspirin box containing heroin and a cigarette lighter hit the ground about three or four feet away from defendant.

APPEAL by defendant from *Clark, Judge.* Judgment entered 7 April 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 12 November 1981.

Defendant was charged with third offense possession of heroin with intent to sell and deliver. He moved to suppress

physical evidence obtained as a result of a search, and a hearing was held. The trial judge denied the motion, and defendant pleaded guilty to the charge. Defendant appeals the denial of his motion to suppress.

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

Assistant Public Defender Orlando F. Hudson, Jr., for defendant-appellant.

HILL, Judge.

Officer Ronnie Purdie testified for the State at the hearing on defendant's motion to suppress evidence. Defendant presented no evidence. The officer testified that he saw the defendant driving an automobile at about 1:10 a.m. on 20 January 1981; that he knew there was an outstanding order for defendant's arrest because he had checked the warrant file on 19 January 1981; that he turned on his blue light and defendant stopped his car and got out; that he stated that he was going to arrest defendant and he had defendant put his hands on the car for a search; that during the search "there appeared to be a rumble as if he was going to come off the car at that time [and] . . . he threw his right hand out to his side, his front;" that an aspirin box and a cigarette lighter hit the ground about three or four feet away from defendant; that another officer picked up these items and the two officers opened the aspirin box; and that they found three or four packets of a white powder inside, identified as heroin. The trial judge found the facts "to be as testified to by Officer Ronnie Purdie" and concluded that defendant had been lawfully arrested, that defendant had voluntarily discarded the aspirin box by throwing it away and no longer had any reasonable expectation of privacy with respect to it, and that the suspicious and furtive conduct of defendant and the appearance of the items inside the box had given probable cause for seizure of the items.

[1] Defendant first argues that his arrest was unlawful. He argues that G.S. 15A-401(e)(1), which deals with entry into private premises or vehicles for the purpose of effecting an arrest, is applicable and that this statute does not allow an arrest unless an officer has a warrant or order for arrest in his possession. The

simple answer to defendant's argument is that G.S. 15A-401(e)(1) does not apply since Office Purdie did not enter defendant's vehicle in order to effect the arrest. The officer testified that defendant "stopped his car and got out;" there was no evidence to the contrary. Even if the arrest had not been lawful, it would not follow that the evidence discovered would have to be suppressed. *See State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706 (1973); *State v. Sutton*, 34 N.C. App. 371, 238 S.E. 2d 305 (1977), *disc. rev. denied*, 294 N.C. 186, 241 S.E. 2d 521 (1978).

[2] Defendant next argues that the trial judge erred in concluding that he discarded the aspirin box. We disagree. The trial judge did not make detailed findings of fact, but such findings were not required since there was no conflict in the evidence at the suppression hearing. *State v. Smith*, 50 N.C. App. 188, 272 S.E. 2d 621 (1980). The trial judge concluded that defendant "voluntarily discarded the aspirin box by throwing the same onto the ground some distance from him; and that the defendant could not have had any reasonable, legitimate expectation of privacy regarding the possession of said item after he discarded the same on a public street." The uncontradicted testimony of Officer Purdie supports this conclusion of law, and we have no basis for overruling it.

The conclusion of law regarding defendant's discarding of the aspirin box amounts to a determination that defendant abandoned it for purposes of the law of search and seizure.

> The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.

United States v. Colbert, 474 F. 2d 174, 176 (5th Cir. 1973).

In *City of St. Paul v. Vaughn*, 306 Minn. 337, 237 N.W. 2d 365 (1975), police stopped that defendant's automobile on the belief that he was another person whom they knew to be under a driver's license suspension. Defendant got out of his automobile and ran into a nearby business. An officer followed and observed defendant put something underneath a counter. The officer

retrieved the item, an eyeglass case, and found it to contain drug paraphernalia. The Supreme Court of Minnesota upheld the seizure. It reasoned as follows:

> The defendant discarded the eyeglass case in a location to which any member of the public had equal access—underneath the counter of a drycleaning establishment. He argues, however, that his intention was merely to hide the case, not to relinquish his right of ownership. That is not the test.
>
> . . . [T]he question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment. Cf. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). In essence, what is abandoned is not necessarily the defendant's property, [footnote omitted] but his reasonable expectation of privacy therein.
>
> Where the presence of the police is lawful [footnote omitted] and the discard occurs in a public place where the defendant cannot reasonably have any continued expectancy of privacy in the discarded property, [footnote omitted] the property will be deemed abandoned for purposes of search and seizure. [footnote omitted] Such is the case here.

Id. at 346-47, 237 N.W. 2d at 370-371. In *Gonzales v. State*, 461 S.W. 2d 408 (Tex. Crim. App. 1970), a police officer, upon stopping that defendant for traffic offenses, saw him throw a bag over the hood of his car. The bag was recovered and was found to contain drugs. The Texas Court of Criminal Appeals found that the case did not involve a search incident to an arrest, but rather involved

> marihuana discovered after it was abandoned by the appellant in the presence of the officers and which when found was in plain view of the officers.
>
> The seizure of the marihuana by the officers under such facts was lawful and the court did not err in admitting the same into evidence.

Id. at 409.

The protection of the Fourth Amendment does not extend to abandoned property. When one abandons property, "[t]here can be nothing unlawful in the Government's appropriation of such abandoned property." *Abel v. United States*, 362 U.S. 217, 241, 80 S.Ct. 683, 698, 4 L.Ed. 2d 668, 687 (1960). *See generally*, 68 Am. Jur. 2d, Searches and Seizures § 9, P. 668; 1 LaFave, Search and Seizure § 2.6(b), pp. 366-75 (1978). This Court recently decided that when one discards property as the product of some illegal police activity, he will not be held to have voluntarily abandoned the property or to have necessarily lost his reasonable expectation of privacy with respect to it, *State v. Cooke*, 54 N.C. App. 33, 282 S.E. 2d 800 (1981); however, there is no evidence of such police misconduct in this case.

Defendant also challenges the trial judge's conclusions with respect to his "furtive conduct" and the officers' probable cause for a search; however, we need not consider these arguments since the status of the aspirin box as abandoned property provides a sufficient independent basis for the officers' seizure and search of it.

The order denying defendant's motion to suppress evidence is

Affirmed.

Judges VAUGHN and WHICHARD concur.

PATRICIA O'NEAL, ALSO KNOWN AS PATRICIA O'NEAL CLEMMER v. STILES A. KELLETT, GEORGETOWN GASTONIA LIMITED, AND U.S. SHELTER CORPORATION

No. 8127SC311

(Filed 15 December 1981)

1. Landlord and Tenant § 8.2— maintenance of common areas—duty of landlord to tenant

A residential landlord in North Carolina owes his tenant a statutory duty of exercising ordinary or reasonable care to maintain common areas of the leased premises in a safe condition, and a violation of that duty is evidence of negligence. G.S. 42-42(a)(3).

2. Landlord and Tenant § 8.3— fall by tenant on dimly lit steps—negligence and contributory negligence

In an action by plaintiff tenant to recover for injuries received when she fell on defendant landlords' outside steps, the evidence on a motion for summary judgment presented a material issue of fact as to negligence by defendants where the jury could find that defendants allowed unlighted outside common area stairs to remain on their premises; such unlighted stairs were an unsafe condition; defendants knew or in the exercise of ordinary care should have known that the stairs were unlighted; defendants failed to exercise ordinary care to correct the unsafe condition caused by the unlighted stairs; and such failure was the proximate cause of plaintiffs injuries. Furthermore, the evidence on motion for summary judgment did not disclose contributory negligence by plaintiff as a matter of law where it showed that plaintiff was using a common area of defendants' premises intended for use by defendants' tenants when she was injured; plaintiff approached the steps cautiously and caught her foot on the edge of the first step while trying to find the second step in the darkness; an alternate lighted route was available to plaintiff; and before the accident plaintiff considered the steps to be defective and unsafe.

APPEAL by plaintiff from *Kirby, Judge.* Judgment entered in GASTON County Superior Court 9 January 1981. Heard in the Court of Appeals 23 October 1981.

This is a negligence action for personal injuries. In her complaint, plaintiff alleged that while she was a tenant in defendants' apartment complex, she fell on defendants' defective, dimly lit outside steps. Defendants moved for summary judgment and supported their motion with depositions of plaintiff, defendants' resident manager, and interrogatories of plaintiff. The trial court granted defendants' motion and plaintiff has appealed.

Harris, Bumgardner & Corry, by Robert Dennis Lorance, for plaintiff-appellant.

Hollowell, Stott, Hollowell, Palmer & Windham, by L. B. Hollowell, Jr., for defendant-appellees.

WELLS, Judge.

On a motion for summary judgment under G.S. 1A-1, Rule 56, the burden is on the movant to show to the court that there are no genuine issues of material fact to be tried in the case and that the movant is entitled to summary judgment as a matter of law. *Vassey v. Burch,* 301 N.C. 68, 269 S.E. 2d 137 (1980). The rule does not allow the court to decide an issue of fact. *Vassey,* supra. As a

general rule, issues of negligence are not ordinarily susceptible to summary disposition. It is only in the exceptional negligence case that summary judgment is appropriate, because the rule of the prudent man or other standard of care must be applied, and ordinarily the jury should apply it under appropriate instructions from the court. *Vassey,* supra.

In her deposition, plaintiff testified that at the time of her injury on 16 June 1978, she was a tenant in defendants' apartment complex in Gastonia, where she had lived for about three months prior to her injury. On the night of 16 June at about 11:00 p.m., plaintiff was walking from another apartment in the complex to plaintiff's apartment. The direct route from the other apartment to plaintiff's apartment included three outside steps, leading from a parking lot toward her apartment. Plaintiff testified that the steps were so dark that she could not see, and that she lost her footing and fell.

> It was dark as I walked down the steps and I knew it was dark. I was looking down at the steps, trying to see them, that is, I was looking right towards my feet when I slipped. I looked down first to see the next step and I thought I stepped where I thought I saw it and that's when I slipped. I was looking where my foot was. My left foot slipped. I fell on the first step of the stairway or walkway. I took three steps on the first step itself. As to the sequence of events, I stepped on the first step with my left foot, then right, then left — my left heel. Yes, I'm positive that I stepped first with my left foot, then with my right foot and then with my left foot. I was intending to place my left foot on the next or second step when I fell. Yes, I stepped with my left foot, then my right foot and I was taking my third step when I fell.

Plaintiff also testified that the steps on which she fell were uneven, that the second and third steps sloped downward, and that the steps were chipped and cracked. Plaintiff testified that she had been near the steps on a number of previous occasions, but had not previously used the steps; that she had previously observed the steps from a distance of a few feet and that previous to her fall, she had formed an opinion that the steps were unsafe. Plaintiff testified that there was a lighted pathway

from the parking lot to her apartment. The record before us, however, does not show whether the pathway was a walkway constructed by defendants or whether the pathway ran near or along plaintiff's route of travel on the occasion of her injury.

Defendants' resident manager testified that the steps were adequately lighted and were safe, and that plaintiff could have used a lighted pathway.

Obviously, there are disputed facts in this case. Defendants' burden upon the motion for summary judgment was to show the trial court that plaintiff's claim was fatally defective: i.e., that defendants were not negligent, or, that plaintiff was contributorily negligent as a matter of law.

[1, 2] A residential landlord in North Carolina owes his tenant a statutory duty of exercising ordinary or reasonable care to maintain common areas of the leased premises in a safe condition. G.S. 42-42(a)(3). A violation of that duty is evidence of negligence. *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 284 S.E. 2d 702 (1981). Defendants must be charged with foreseeing that outside stairs on their premises may be used by their tenants at all hours of the day and night and that when such stairs are used at night, the absence of lighting may render them unsafe. On the issue of defendants' negligence, the evidence before the trial court shows material facts from which a jury could find that defendants allowed unlighted outside common area stairs to remain on their premises; that such unlighted stairs were an unsafe condition; that defendants knew or in the exercise of ordinary care should have known that the stairs were unlighted; that defendants failed to exercise ordinary care to correct the unsafe condition caused by the unlighted stairs; and that such failure was the proximate cause of plaintiff's injury. *See Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1978); *Lenz v. Ridgewood*, supra. The question of defendants' negligence must be passed on by a jury.

The materials before the trial court do not show plaintiff to have been contributorily negligent as a matter of law. When she was injured, plaintiff was where she had a privilege to be: using a common area of defendants' premises intended for use by defendants' tenants. Under these circumstances, it cannot be said as a matter of law that plaintiff was required to avoid the use of the

stairs or to use them at her peril, *Rappaport*, supra, *Lenz*, supra: or that she was required to use an alternate route. *Lenz*, supra. Plaintiff's testimony, viewed in the light most favorable to her, shows that she approached the steps cautiously and caught her foot on the edge of the first step while trying to find the second step in the darkness. In view of all of the facts and circumstances, reasonable minds may differ as to whether plaintiff exercised due care for her own safety in attempting to use the steps. *Rappaport*, supra.

Defendants contend that plaintiff's testimony that she considered the steps to be defective or unsafe shows that she knowingly exposed herself to danger and that she was therefore negligent per se in attempting to use the steps. We cannot agree. As our Supreme Court stated in *Smith v. Fiber Controls*, 300 N.C. 669, 268 S.E. 2d 504 (1980):

> [T]he existence of contributory negligence does not depend on plaintiff's *subjective* appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an *objective* standard of behavior—the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury. (Cites omitted.)

See also Lenz, supra. The standard of care required differs with the exigencies of the situation. *Wallsee v. Water Co.*, 265 N.C. 291, 144 S.E. 2d 21 (1965). *See also Lenz*, supra.

The issue of plaintiff's contributory negligence is for a jury to decide. For the reasons stated, the judgment of the trial court must be and is

Reversed.

Judges MARTIN (Robert M.) and WEBB concur.

STATE OF NORTH CAROLINA v. RANDY TERRY HERRING AND EDWARD D. JOHNSON

No. 8112SC406

(Filed 15 December 1981)

1. **Burglary and Unlawful Breakings § 5.8— doctrine of recent possession—testimony identifying stolen property contradictory**

In a case in which defendants were convicted of felonious breaking and entering and felonious larceny, the trial court did not err in submitting an instruction on the doctrine of recent possession and did not err in its failure to grant defendants' motions to dismiss on the basis that the testimony identifying the stolen property was contradictory. Even though each of three witnesses upon further examination equivocated in their identification of the stolen property, each had previously positively identified the property.

2. **Criminal Law § 73— incomplete answer—objection premature**

In a prosecution for felonious breaking or entering and felonious larceny, where, in response to a question concerning identification of equipment, the witness answered "by the serial number the landlord had on" before an objection to his testimony was lodged, the court did not err in overruling the objection as it was impossible to discern at that time whether the answer expressed information within the witness's personal knowledge or depended on the competency and credibility of someone else.

3. **Criminal Law § 114.3— improper phrase in jury instruction—not misleading**

Where the trial court instructed the jury that "the mere fact that the defendants have been indicted or charged with the commission of crime is not evidence of guilt in and of itself," the addition of the words "in and of itself" were improper; however, there was no reason to believe the jury was misled or misinformed by the apparent *lapsus linguae* of the court. G.S. 15A-1443.

APPEAL by defendants from *Herring, Judge.* Judgments entered 26 November 1980 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 13 October 1981.

Defendants were indicted for second degree burglary and felonious larceny and convicted of felonious breaking and entering and felonious larceny. From judgments of imprisonment, defendants appeal.

Attorney General Edmisten, by Special Deputy Attorney General Lester V. Chalmers, Jr., for the State.

John G. Britt, Jr., Assistant Public Defender, Twelfth Judicial District, for defendant appellant Randy Terry Herring.

Jack E. Carter for defendant appellant Edward D. Johnson.

WHICHARD, Judge.

The State's evidence showed the following:

On 4 June 1980 Hugh Gladden left his trailer sometime after dark. Upon his return he found a window torn out; and his stereo stand, two stereo speakers, tape player, turntable, and radio were missing. Gladden identified State's Exhibit 2—"a stereo, tape player and turntable and radio"—as "the one I lost." He further identified State's Exhibit 3 as the stand to his stereo and State's Exhibit 5 as his speakers.

Anthony Sarcinella saw the defendants coming down a street together "at approximately midnight to two o'clock" the night Gladden's property was stolen. Defendant Herring was carrying a stereo and a stand. Sarcinella identified State's Exhibits 2 and 3 as the stereo and stand he saw Herring carrying. Defendant Johnson was carrying two speakers. Sarcinella testified that he "would say that State's Exhibits 4 and 5 [were] the same two speakers." Sarcinella asked defendants what they were going to do with the stereo. He then asked Martha Charles, near whose home he had seen defendants, to get Steven and Carol Ann Henby, who were staying with her that evening. The police were called after the Henbys came out. Defendants then ran down the road and out of sight. Steven Henby identified the State's exhibits as the stereo and cover he saw defendant Johnson carrying and the speakers he saw defendant Herring carrying.

Upon further examination each witness equivocated in his identification of the State's exhibits. Gladden stated: "I do not know for certain whether or not this stereo is the same one that was stolen from me." Sarcinella stated: "I am reasonably sure that this was the stereo equipment that I saw [defendants] with that night. . . . It appears similar to the one I saw that night, but I do not know that it is the same stereo that I saw that night." Steven Henby stated: "I have never seen another stereo like this one before I saw those two men carrying it, so I don't really know if it's the one I saw that night or one like it or identical to it. As far as I'm concerned, it's the same one."

[1] Defendants contend the equivocal nature of the State's evidence identifying the property they possessed renders it insufficient to support an instruction on, and submission to the jury

under, the doctrine of recent possession. They argue the court thus erred in its instructions and in its failure to grant their motions to dismiss. We find no error.

When passing upon a motion to dismiss in a criminal case, just as when passing upon a motion for nonsuit, "all of the evidence favorable to the State . . . must be considered, such evidence must be deemed true and considered in the light most favorable to the State, *discrepancies and contradictions therein are disregarded* and the State is entitled to every inference of fact which may be reasonably deduced therefrom." *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E. 2d 822, 826 (1977) (emphasis supplied). *See State v. Mendez*, 42 N.C. App. 141, 256 S.E. 2d 405 (1979) (motions for nonsuit and dismissal treated alike). "[T]he question for the court is whether there is substantial evidence of each element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense." *State v. Snead*, 295 N.C. 615, 617, 247 S.E. 2d 893, 895 (1978).

The evidence here, judged by the foregoing standard, was sufficient to establish that: (1) the property described in the indictments was stolen, (2) the stolen goods were found in defendants' custody and subject to their control and disposition to the exclusion of others, and (3) the possession was recently after the larceny. It was thus sufficient under the doctrine of recent possession to withstand the motions to dismiss. *See State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981); *State v. Allison*, 265 N.C. 512, 144 S.E. 2d 578 (1965). The equivocation in the testimony identifying the stolen property constituted "discrepancies and contradictions" which the court properly disregarded in passing on the motions to dismiss. *Witherspoon*, 293 N.C. at 326, 237 S.E. 2d at 826. Gladden had positively identified the property as his, and other witnesses had positively identified it as that which they saw in defendants' possession the night the thefts occurred. The court thus properly instructed on the doctrine of recent possession and properly denied the motions to dismiss.

[2] Defendants next contend the court erred in its evidentiary ruling when the following occurred during examination of the witness Gladden:

Q. And how did you identify [the equipment]?

A. By the serial number the landlord had on—

MR. BRITT: Objection.

MR. CARTER: Objection, Your Honor.

MR. BRITT: Move to strike.

COURT: Overruled.

They argue that the probative force of the evidence admitted depended on the competency and credibility of someone other than the witness, and that the evidence thus constituted inadmissible hearsay. *See* 1 Stansbury's North Carolina Evidence, § 138 (Brandis Rev. 1973).

The witness had not completed his answer when objections were lodged. Whether the answer expressed information within his personal knowledge, or depended on the competency and credibility of someone else, was thus indeterminable at that time. The court, then, did not err in overruling the objections. While the testimony would have been subject to motions to strike when the witness subsequently indicated that his identification was based on "some numbers that someone else had" and that he had "no way of knowing whether those numbers were accurate," no such motions were entered.

[3] Defendants finally contend the court erred in instructing that "the mere fact that the defendants have been indicted or charged with the commission of crime is not evidence of guilt in and of itself." They cite N.C.P.I.-Crim. 101.10, which reads in part: "[T]he fact that he has been [indicted] [charged] is no evidence of [a defendant's] guilt"; and argue that by adding the words "in and of itself" to the pattern instruction, the court implied that the fact of indictment may be considered as evidence of guilt if there is other evidence thereof.

Although the phrase was improper, we find no reason to believe the jury was misled thereby to the prejudice of defendants. Construing the charge contextually, as we must, it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed by the apparent *lapsus linguae* of the court in this isolated instance. *See State v. Davis*, 290 N.C. 511, 544, 227 S.E. 2d 97, 117 (1976). The exception thus will not be sustained, even though the instruction

would have been more aptly given in different form. *Davis*, 290 N.C. at 544-545, 227 S.E. 2d at 117. *See generally* G.S. 15A-1443.

We find that defendants had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and HILL concur.

FRED V. COOPER, D/B/A FRED V. COOPER REALTY v. LAWRENCE HOMER HENDERSON

No. 815DC375

(Filed 15 December 1981)

Brokers and Factors § 6.2— exclusive listing contract—owner's sale of property after contract terminated—whether broker had negotiated with purchaser

Plaintiff real estate broker was not entitled to a commission upon defendant owner's sale of property within three months after the expiration of an exclusive listing contract which provided for payment of a commission to the plaintiff if the listed property was sold during the life of such agreement or within three months thereafter to any party with whom plaintiff had "negotiated" where plaintiff's evidence showed that plaintiff sold two parcels of the listed property and was paid the stipulated commission therefor; the third parcel was sold by defendant owner within 90 days after the termination of the listing contract to the mother of the female purchaser of one of the two parcels previously sold; plaintiff knew that the mother of the female purchaser might help to finance the purchase; plaintiff gave photographs of all the property to the female purchaser so that she might send them to her mother; and plaintiff never spoke with or met the purchaser of the third parcel, and where plaintiff failed to allege or offer any evidence of bad faith on the part of defendant or evidence that the mother purchased the third tract as an agent or trustee for her daughter.

APPEAL by plaintiff from *Rice, Judge.* Judgment entered 21 January 1981 in District Court, PENDER County. Heard in the Court of Appeals 18 November 1981.

Plaintiff and defendant entered into an exclusive real estate listing contract to sell certain property owned by the defendant. Plaintiff sold two parcels of said property and was paid the

stipulated commission therefore. The third parcel was sold by the defendant within ninety days of the termination of the exclusive listing contract to Betty J. Pollmann, who is the mother of Patricia F. Copp who was one of the purchasers of the two parcels previously sold.

The contract entered into between plaintiff and defendant contained the following provision: "if the property is sold or exchanged by you, by me, or by any other party before the expiration of this listing, at any terms accepted by me, or within three months thereafter, to any party with whom you or your representatives have negotiated, I agree to pay you a commission of ten (10) percent of the gross sales price."

The defendant refused to pay plaintiff any commission on the third parcel of land which sold for $65,000. Plaintiff brought suit against the defendant on the basis of the listing contract. At trial at the close of the plaintiff's evidence, the judge allowed defendant's motion for a directed verdict pursuant to Rule 50, N.C. Rules Civ. Proc. from which plaintiff appealed.

Trawick and Pollock by Gary E. Trawick for the plaintiff-appellant.

Moore and Biberstein by R. V. Biberstein, Jr., for the defendant-appellee.

MARTIN (Robert M.), Judge.

Plaintiff's sole question on appeal is whether the trial court erred in granting the defendant's motion for a directed verdict. Our Supreme Court in *Kelly v. Harvester Co.*, 278 N.C. 153, 158, 179 S.E. 2d 396, 398 (1971) stated the rule that "[o]n a motion by a defendant for a directed verdict in a jury case, the court must consider all the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff." (Citation omitted.)

The key in this case is whether plaintiff negotiated with Mrs. Pollmann as required by the terms of the listing contract. Negotiation has been defined as deliberation, discussion, or conference upon the terms of a proposed agreement, or as the act of settling or arranging the terms of a bargain or sale. *Dunklee v.*

Shepherd, 145 Colo. 197, 358 P. 2d 25 (1960). In *Werner v. Hendricks*, 121 Pa. Super. Ct. 46, 182 A. 748 (1936) the court held that merely calling attention to a property without further discussing the details which necessarily had to follow for consummation of a sale, could not be called negotiation.

The present case is similar to *Jessup v. La Pin*, 35 Wis. 2d 186, 150 N.W. 2d 342 (1967). In *Jessup* the court held that the plaintiff broker was not entitled to a commission upon a sale of defendant's property consummated within six months after the expiration of the one-month exclusive listing contract between them which provided for payment of a commission to the plaintiff if the listed property was sold during the life of such agreement, or if it was sold within six months of the termination thereof to anyone with whom the plaintiff had negotiated during the exclusive period. The only evidence in the record concerning the plaintiff's contacts with the purchasers was that on two occasions he had shown the property to them. That court noted that the purchasers did not testify and that there was no evidence of even a passing conversation or communication between them and the plaintiff. It did not appear that the plaintiff had discussed price or terms of sale, or that he had said anything to the purchasers concerning the property. In short the record was devoid of any proof that the plaintiff's efforts had brought such persons to the point of being likely purchasers.

Similarly in the present case, plaintiff never spoke with or met Mrs. Pollmann, and neither Mrs. Pollmann nor her daughter was called as a witness for the plaintiff. Plaintiff was aware that Mrs. Pollmann might help the Copps finance their purchase of the 73 acre tract of land. Plaintiff knew that the Copps also wanted to buy the homestead tract, and that in fact the Copps made an offer for that parcel which was rejected. Plaintiff gave pictures of all the land to Mrs. Copp, assuming that she would mail them to her mother in Arizona in order to obtain financing. Considering all of plaintiff's evidence in the light most favorable to him, there is no evidence that plaintiff's efforts had elevated Mrs. Pollmann to the level of a likely purchaser of the homestead tract. There is no evidence that plaintiff worked out any arrangements of a sale to Mrs. Pollmann.

The plaintiff argues that a landowner-seller could avoid paying a real estate commission simply by conveying the land to a

fiduciary or confidant, to a wife of the husband-buyer and so on. His examples all suggest either fraud or collusion, or the use of a trustee. In this case plaintiff has not alleged or offered any evidence of bad faith on the part of the defendant or evidence that Mrs. Pollmann purchased the homestead tract as an agent or trustee for the Copps.

The plaintiff further asserts that the test of whether negotiations occurred should be whether the broker was the procuring cause of the sale. Our Supreme Court stated the rules governing such brokers' commissions in *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 250-51, 162 S.E. 2d 486, 491 (1968) as follows:

> "Ordinarily, a broker with whom an owner's property is listed for sale becomes entitled to his commission whenever he procures a party who actually contracts for the purchase of the property at a price acceptable to the owner. *Cromartie v. Colby*, 250 N.C. 224, 108 S.E. 2d 228; *Martin v. Holly*, 104 N.C. 36, 10 S.E. 83. If any act of the broker in pursuance of his authority to find a purchaser is the initiating act which is the procuring cause of a sale ultimately made by the owner, the owner must pay the commsision [sic] provided the case is not taken out of the rule by the contract of employment. *Trust Co. v. Goode*, 164 N.C. 19, 80 S.E. 62. The broker is the procuring cause if the sale is the direct and proximate result of his efforts or services. The term *procuring cause* refers to 'a cause originating or setting in motion a series of events which, without break in their continuity, result in the accomplishment of the prime object of the employment of the broker, which may variously be a sale or exchange of the principal's property, an ultimate agreement between the principal and a prospective contracting party, or the procurement of a purchaser who is ready, willing, and able to buy on the principal's terms.' 12 C.J.S. *Brokers* § 91, p. 209 (1938). *Accord*, 12 Am. Jur. 2d Brokers § 190 (1964)."

Plaintiff's evidence in this case simply does not support a claim that there was a series of unbroken events which resulted in a sale. Also in this case the sale occurred after the expiration of the listing contract. Therefore, this sale should be governed by the terms of the contract itself rather than by a procuring cause

theory. *Realty Agency, Inc. v. Duckworth & Shelton, Inc., supra.*

For the foregoing reasons the judgment of the trial court is affirmed.

Affirmed.

Chief Judge MORRIS and Judge HEDRICK concur.

IN THE MATTER OF KENNETH RAY LAIL, JUVENILE

No. 8125DC523

(Filed 15 December 1981)

1. **Criminal Law § 154.1— recorded hearings—unrecorded remarks—no prejudice**

Defendant failed to show prejudice where his juvenile proceeding was recorded pursuant to G.S. 7A-636 and several remarks were inaudible as he did not explain why he did not invoke the procedure provided by App. R. 11 for establishing the content of the unrecorded remarks, did not argue such procedure was inadequate, and did not argue any error in the unrecorded remarks.

2. **Criminal Law § 91.7— absence of witness—no continuance**

The trial court did not err in denying defendant a continuance when one of his subpoenaed witnesses failed to appear as he failed to support his motion with an affidavit indicating the facts to be proved by the witness. G.S. 7A-632.

3. **Infants § 20— dispositional hearing—denial of opportunity to present evidence**

The trial court erred when it denied the juvenile defendant an opportunity, upon request, to have a dispositional hearing and to present evidence at that hearing. G.S. 7A-639, 7A-640 and 7A-652.

APPEAL by respondent from *Martin (Bill J.), Judge.* Judgment entered 18 November 1980 in District Court, CATAWBA County. Heard in the Court of Appeals 11 November 1981.

This is a juvenile action instituted by a petition charging that the respondent was delinquent in that he had opened a coin-operated machine with intent to steal the property therein. Respondent denied the allegations of the petition. The State relied primarily upon the testimony of Ken Dale. He testified that he lived beside a beauty shop that had a soft drink vending machine in front of it and that during the early morning hours of 23 August 1980 he saw the respondent and Casey Perkins beating on the machine and prying at it with a bar. Dale testified that he

recognized the two by the light given off by the machine and that there was a third person standing in a shadow, whom he could not recognize. Dale called the sheriff and an officer came to the scene. The officer found pry marks on the machine and the machine door open. He went to the residence of Casey Perkins and arrested respondent. Respondent testified that he had been drinking with Casey and others and that he went to sleep when the others left to buy more chasers. He denied having anything to do with breaking into the machine. The trial court found respondent to be delinquent and committed him to the Department of Human Resources, Division of Youth Services for an indefinite period. Respondent appeals.

Attorney General Edmisten, by Associate Attorney Thomas J. Ziko, for the State.

John F. Cutchin for respondent appellant.

MARTIN (Robert M.), Judge.

[1] G.S. 7A-636 provides that the hearings in juvenile proceedings shall be recorded by stenographic notes or by electronic or mechanical means. The proceedings in the present case were recorded by a tape recorder, but respondent argues that the recording was so inadequate as to deny him effective appellate review. He cites several instances in which the record on appeal indicates either that remarks were inaudible or that no verbal answer was given to a question. Respondent argues that these matters cannot be reconstructed; however, he does not explain why he did not invoke the procedure provided by App. R. 11 for establishing the content of the unrecorded remarks. He does not argue that this procedure is inadequate. Furthermore, respondent does not argue any error in the unrecorded remarks. Respondent has therefore failed to show prejudice and his assignment of error is overruled. *State v. Sanders*, 280 N.C. 67, 185 S.E. 2d 137 (1971); *State v. Tripp*, 52 N.C. App. 244, 278 S.E. 2d 592 (1981).

[2] By his second assignment of error, the respondent argues that the trial court erred by denying him a continuance when one of his subpoenaed witnesses failed to appear. We disagree. G.S. 7A-632 provides, "[t]he judge may continue at any time any case to allow additional factual evidence, social information or other information needed in the best interest of the juvenile or in the in-

terest of justice." Still, the grounds for a motion for a continuance must be fully established. When the motion is based upon the absence of a witness, the motion should be supported by an affidavit indicating the facts to be proved by the witness. *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974); *State v. Mitchell*, 27 N.C. App. 313, 219 S.E. 2d 295 (1975), *disc. review denied*, 289 N.C. 301, 222 S.E. 2d 701 (1976). Respondent failed to support his motion in the present case, and we find no error in the trial court's ruling.

Respondent next presents several arguments with respect to various evidentiary rulings by the trial court. We have examined each of the arguments with care, and we find no prejudicial error in any of them. Respondent also argues that the evidence was insufficient to support an adjudication of delinquency; however, we again disagree. The observations of Ken Dale and of the officer who examined the vending machine were sufficient to avoid dismissal. Although respondent's attorney challenged the credibility of Dale's identification testimony during cross-examination, his examination went only to the weight to be afforded the testimony, not its sufficiency.

[3] Respondent's final argument does have merit. Immediately after announcing the finding of delinquency, the trial judge proceeded to announce his disposition. When respondent's attorney attempted to speak on disposition, the trial judge cut him off by stating, "[t]he court has made its decision." The North Carolina Juvenile Code provides:

> § 7A-639. Predisposition investigation and report.
>
> The judge shall proceed to the dispositional hearing upon receipt of sufficient social, medical, psychiatric, psychological, and educational information. . . .
>
> § 7A-640. Dispositional hearing.
>
> The dispositional hearing may be informal, and the judge may consider written reports or other evidence concerning the needs of the juvenile. The juvenile and his parent, guardian, or custodian shall have an opportunity to present evidence, and they may advise the judge concerning the disposition they believe to be in the best interest of the juvenile. . . .

. . ..

§ 7A-652. Commitment of delinquent juvenile to Division of Youth Services.

(a) A delinquent juvenile 10 years of age or more may be committed to the Division of Youth Services for placement in one of the residential facilities operated by the Division if the judge finds that the alternatives to commitment as contained in G.S. 7A-649 have been attempted unsuccessfully or are inappropriate and that the juvenile's behavior constitutes a threat to persons or property in the community.

"[T]he dispositional hearing *must* be continued for the respondent to present evidence when he requests such a continuance." *In re Vinson*, 298 N.C. 640, 662, 260 S.E. 2d 591, 605 (1979). "[T]he essential element in the commitment order is not that it recites detailed findings beyond . . . the two tests enumerated in new G.S. 7A-652, but that those enumerated findings are supported by *some evidence in the record of the dispositional hearing." Id.* at 672, 260 S.E. 2d at 610. Respondent argues that the judge in this case held no dispositional hearing, that the judge denied him the opportunity to present evidence as to disposition and that there was no evidence to support the findings made by the judge with respect to disposition. We agree. Although we affirm the adjudication order of 18 November 1980, we reverse the commitment order of the same date and remand to the District Court so that it may conduct a dispositional hearing.

Affirmed in part; reversed and remanded in part.

Judges WEBB and WELLS concur.

ROBERT E. LEE, NANCY LOUISE LEE LASSITER, AND JOYCE LEE JACKSON v. ROSSIE B. BAREFOOT

No. 8111SC359

(Filed 15 December 1981)

Guardian and Ward § 4; Partition § 10— sale of minors' land—confirmation—purchase price not tendered—no passage of title

Although a decree of confirmation of a commissioner's sale of land owned by minors was entered, title to the land did not pass to the purchaser where the purchaser did not tender the purchase price of the land and the commissioner delivered no deed to the purchaser.

APPEAL by defendant from *Brannon, Judge.* Judgment entered 18 November 1980 in Superior Court, HARNETT County. Heard in the Court of Appeals 16 November 1981.

Plaintiffs brought a civil action to remove a cloud on their title to twenty-one acres of land. The defendant answered and counterclaimed to establish his claim to these lands. From a verdict for plaintiffs, defendant appealed.

Emerald Lee, mother of the plaintiffs, initiated an *ex parte* special proceeding in 1962 to sell twenty-one acres of land which plaintiffs, her minor children, owned subject to Mrs. Lee's dower. An attorney was appointed as next friend to the minor children, and an order appointing a commissioner and authorizing him to sell the land at private sale, to receive defendant's bid of $2000, and to accept a deposit of 10% of the bid was entered. The sale was confirmed on 12 June 1962 and the commissioner was ordered to deliver a deed to the defendant upon the payment of the $2000 purchase price. The commissioner received the $200 deposit but never received the balance of the purchase price, so the sale was not completed. In July 1970, the commissioner served the defendant with notice that he was going to move to vacate and set aside the order confirming the sale. Defendant's counsel contacted the commissioner's law partner and indicated some interest in consummating the sale through payment of an amount less than the $1800 difference between the approved purchase price and the amount received by the commissioner. The commissioner's son and law partner notified defendant's counsel in 1970 that Mrs. Lee did not care to go forward with the sale.

Mrs. Lee and her children have been in continuous possession of the property at all times since 1962. Defendant testified that he tendered the remainder of the $2000 purchase price to the commissioner in September, 1962. The commissioner's son and law partner, Max McLeod, testified that the commissioner had tried repeatedly to get the defendant to accept the deed to the property, with no response. The $200 deposit is still in that law firm's trust account and to Mr. McLeod's knowledge the defendant had never tendered the purchase price. The trial court concluded that plaintiffs are the fee simple owners of the land and that defendant had no valid claim or interest in the property.

Johnson and Johnson by W. A. Johnson and Sandra L. Johnson for plaintiff-appellees.

Levinson and Berkau by James R. Levinson for the defendant-appellant.

MARTIN (Robert M.), Judge.

The trial court found as fact that the sale of the land to the defendant was confirmed and then approved by Superior Court Judge Hall on 12 June 1962. The court further found that the defendant never legally tendered to the commissioner or to any other person the sum due for the land. The defendant excepts to this finding of fact. It is well-settled in North Carolina that the court on appeal is bound by the findings of fact made by the trial court where there is some evidence to support those findings, even if there is evidence to the contrary that would support a different finding. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). In this case, there was evidence, including Mr. McLeod's testimony, to support the trial court's finding of no tender. Thus defendant's assignment of error is without merit and is overruled.

Because we accept the trial court's finding that the defendant did not tender the purchase price of the property, we must further conclude that the defendant does not have any claim to the property in dispute. This case is governed by *Tayloe v. Carrow*, 156 N.C. 6, 9, 72 S.E. 76, 78 (1911) which held as follows:

> No title vested until the decree of confirmation upon the final report of the commissioners. Until the decree of confirmation

> the proceedings are not final, but interlocutory, and rest in the discretion of the court, even though the purchase money has been paid and the purchaser taken possession of the premises. Knapp on Partition, 335. On the other hand, even when there has been a decree of confirmation, title will not be executed until the purchase money *has been paid. Burgin v. Burgin*, 82 N.C., 197; White, ex parte, ib., 378. (Emphasis added.)

Consequently although the sale was confirmed, because the defendant never paid the purchase price, no title ever passed to him. *Accord, Crocker v. Vann*, 192 N.C. 422, 135 S.E. 127 (1926). The trial court correctly concluded that the plaintiffs were the fee simple owners of the land and that the defendant had no valid claim to the property in dispute.

Because defendant's other assignments of error are not determinative of the outcome of this case, we do not discuss them in this opinion.

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

Affirmed.

Chief Judge MORRIS and Judge HEDRICK concur.

BESSIE BARNES, EMPLOYEE-PLAINTIFF v. O'BERRY CENTER, EMPLOYER, SELF-INSURED CARRIER, DEFENDANT

No. 8110IC429

(Filed 15 December 1981)

Master and Servant § 96.4— workers' compensation—failure of Commission to make definitive findings

In a workers' compensation proceeding, the Industrial Commission failed to make definitive findings as required by statute where it merely found: "Plaintiff has not had any additional disability as a result of the injury giving rise hereto." That finding failed to inform the reviewing court on what ground the Commission denied the existence of additional disability, and there were several possible inferences.

Barnes v. O'Berry Center

APPEAL by plaintiff from the North Carolina Industrial Commission opinion and award of 3 November 1980. Heard in the Court of Appeals 10 December 1981.

On 11 December 1974, plaintiff fell from a stool during her employment as a nurse at O'Berry Center. She sustained an injury for which defendant compensated her from 9 January 1975 to 27 February 1976, and for a few days between then and 24 March 1976.

On 28 May 1980, there was a hearing to determine plaintiff's right to additional disability compensation. The Deputy Commissioner denied plaintiff's claim. The Full Commission affirmed the award, adopting the following findings as its own:

> "1. On December 11, 1974 plaintiff fell off a stool at work, landing on her buttocks. She had severe pain in her buttocks but no radiating pain to her legs.
>
> 3. Plaintiff was examined by Dr. Clippinger of Duke Medical Center on February 20, 1975. Plaintiff complained of numbness of both legs but Dr. Clippinger found no anatomical basis for her complaints. Dr. Clippinger saw plaintiff on August 16, 1977 and December 19, 1978. His conclusion was that plaintiff's complaints had an emotional basis.
>
> 4. The findings of Dr. McLamb of Goldsboro on examining plaintiff on January 19, 1976 were essentially the same.
>
> 5. Plaintiff has not returned to work since the accident.
>
> 6. Plaintiff has not had any additional disability as a result of the injury giving rise hereto."

Thigpen, Blue and Stephens, by Cressie H. Thigpen, Jr., and Ralph L. Stephens, for plaintiff appellant.

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

VAUGHN, Judge.

Plaintiff's appeal challenges the sufficiency of the Commission's findings to support its conclusion of law. We agree that the Commission has failed to make definitive findings as required by statute, and, therefore, remand the cause.

To establish a claim for additional benefits, plaintiff must prove she continues to suffer from a compensable injury which impairs her wage-earning capacity. *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619 (1968). The Commission is not required to make findings of fact as to each question raised by the evidence, but it is required to make specific findings pertaining to these crucial facts upon which plaintiff's claim rests. *Smith v. Construction Co.*, 27 N.C. App. 286, 218 S.E. 2d 717 (1975).

Our courts have consistently held that mere recitals of medical expert opinion are not sufficiently specific to enable a reviewing court to judge the propriety of the Commission's order. *Harrell v. Stevens & Co.*, --- N.C. App. ---, --- S.E. 2d --- (1981); *Moore v. Stevens & Co.*, 47 N.C. App. 744, 269 S.E. 2d 159, *cert. denied*, 301 N.C. 401, 274 S.E. 2d 226 (1980); *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 235 S.E. 2d 856 (1977). Findings of Fact Nos. 3 and 4, therefore, cannot properly form the basis of the denial of benefits.

Defendant argues that Finding of Fact No. 6, however, is specific and a sufficient basis for the Commission's order. We disagree.

Plaintiff contends that the present pain in her back and legs is the result of the compensable injury she suffered on 11 December 1974. She further argues that the pain prevents her from sitting or standing, and she is therefore unable to engage in gainful employment. Finding of Fact No. 6 is contrary to plaintiff's claim but so general it fails to inform the reviewing court on what ground the Commission is denying the existence of additional disability. It, therefore, cannot justify the Commission's award.

The finding appears almost immediately after two findings that plaintiff's pain has an emotional basis. A reasonable inference, therefore, is that the Commission has found plaintiff does not have any additional disability simply because it finds her pain is not caused by any physical complications of her earlier injury. This Court, however, has held that if an employee receives an injury which is compensable and the injury causes her to become so emotionally disturbed that she is unable to work, she is entitled to compensation. *Fayne v. Fieldcrest Mills, Inc.*, --- N.C. App.

---, 282 S.E. 2d 539 (1981). *Accord, Snead v. Mills, Inc.*, 8 N.C. App. 447, 174 S.E. 2d 699 (1970).

Another possible inference from Finding No. 6 is that plaintiff has not proved a causal relationship between her present pain and the compensable injury of December, 1974. *See Fayne v. Fieldcrest Mills, Inc., supra.* A third inference is that plaintiff is not additionally disabled because she has suffered no wage-earning impairment. *See Burton v. Blum & Son*, 270 N.C. 695, 155 S.E. 2d 71 (1967). Denial of compensation based on plaintiff's failure to prove either of these facts is proper. *See Moore v. Stevens & Co., supra.*

"The findings of fact of the Industrial Commission should tell the full story of the event giving rise to the claim for compensation." *Thomason v. Cab Co.*, 235 N.C. 602, 605, 70 S.E. 2d 706, 709 (1952). Such specific findings are crucial if the reviewing court is to ascertain whether the findings of fact are supported by evidence and whether they in turn support the conclusions of law reached. *Cannady v. Gold Kist*, 43 N.C. App. 482, 259 S.E. 2d 342 (1979). For the reasons stated, the opinion and award of the Commission is vacated, and the cause is remanded for more definitive findings and conclusions based on the evidence in the present record.

Vacated and remanded.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA v. GEORGE WILLIAM BEAN

No. 814SC448

(Filed 15 December 1981)

Criminal Law § 34.8; Narcotics § 3.1— felonious possession of narcotics—prior sale—competency—erroneous instructions

In a prosecution for felonious possession of marijuana in September 1980 with intent to manufacture, sell and deliver, testimony that a State's witness had purchased marijuana from defendant in August 1980 was competent to show a plan or scheme to deal in drugs. However, the trial court erred in instructing that the jury could consider such testimony to show defendant's disposition to deal in drugs.

State v. Bean

APPEAL by defendant from *Strickland, Judge.* Judgment entered 19 December 1980 in Superior Court, ONSLOW County. Heard in the Court of Appeals 16 October 1981.

The defendant was tried for felonious possession of marijuana with intent to manufacture, sell, and deliver it. Pat Rodriguez testified that he called the defendant on 3 September 1980 and arranged to buy marijuana from him. He testified over objection that he had previously bought marijuana from the defendant during the last week in August 1980. The court instructed the jury in regard to this testimony as follows:

> "the testimony relative to previous delivery of marijuana is admitted only for the limited purpose if you, in fact, find that it tends to show plan or scheme, (disposition to deal in illicit drugs,) knowledge or the presence, and character of the drug, and may not be considered by you as substantive evidence in this case or for any other purpose."

The State's evidence further showed that on 3 September 1980 two deputy sheriffs of the Onslow County Sheriff's Department accompanied Pat Rodriguez to a place in Onslow County where the transaction between Rodriguez and the defendant was to be consummated. The deputies saw the defendant place something which was later determined to be marijuana in a metal container.

The defendant did not offer evidence. He was convicted and appealed from the imposition of a prison sentence.

Attorney General Edmisten, by Assistant Attorney General Thomas G. Meachum, Jr., for the State.

Jeffrey S. Miller for defendant appellant.

WEBB, Judge.

The defendant's first assignment of error is in regard to the testimony of Rodriguez that he had bought marijuana from the defendant during the last week in August. The defendant contends the admission of this testimony was error because it was evidence of another independent crime with its only relevancy being to show the character of the defendant or his disposition to commit an offense of the nature of the one charged. *See State v. McClain,* 240 N.C. 171, 181 S.E. 2d 364 (1954) and 1 Stansbury's

N.C. Evidence § 91 (Brandis rev. 1973). We overrule this assignment of error. *McClain* applies the rule that evidence of another independent crime is ordinarily not admissible to prove the crime for which a defendant is being tried. It lists eight exceptions to this rule. The sixth exception is: "Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." We believe our Supreme Court has interpreted this exception so that if it can be shown that the defendant has committed a crime or crimes similar to the one with which he is charged, within a time period reasonably close to the time of the offense for which he is being tried, proof of the independent crime is within the sixth exception of *McClain*. *See State v. Rick*, 304 N.C. 356, 283 S.E. 2d 512 (1981); *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Humphrey*, 283 N.C. 570, 196 S.E. 2d 516 (1973), and *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735 (1972). The evidence that defendant had sold drugs to Rodriguez the last week in August 1980 is admissible to prove he sold drugs to Rodriguez on 3 September 1980.

In his second assignment of error the defendant challenges the instructions given the jury at the time Rodriguez testified as to the August offense. It appears that the trial judge followed the decision of this Court in *State v. Richardson*, 36 N.C. App. 373, 375, 243 S.E. 2d 918, 919 (1978) in instructing the jury. This instruction included a statement that the jury could consider this testimony to show the defendant's disposition to deal in drugs. The proof of an independent crime to show a disposition to commit the crime with which the defendant is charged is not one of the exceptions listed in *McClain*. In 1 Stansbury's N.C. Evidence § 91 (Brandis rev. 1973) at page 288 et seq. it is stated that evidence of other crimes is admissible if it tends to prove any relevant fact other than the character of the defendant or his disposition to commit the offense. Under the rule as stated by *Stansbury*, the jury was instructed that they could consider the testimony for the very thing for which it should not be considered. In *Richardson* the issue before the court was not the jury instruction. It was whether evidence of an independent drug offense was admissible. It seems clear that proof of the independent

offense in *Richardson* was admissible to show a plan or scheme to deal in drugs. The statement of this Court that it was admissible to show a disposition to deal in drugs was dictum. Although Judge Strickland quoted this Court in his instruction, we hold it was error to do so and the defendant must have a new trial.

We do not discuss the defendant's other assignments of error as the questions they raise may not recur at a subsequent trial.

New trial.

Judges MARTIN (Robert M.) and WELLS concur.

ANTHONY E. STEPHENSON v. REBECCA D. STEPHENSON

No. 816DC403

(Filed 15 December 1981)

Appeal and Error § 6.2— awards pendente lite—interlocutory

Orders and awards pendente lite are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to G.S. 7A-27(d). This ruling expressly overrules *Peeler v. Peeler*, 7 N.C. App. 456 and subsequent cases.

APPEAL by plaintiff from *Williford, Judge.* Order entered 30 December 1980 in District Court, HERTFORD County. Heard in the Court of Appeals 20 November 1981.

On 20 August 1980, plaintiff husband filed an action for divorce from defendant wife based on one year's separation as permitted by G.S. 50-6. Wife counterclaimed alleging abandonment and adultery by husband and seeking alimony, child support and possession of certain real and personal property. Husband subsequently took voluntary dismissal of his divorce action.

The trial court entered an order for alimony pendente lite, child support pendente lite, and attorney fees pendente lite. Husband appeals.

Thomas L. Jones for plaintiff appellant.

Revelle, Burleson, Lee and Revelle, by L. Frank Burleson, Jr., for defendant appellee.

ARNOLD, Judge.

An order awarding payments and attorney fees pendente lite is an interlocutory decree. Previously, however, this Court has held that such orders affect a substantial right, and we have allowed immediate appellate review under G.S. 1-277 and G.S. 7A-27(d). *Peeler v. Peeler*, 7 N.C. App. 456, 459, 172 S.E. 2d 915, 917 (1970).

It is significant that when *Peeler* was decided, along with *Kearns v. Kearns*, 6 N.C. App. 319, 170 S.E. 2d 132 (1969), and other seminal decisions establishing the direct appeal of pendente lite awards as a matter of right, the situation was different with both the district courts and this Court. At that time there was insufficient experience with the district courts to know what might be expected. Indeed, many counties still did not have district courts since the General Court of Justice was not fully operational until 1971. Moreover, appeal of a pendente lite matter could be heard and an opinion rendered by this Court within a reasonably short period of time.

Today the situation is quite different. In the majority of appeals from pendente lite awards it is obvious that a final hearing may be had in the district court and final judgment entered much more quickly than this Court can review and dispose of the pendente lite order. In this appeal, for instance, the matter could have been heard on its merits and a final order entered by the District Court in Hertford County months before the appeal reached this Court for disposition.

There is an inescapable inference drawn from an overwhelming number of appeals involving pendente lite awards that the appeal too often is pursued for the purpose of delay rather than to accelerate determination of the parties' rights. The avoidance of deprivation due to delay is one of the purposes for the rule that interlocutory orders are not immediately appealable. The fact that appeals of pendente lite orders often are used as delay tactics weighs in favor of reconsidering *Peeler*, insofar as it recognized a right of immediate appeal of an order to pay alimony pendente lite and attorney fees pendente lite, and concluding that that part of the *Peeler* decision has outlived its usefulness. As stated by our Supreme Court in *Veazey v. Durham*, 231 N.C. 357, 57 S.E. 2d 377 (1949), "[t]here is no more effective way to pro-

crastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Id.* at 363.

In consideration of fairness to the parties and as a matter of public policy this Court now overrules *Peeler v. Peeler, supra,* and other prior decisions recognizing a right of immediate appeal from orders and awards pendente lite. We hold, therefore, that orders and awards pendente lite are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to G.S. 7A-27(d).

The remaining members of the Court join this panel and concur in this decision for the purpose of expressly overruling *Peeler* and subsequent cases in which this Court has allowed immediate appeal from pendente lite orders.

The appeal in this matter is premature and is

Dismissed.

Judges MARTIN (Harry C.) and WELLS concur.

CHARLES GRAVES, EMPLOYEE-PLAINTIFF v. ABC ROOFING COMPANY, AND TRAVELERS INSURANCE CO., CARRIER-DEFENDANTS

No. 8110IC335

(Filed 15 December 1981)

Master and Servant § 83— workers' compensation policy—failure of insurance company to effectively cancel

The Industrial Commission erred in concluding that TIFCO, a financing company, and Travelers, an insurance company, complied with N.C.G.S. § 58-60 and effectively cancelled defendant's workers' compensation policy. TIFCO failed to follow the procedure of first submitting a written notice to the owner of defendant company of its intent to cancel at a date not sooner than ten days and advising of his right to cure any default, and then following that notice period submitting a written request to Travelers for cancellation with a copy to defendant company's owner.

APPEAL by employee-appellant from an Opinion and Award for the Full Commission of the North Carolina Industrial Commis-

sion filed 16 November 1980, holding that Travelers Insurance Co. was not the carrier on the risk in this case. Heard in the Court of Appeals 11 November 1981.

On 29 August 1978, Charles Graves was injured while working for ABC Roofing Company. At the hearing before Deputy Commissioner Denson on 17 and 23 August 1980, the parties stipulated that they were subject to the provisions of the Worker's Compensation Act, that an employer-employee relationship existed between Graves and ABC, and that Graves' average weekly wage was $200.00.

Deputy Commissioner Denson and the Full Commission found that Graves sustained an injury by accident arising out of and in the course of his employment. The sole issue was whether Travelers had properly cancelled a worker's compensation insurance policy issued to ABC so that coverage under the policy was not in effect at the time of the accident.

Deputy Commissioner Denson, after hearing testimony from the parties, concluded that Travelers had not effectively cancelled the policy pursuant to N.C. Gen. Stat. § 97-99 and was therefore the carrier on risk.

Upon appeal by Travelers, the Full Commission held in a 2-1 decision that TIFCO, the financing company, and Travelers had complied with N.C. Gen. Stat. § 58-60, that Travelers had cancelled in accord with the financing agreement, and that Travelers was not the carrier on risk. Employee-appellant appeals herein the decision by the Full Commission.

Tharrington, Smith & Hargrove by Steven L. Evans for the employee-appellant.

Gene Collinson Smith for the carrier-appellee.

MARTIN (Robert M.), Judge.

We need only consider the appellant's second assignment of error that TIFCO and Travelers failed to effectively cancel the policy so that Travelers should be the carrier on the risk. We agree with the appellant.

N.C. Gen. Stat. § 58-60 requires:

When an insurance premium finance agreement contains a power of attorney or other authority enabling the insurance premium finance company to cancel any insurance contract or contracts listed in the agreement, the insurance contract or contracts shall not be cancelled unless such cancellation is effectuated in accordance with the following provisions:

(1) Not less than 10 days' written notice be mailed to the last known address of the insured or insureds shown on the insurance premium finance agreement of the intent of the insurance premium finance company to cancel his or their insurance contract or contracts unless the defaulted installment payment is received. A notice thereof shall also be mailed to the insurance agent.

(2) After expiration of such period, the insurance premium finance company shall mail the insurer a request for cancellation, including a copy of the power of attorney, and shall mail a copy of the request for cancellation to the insured at his last known address as shown on the insurance premium finance agreement.

(3) Upon receipt of a copy of such request for cancellation notice by the insurer or insurers, the insurance contract shall be cancelled with the same force and effect as if the aforesaid request for cancellation had been submitted by the insured himself, without requiring the return of the insurance contract or contracts.

Although it is difficult to identify and reconstruct chronologically the specific steps taken by TIFCO and Travelers to attempt to cancel the worker's compensation policy, the following chain of events appears from the testimony of Charles Williams for Travelers and from the supporting documents offered by Travelers:

(1) Travelers first received oral notice from TIFCO on 19 June 1978 requesting cancellation.

(2) On 22 June 1978, Charles Williams, senior account analyst for Travelers, mailed a notice of cancellation to William Glover,

owner and operator of ABC, such notice indicating a cancellation date of 17 June 1978.

(3) Written notice from TIFCO requesting cancellation did not come to Travelers until sometime in July 1978.

(4) Although Mr. Glover denies receiving such notice of cancellation, the Notice of Cancellation allegedly mailed by TIFCO to Mr. Glover bears a mailing date of 12 June 1978 and identifies the effective date of cancellation as 17 June 1978, five days later.

(5) When Travelers' notice of cancellation was issued on 22 June 1978, to be effective 17 June 1978, it did not have a written request for cancellation from TIFCO, nor did Travelers have any indication in its file that TIFCO had given notice to Mr. Glover.

TIFCO failed to follow the procedure of first submitting a written notice to Mr. Glover of its intent to cancel at a date not sooner than ten days and advising of his right to cure any default, and then following that notice period submitting a written request to Travelers for cancellation with a copy to Mr. Glover. Thus the Commission erred in concluding that TIFCO and Travelers complied with N.C. Gen. Stat. § 58-60 and effectively cancelled the workers' compensation policy.

For the foregoing reasons the opinion of the Industrial Commission is

Reversed.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. BOBBY W. GREEN, JR.

No. 8118SC672

(Filed 15 December 1981)

1. Bastards § 5.1— paternity test results—competency of witness

The director of paternity testing in the immunology lab of Bowman-Gray School of Medicine was qualified under G.S. 8-50.1 to testify as to the results of paternity tests administered to defendant, the natural mother and the child although he did not personally perform the tests.

2. Bastards § 5— failure to support illegitimate child—mother's opinion as to resemblance of child to defendant

In a prosecution for willful refusal to support an illegitimate child, testimony by the child's mother that her forehead and side view resembled that of defendant, if improper, did not constitute prejudicial error since the child was introduced into evidence, defendant was present in the courtroom, and the jury was, therefore, free to observe both the defendant and the child and reach its own conclusion as to any similarities in appearance.

3. Bastards § 5— failure to support illegitimate child—ability of defendant to work

In a prosecution for willful failure to support an illegitimate child, a child support enforcement officer could properly state his opinion that defendant was presently able to work based on his conversations with and observations of defendant.

APPEAL by defendant from *Washington, Judge.* Judgment entered 20 November 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 December 1981.

Defendant was convicted of willfully neglecting and refusing to provide adequate support for his illegitimate child.

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

Assistant Public Defender Frederick G. Lind, for defendant appellant.

VAUGHN, Judge.

Defendant brings forward three assignments of error. None of them disclose prejudicial error.

[1] Defendant's first assignment of error relates to testimony by Dr. Dove concerning the paternity tests administered to defendant, the natural mother, and the child. Defendant argues that Dr. Dove did not personally perform the tests. He, therefore, should not be allowed to testify to their results and to the possibility that defendant is the child's natural father. G.S. 8-50.1, however, specifically allows such testimony: "The results of those blood tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist, or other duly qualified person."

Dr. Dove is the director of paternity testing in the immunology lab of Bowman-Gray School of Medicine. He, therefore, is a duly qualified person under G.S. 8-50.1. Since G.S. 8-50.1 allows testimony of paternity test results without requiring personal performance of the test, defendant's objection is overruled. We also overrule defendant's objections to Dr. Dove's testimony explaining the paternity test.

[2] Defendant next assigns as error the admission of opinion testimony by the natural mother. The district attorney asked her, "Now, would you look at your daughter and Mr. Green and tell us if she bears any relationship to Mr. Green." Overruling objections by defendant, the court allowed the witness to reply, "To me, the forehead, she has the forehead and the side view." Defendant argues that the opinion invaded the province of the jury.

Even if the question by the district attorney was improper, we fail to find prejudicial error. Where paternity is in issue, the child may be exhibited to show a resemblance to the alleged father. 1 Stansbury, N.C. Evidence § 119 (Brandis rev. 1973). Here, the child had been introduced into evidence as State's Exhibit No. 3. Although the defendant did not take the stand, he was present in the courtroom. The jury was, therefore, free to observe both the defendant and child and reach its own conclusion as to any similarities in appearance. *See also State v. Brackett*, 218 N.C. 369, 372, 11 S.E. 2d 146, 148 (1940).

[3] Defendant's final argument is that the court erred in allowing hearsay evidence concerning defendant's alleged work record. The child support enforcement officer assigned to the mother and child's case, testified concerning defendant's ability to work. At one point, the officer referred to his file in answer to a question about when defendant had earlier had a job. The record is unclear as to whether the witness checked his file before or during trial. The witness, however, clearly stated in later testimony that his opinion that defendant was presently able to work was based on his conversations with and observations of defendant. Since the witness' opinion was based on personal knowledge, defendant's assignment of error is without merit.

No error.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA v. LARRY WADE

No. 8115SC700

(Filed 15 December 1981)

Criminal Law § 75— admissibility of in-custody confession

There was ample evidence supporting the court's findings and conclusion that defendant freely, knowingly and voluntarily waived his right to remain silent where the State's evidence tended to show that before interrogation, defendant was informed of his Miranda rights; that he stated that he understood his rights and waived them; that he signed a waiver of rights form; that he made a statement; and that he never requested an attorney.

APPEAL by defendant from *Martin (John C.), Judge.* Judgments entered 11 February 1981 in Superior Court, ORANGE County. Heard in the Court of Appeals 10 December 1981.

Defendant was convicted of attempted second degree rape and kidnapping. Judgments imposing concurrent prison sentences were entered.

Defendant's convictions of kidnapping and attempted second degree rape were based, in part, on a statement he gave police officers. The statement was admitted into evidence after the court conducted a *voir dire* on defendant's motion to suppress.

Officer Talbert testified for the State on *voir dire* that he had questioned defendant on 3 October 1980 after defendant's first appearance in court. He read defendant his Miranda rights and asked him if he understood them. Defendant replied that he did and signed a waiver of rights form. Defendant then made an incriminating statement concerning his actions on 2 October 1981. Officer Talbert stated defendant did not ask for an attorney during questioning.

Defendant testified that Officer Talbert read him his rights before the first interrogation. During later questioning, however, he was not informed of his rights. Defendant testified that officers called him upstairs six times for questioning. At no point during the interrogations did he ever make or sign a statement.

At the conclusion of evidence on *voir dire*, the court made the following pertinent finding of fact:

"Defendant, Larry Wade, was arrested on October 2, 1980. That on October 3, 1980, he was taken to the District Court of Orange County for his first appearance; and upon being returned to the Orange County jail after making his court appearance, the defendant was asked by Investigator Talbert if he wished to make a statement. That the defendant replied that he would tell Investigator Talbert what he knew. Thereupon, Investigator Talbert took the defendant to the booking room of the Orange County jail and advised the defendant of his rights under the Miranda Decision and specifically his rights to remain silent and that anything that he said could be used against him in court, of his rights to an attorney during the interrogation and of his right to have an attorney appointed, of his right to stop answering questions at any time and of his right to consult with an attorney during the questioning. That the defendant indicated to Investigator Talbert that he understood those rights and was willing to make a statement. That the defendant orally and in writing indicated his understanding of his Miranda Rights and waived said rights orally and in writing."

The court concluded that defendant freely, knowingly and voluntarily waived his right to remain silent.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

F. Lloyd Noell, for defendant appellant.

VAUGHN, Judge.

Defendant argues that the evidence presented on *voir dire* was insufficient to support the court's conclusion that defendant's confession was voluntarily made. We disagree.

When the admissibility of an in-custody confession is contested, the court must conduct a *voir dire* to determine whether the procedural safeguards required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966), have been met. *State v. Jenkins*, 292 N.C. 179, 232 S.E. 2d 648 (1977); *State v. Waddell*, 34 N.C. App. 188, 237 S.E. 2d 558 (1977). At the conclusion of the *voir dire*, the judge should make findings of fact to indicate the basis of his ruling. *State v. Siler*, 292 N.C. 543, 548, 234 S.E. 2d 733, 737 (1977).

The judge in the present case made such findings. They will not be disturbed on appeal if there is any competent evidence to support them. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). In this cause, we find ample evidence supporting the court's findings. There was testimony that before interrogation, defendant was informed of his Miranda rights; that he stated he understood his rights and waived them; that he signed a waiver of rights form; that he made a statement; and that he never requested an attorney.

Defendant contends that his confession was tainted because of a promise extracted from him when he was without assistance of counsel. *State v. Edwards*, 282 N.C. 201, 192 S.E. 2d 304 (1972). Defendant testified that, when Officer Talbert had asked him to make an admission, he had replied he would. We do not agree that defendant's reply amounts to an improperly extracted promise to confess such as that in *State v. Edwards, supra.* Furthermore, defendant repeatedly denied he subsequently ever made or signed a statement. Defendant's argument, therefore, is patently without merit.

The trial court found that defendant waived his Miranda rights orally and in writing. That finding is the essential one which must be made on *voir dire*. *State v. Reynolds*, 298 N.C. 380, 400, 259 S.E. 2d 843, 855 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2164, 64 L.Ed. 2d 795 (1980); *State v. Dunn*, --- N.C. App. ---, --- S.E. 2d --- (1981). The court properly admitted defendant's confession.

No error.

Judges WEBB and HILL concur.

VIRGINIA H. McDOWELL v. GEORGE E. McDOWELL

No. 8118DC404

(Filed 15 December 1981)

Divorce and Alimony § 21; Husband and Wife § 13— separation agreement—enforcement by specific performance

The trial court could properly enter summary judgment ordering specific performance by defendant of provisions of a separation agreement requiring defendant to pay $150 per month to plaintiff for support, especially where plaintiff had two unsatisfied judgments against defendant for sums due under the separation agreement.

APPEAL by defendant from *John, Judge.* Judgment entered 5 December 1980 in District Court, GUILFORD County. Heard in the Court of Appeals 7 December 1981.

The parties entered into a separation agreement on 3 August 1970, which provided, among other things, that the defendant would pay the sum of $125.00 per month support to his wife until the then existing indebtedness on the homeplace was paid and thereafter would pay the sum of $150.00 per month to his wife for the rest of her life or until her remarriage. In August 1974 a judgment was entered against the defendant ordering him to pay $1,000 to plaintiff and in November 1979 a judgment was entered against defendant for $12,042.00 pursuant to the terms of the separation agreement. On 17 January 1979 execution was issued against defendant on a truck owned by him from which plaintiff received the sum of $500. The defendant has paid no support pursuant to the agreement since the entry of the last judgment in November 1979.

Plaintiff filed a complaint 28 April 1980 seeking specific performance of the obligations of the separation agreement. From an order granting plaintiff's motion for summary judgment in the form of a writ of specific performance, defendant appealed.

Charles L. Cromer for the plaintiff-appellee.

Donald L. Boone for the defendant-appellant.

MARTIN (Robert M.), Judge.

Defendant's sole assignment of error is that summary judgment linked with a writ of specific performance should not have been allowed in a matter of contract law. We disagree.

The purpose of summary judgments is to bring litigation to an early decision on the merits without the delay and expense of trial where it can be demonstrated that no material facts are in issue. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). It is to eliminate formal trials where only questions of law are involved. If there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law, summary judgment should be granted. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976).

In this case the facts are not in dispute that the defendant has a contractual obligation arising out of a separation agreement to pay to plaintiff the sum of $150.00 per month and he has failed so to do. The defendant does not raise any triable issue of fact; therefore, plaintiff's motion for summary judgment was properly granted. *In re Will of Edgerton*, 29 N.C. App. 60, 223 S.E. 2d 524, disc. rev. denied, 290 N.C. 308, 225 S.E. 2d 832 (1976).

The plaintiff in this case was granted a writ of specific performance rather than a money judgment. The law is clear in North Carolina that if a husband does not perform his part of a valid separation agreement, which has not been incorporated into a court order, the wife may obtain from the court a decree of specific performance of the separation agreement which is enforceable through contempt proceedings. *Moore v. Moore*, 297 N.C. 14, 252 S.E. 2d 735 (1979); 2 R. Lee, N.C. Family Law § 201 (4th Ed. 1980).

The defendant husband attempts to distinguish *Moore* from the present case by pointing to the defendant's offensive acts in *Moore* by which he attempted to circumvent his former wife's ability to collect the support payments and effectively rendered himself judgment proof. This is the same issue this Court considered in *Gibson v. Gibson*, 49 N.C. App. 156, 270 S.E. 2d 600 (1980) in which the Court held that specific performance was an appropriate remedy.

The *Gibson* court quoted *Moore*, saying that a separation agreement was more than a contract to pay money. In *Moore* the Court recognized that to require a dependent spouse to wait until support payments come due, then enter suit on each payment, await trial, and possibly be delayed through an execution sale, does not provide an adequate remedy at law.

> An adequate remedy is not a partial remedy. It is a full and complete remedy and one that is accommodated to the wrong which is to be redressed by it. *It is not enough that there is some remedy at law; it must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.*

Moore at 16; 252 S.E. 2d 738; *Sumner v. Staton*, 151 N.C. 198, 201, 65 S.E. 902, 904 (1909).

The plaintiff in the present case had two unsatisfied judgments against defendant for sums due under the separation agreement. Specific performance was an appropriate remedy by which to enforce her rights.

The judgment entered in the trial court is

Affirmed.

Chief Judge MORRIS and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. EDNA PEARL CAMERON

No. 8114SC622

(Filed 15 December 1981)

Criminal Law § 144— motion for appropriate relief—modification of sentence—trial court without jurisdiction

The trial judge was correct in holding that he was without authority to suspend defendant's sentence upon her motion for appropriate relief in the next session of court as, in the absence of an error in the sentencing procedure, the authority of the trial judge to modify defendant's sentence ended at the conclusion of the session of court in which her sentence was imposed.

State v. Cameron

APPEAL by defendant from *Herring, Judge.* Judgment entered 13 March 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 18 November 1981.

Defendant was charged in a bill of indictment with welfare fraud and food stamp fraud. She pled guilty to these charges. Judgment was entered on 23 February 1981 and defendant was sentenced to two years in prison. On 24 February 1981, defendant filed a motion for appropriate relief, requesting modification of her sentence to permit her to be placed on probation. The court denied defendant's motion on 13 March 1981 on grounds that it was without jurisdiction to change a sentence entered in a prior session of court. Defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General Jo Anne Sanford, for the State.

Shirley D. Dean for defendant appellant.

ARNOLD, Judge.

Defendant's sole argument is that since the general statutes do not provide a procedure by which she may request suspension of her sentence by the sentencing judge a motion for appropriate relief should be construed as available for this purpose. This Court addressed a similar issue last year in the case of *State v. Bonds*, 45 N.C. App. 62, 262 S.E. 2d 340, *pet. denied* 300 N.C. 376, 267 S.E. 2d 687 (1980), in which a trial judge's discretionary modification of the length of the defendant's sentence was challenged. Judge Martin (Harry C.), writing for the Court in *Bonds*, stated very clearly that "a trial court does not have authority to resentence a criminal defendant for discretionary reasons after the expiration of the session of court in which he was originally sentenced where no error of law appears on the face of the judgment." *Id.* at 65, 262 S.E. 2d 343.

In the case *sub judice*, no error in the sentencing procedure is asserted by defendant and none has been found by this Court. In the absence of such error, we hold that the authority of the trial judge to modify defendant's sentence ended at the conclusion of the session of court in which her sentence was imposed. Thus, the trial judge was correct in holding that he was without authority to suspend defendant's sentence upon her motion for ap-

propriate relief in the next session of court. Indeed, unlike federal law and the laws of some other jurisdictions, we find that North Carolina law provides no vehicle for discretionary modification of a lawful sentence unless the modification is made before the close of the session of court in which sentence was passed.

Affirmed.

Judges MARTIN (Harry C.) and WELLS concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER ANTHONY INGRAM

No. 8120SC427

(Filed 15 December 1981)

Criminal Law § 101.4— jury's examination of exhibits during guilty plea in another case

The trial court in a second degree murder case did not err in allowing the jury to examine exhibits in the jury box while a guilty plea was taken for an unrelated traffic offense.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 3 December 1980 in Superior Court, STANLY County. Heard in the Court of Appeals 14 October 1981.

The defendant was tried for second degree murder. After the jury had begun deliberating, they requested that they be allowed to examine some exhibits which had been offered in evidence. The defendant consented to the exhibits being taken to the jury room, but the State objected to the jury's doing so. The court then allowed the jury to examine the exhibits in the courtroom while a guilty plea was taken for a traffic offense in an unrelated case. Defendant took exception to this procedure.

Defendant was convicted of second degree murder and appealed from the imposition of a prison sentence.

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

John M. Bahner, Jr. for defendant appellant.

WEBB, Judge.

The defendant assigns error to the court's allowing the jury to examine the exhibits in the jury box while a guilty plea was being taken. He contends that the taking of a guilty plea engendered an atmosphere of guilt finding in the courtroom which was prejudicial to the defendant. We cannot so hold. There is nothing in the record to show that the traffic case in which a guilty plea was accepted in any way related to the case upon which the jury was deliberating. We cannot conclude the jury heard anything which would affect their deliberations.

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

No error.

Judges MARTIN (Robert M.) and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 DECEMBER 1981

CLARK v. CLARK No. 812DC370	Beaufort (80CVD391)	Affirmed
HAYES v. HAYES No. 8119DC389	Randolph (80CVD452)	Affirmed
HUGHES v. JOHNSTON No. 8130DC227	Jackson (80CVD58)	Affirmed
LESSLIE v. CAROLINAS CORP. No. 8126SC333	Mecklenburg (77CVS358)	New Trial
MITCHELL v. MITCHELL No. 8118DC362	Guilford (78CVD4624)	Vacated & Remanded
NORTHWEST AUTO v. CLINARD No. 8126SC334	Mecklenburg (80CVS1963)	Reversed
ROBERTS v. ROBERTS No. 8128DC364	Buncombe (80CVD2388)	Portion of Order Relating to Alimony Pendente Lite, Appeal Dismissed. Portion of order Relating to Child Support, Affirmed.
STATE v. ADAMS No. 811SC482	Dare (80CRS2261)	Affirmed
STATE v. DAVIS No. 818SC621	Wayne (80CRS15649) (80CRS15650) (80CRS15651) (80CRS15652)	No Error
STATE v. EPPS No. 8116SC644	Robeson (80CRS19414) (80CRS19421)	No Error
STATE v. FAULKNER No. 818SC424	Lenoir (80CR6189) (80CR6190)	No Error
STATE v. HAIR No 8112SC608	Cumberland (80CRS34362)	No Error
STATE v. HARRIS No. 816SC648	Hertford (81CR966)	No Error

STATE v. HOWZER No. 8126SC646	Mecklenburg (75CRS32581) (76CRS52080)	Affirmed
STATE v. MOORE No. 818SC601	Lenoir (80CRS9707)	No Error
STATE v. SCALES No. 8120SC294	Moore (80CRS3428)	No Error
STATE v. SCOTT & SELLERS No. 8126SC637	Mecklenburg (80CRS49848) (80CRS49851)	No Error
STATE v. STALLINGS No. 8114SC536	Durham (80CRS14561)	No Error
STATE v. STEBBINS No. 8112SC261	Cumberland (80CRS8928) (80CRS11181)	No Error
STATE v. WALKER No. 8129SC588	McDowell (80CRS3702)	No Error
STATE EX REL. v. CHAPMAN No. 8127SC343	Gaston (80CVS909)	No Error

STATE OF NORTH CAROLINA v. JAMES E. JEFFRIES

No. 8125SC165

(Filed 5 January 1982)

1. **Criminal Law §§ 75, 75.7— statements to officers by defendant—no custodial interrogation—voluntary—properly admissible**

The trial court did not err in admitting into evidence three separate statements made by defendant, who was indicted for feloniously and willfully setting fire to his store and for five counts of first degree murder in connection with deaths resulting from the fire. Defendant made the first statement after going to the Law Enforcement Center voluntarily, voluntarily submitting to a polygraph test and after being told by the person administering the test that he did not believe defendant was telling the truth. Before he submitted to the test, defendant was read his rights and signed a waiver acknowledging that he was free to end the test and to leave at any time. After the first statement defendant was again advised of his rights but he was not under arrest and was told he could leave anytime. He made two more statements to two other officers. He was not arrested until three weeks later. Under these circumstances, defendant's statements were made voluntarily and while he was not in custody.

2. **Constitutional Law § 30— sanctions for failure to comply with discovery—discretionary with judge**

Where a defendant follows the procedures for seeking discovery outlined in G.S. 15A-902(a) and 15A-903(d) and (e), and the State fails to comply with the court's order compelling discovery, there are several sanctions available to the court under G.S. 15A-910, including prohibiting the noncomplying party from introducing evidence not disclosed. However, where the record on appeal did not contain defendant's initial G.S. 15A-902 letter nor his motion to compel discovery; where defendant only entered a general objection when a can of vinyl flooring was entered into evidence; and where there was no allegation the prosecutors acted in bad faith, the Court found no abuse of the trial court's discretion in allowing the flooring into evidence.

3. **Constitutional Law § 30— failure to comply with discovery—admitting testimony discretionary**

Where the trial judge found that defendant was not prejudiced by the State's failure to furnish copies of tests which indicated that the fire defendant was accused of starting did not originate in the building's electrical system or furnace, and where the court offered defendant a reasonable time period in which to review the reports, the trial court did not abuse its discretion in admitting testimony concerning the tests.

4. **Criminal Law § 158— failure to include photographs in record—no review**

Failure to include excepted-to photographs and film footage in the record is a violation of App. R. 9(b)(3) and makes it impossible for the Court to rule on the admissibility of the evidence.

5. Criminal Law § 43.4— testimony concerning appearance of persons killed in fire proper

Testimony about the appearance of firemen who died fighting the fire defendant was accused of starting was in no way incompetent or irrelevant to the issues being tried.

6. Criminal Law § 50— jury unable to draw on inferences—opinion testimony admissible

In a prosecution concerning the felonious setting of a fire to defendant's store, it was not error to allow one fireman to testify the steam he observed was "an indication that they had hit the seat of the fire" and for another fireman to testify the smoke smelled like "burning oil or some type of petroleum product" as the facts upon which each opinion was based could not be described in a manner which would allow the jury to draw their own inferences.

7. Criminal Law § 66.18— waiver of objection to identification testimony—no error in court's failure to exclude ex mero motu

There was no error in the court's failure to exclude identification testimony of a witness *ex mero motu* at the end of a *voir dire* where the defense counsel chose to withdraw his objection to the testimony at the end of the *voir dire*. A defendant may, for whatever reason, waive the benefit of constitutional provisions by express consent.

8. Criminal Law § 43.5— videotape of unavailable witness's testimony—admission proper—cross-examination not thwarted

The trial court did not err in admitting a videotape of a witness's testimony under the following facts: Defendant's trial was in its sixth week when the last witness for the State was hospitalized; the witness's physician would not allow the witness to return to the courtroom for at least two weeks, but would allow him to testify *via* videotape from the hospital; the trial judge presided over the videotaping session at which defendant, his counsel, and his expert advisor were present, and the defense counsel's cross-examination appeared thorough and unrestrained as it comprised 49 pages of the record on appeal. Admission of a witness's videotaped testimony in a criminal case does not constitute an inherent violation of a defendant's right to confront witnesses against him; however, the conditions under which such testimony is allowed must be controlled in the following manner: (1) There must be exceptional circumstances necessitating the procedure. (2) The witness must be unavailable to testify within a period of time after which the trial itself would be subject to mistrial. (3) The videotaped session must be under the control of the trial judge, and the defendant and his attorney must be allowed to attend. (4) Effective cross-examination by defendant must be unimpeded. (5) All measures must be taken to eliminate possible prejudice due to the location or condition of the witness. (6) The videotape shown to the jury must be clear.

9. Homicide § 30.3— submission of lesser included offense—no evidence supporting charge—harmless error

Submission to the jury of the offense of involuntary manslaughter was error where the evidence supported the State's theory that five deaths resulted

from defendant's feloniously and deliberately setting fire to his store. However, the error was not prejudicial. The jury's verdict finding him guilty of involuntary manslaughter implicitly but clearly rejected his defense that he did not commit the act upon which the charges were based. When the jury discarded defendant's sole defense, all the evidence pointed to the greater crime of felony murder.

10. Constitutional Law § 34; Criminal Law § 26.5— convictions of involuntary manslaughter and unlawful burning—no double jeopardy

Defendant's conviction of involuntary manslaughter and unlawful burning arising out of the same transaction did not constitute double jeopardy.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 22 April 1980 in Superior Court, CATAWBA County. Heard in the Court of Appeals 14 September 1981.

On 9 July 1979, defendant was indicted on the charges of: (1) conspiracy to violate G.S. 14-62 by willfully, feloniously and wantonly setting fire to the Gardner Building in Shelby, North Carolina, for the purpose of collecting monies under the terms of an insurance policy, (2) the felonious and willful setting of fire to the Gardner Building, and (3) five counts of first degree murder for the deaths of four firemen and one city employee who died in the fire. Prior to his trial, defendant made numerous motions including a motion for a change of venue from Cleveland County. Change of venue was allowed, and defendant's case was tried in Catawba County. Defendant's motion for a court-appointed expert in arson investigation was also allowed.

At trial, State's evidence tended to show that on 25 May 1979 at approximately 6 p.m., Melinda Setzer was working in the rear of J.E.'s, a clothing store located in the Gardner Building, when she smelled what she thought was kerosene. After checking with Assistant Manager Mary Ann Skinner at the front of the store, Setzer returned to her work. She again smelled something like charcoal lighter fluid. She looked out a window in the rear of the building and saw smoke coming from the west. Behind the building, Setzer found smoke "coming from behind Jeffries [sic] Clothing", another store located in the Gardner Building. She immediately returned to J.E.'s, where the assistant manager was calling or had already called the fire department. Then smoke started coming through the ceiling of J.E.'s, and the two employees evacuated the store. Setzer ran to Jeffries', the Bible Book Store and Wonderland Toy, the other three stores located

within the Gardner Building, to warn of the fire, but she found no one in any of those stores.

At approximately 6:15 p.m., the Cleveland County communication center received Skinner's call, and within minutes the Shelby Fire Department responded. In addition, members of the Cleveland County Volunteer Fire Department went to the Gardner Building. Smoke and fire seemed to be located in the rear of Jeffries', so water was sprayed into that store. The double back door to Jeffries' was knocked in, allowing the firemen to observe "an inferno", with flames rolling "in a circular motion". At 6:43 p.m., without warning, the building exploded. Glass flew across the street, and the entire structure of bricks and concrete collapsed into the street and the alley. Four firemen and a city employee were trapped by the debris and died as a result of the impacts to their bodies.

In addition to testimony by firefighters and other eyewitnesses that the fire appeared to be located in defendant's store, there was evidence that the fire had originated there, flammable fluids or accelerants having been used to start it. Earl Hatcher, the Chief Arson Investigator for the State Bureau of Investigation (S.B.I.), qualified as an expert in the field of arson investigation. He testified that he had observed deeply charred or alligatored 2 x 4 inch studdings on the east and west walls of Jeffries', and deep charring in the southeast corner of the store, both of which indicated the presence and ignition of accelerants. Tile taken from the floor of Jeffries' bore the odor of a petroleum product similar to that of mineral spirits. After examining Jeffries', J.E.'s, and the Bible Book Store, Hatcher concluded that the fire in the Gardner Building originated from the ignition of liquid accelerants in the southeast corner of Jeffries' store.

William E. Kelleher, an expert in the field of fire origin and arson investigation, gave his opinion that the fire originated in Jeffries'; that flammable fluids had been employed; and that their vapors had reached the explosive range sometime after the fire was set, thus causing the explosion. This opinion was based on Kelleher's personal investigation of the scene and his interviews of firemen who were present when the building burned. Kelleher testified that the burn holes in Jeffries' revealed that the fire had burned downward, following an unnatural path, due to the

presence of a liquid accelerant which flowed to the lowest point possible. The alligator burn pattern also supported Kelleher's conclusion that an accelerant had been poured on the floor.

There was evidence that defendant's business was not doing well. One customer testified that the defendant's store did not appear to be completely stocked. A United Parcel Service employee testified that merchandise delivered to the store had been consistently shipped COD (cash on delivery) or had been prepaid. Furthermore, when defendant relocated to the Gardner Building eight months before the fire, he had increased his inventory insurance coverage from $15,000 to $20,000.

James F. Walker, who had worked with defendant previously, testified that approximately one month before the fire, defendant had offered him a thousand dollars to set fire to his store. Walker refused. His testimony was corroborated by several witnesses to whom he had told the story both before and after the 25 May 1979 fire.

The State's evidence also tended to show that the day before the fire, the defendant and an unidentified man were seen reading labels on cans of paint thinner, naptha, lacquer thinner, and solvents at the Cal-Tone Paint Store. No purchases were made. Just after 5:00 p.m. on 25 May 1979, two customers entered Jeffries', spoke with defendant, and noticed one Sammy Guest in the rear of the store. Guest and defendant left with the customers at approximately 5:20 p.m.; defendant locked the front door and drove off with Guest. No one else was seen in the store.

Over defendant's objection, the State introduced evidence that on 31 May 1979, defendant told S.B.I. agent Albert Stout that he didn't care if his business burned but he hadn't wanted anyone to get hurt; that Sammy Guest told him he could burn the place by leaving a cigarette in the ashtray, and that, on 24 May 1979, a cigarette was left burning on the carpeted floor next to the ashtray, but it burned out; and that thereafter Sammy Guest told defendant he would take care of it.

Also over defendant's objections, the State introduced two more statements of the defendant, one made to Frank Lee, a Special Agent of the Bureau of Alcohol, Tobacco and Firearms, and made another to S.B.I. Special Agent Jack Richardson. Agent

Lee testified that defendant had told him that he had been hoping his business would burn so he could collect the insurance money; that he was being pressured by companies who wanted to be paid by defendant; that he, Jeffries, had jokingly stated to several persons that he wouldn't care if his business burned; that he could not understand how the building exploded; and that he was sorry the five men had died. The statement defendant made to Richardson was similar but added that Sammy Guest had told defendant that he could burn the business for him because he had burned a house one time and was never caught; that a burning cigarette Guest placed on the carpet failed to ignite a fire; and that Guest told defendant that he would make sure it burned next time and defendant wouldn't know anything about it.

Defendant offered no evidence.

The jury returned verdicts of guilty to five counts of involuntary manslaughter, one count of felonious burning, and one count of felonious conspiracy to burn. From the imposition of consecutive prison terms, defendant appeals.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Lester V. Chalmers, for the State.

Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A., by James E. Ferguson, II, for defendant-appellant.

HILL, Judge.

Defendant brings forward seven assignments of error. The trial of the case as well as the issues on appeal are complex. We have considered all of defendant's assignments, and find no error in the trial.

I.

[1] Defendant first contends that his right against self-incrimination was violated when the trial court admitted into evidence incriminatory statements which defendant made to law enforcement officers. Defendant contends that these statements were made without the requisite constitutional warnings and that they were induced by misleading police statements and false police promises that the statements would be kept in confidence.

In *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), the Supreme Court held that the prosecution may not use either exculpatory or inculpatory statements which result from custodial interrogation of a defendant unless the prosecution can show the use of procedural safeguards which effectively secure the privilege against self-incrimination. "[B]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* However, "[p]olice officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Oregon v. Mathiason*, 429 U.S. 492, 50 L.Ed. 2d 714, 97 S.Ct. 711 (1977). In *Mathiason*, custody was characterized as a restriction on one's freedom or detention in a "coercive environment".

Our Supreme Court has analyzed custody by applying an objective test which involves determining whether a reasonable person would believe under the circumstances that he is free to leave the place in which he is being questioned. *State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496 (1979). Citing *Mathiason*, supra, the Court focused on three time frames to determine whether a reasonable person would believe that he was free to leave the place of interrogation.

> [1] events occurring *prior* to the questioning, including the fact that the defendant had voluntarily appeared in response to a written request; [2] events happening *during* the questioning, including the fact that defendant was told at the outset he was not under arrest but that he was a suspect; and [3] events taking place *after* the questioning, including the fact that defendant was allowed to leave the parole office unhindered even though he had confessed to the burglary.

State v. Perry, supra.

In light of the foregoing principles, we conclude that Jeffries was not in custody when he made his inculpatory statements. When the State sought to introduce statements which the defendant had made to S.B.I. Agent Stout, the defendant objected, and an extensive *voir dire* was conducted. Upon defendant's motion,

the trial judge ordered each State witness for the *voir dire* sequestered. Evidence adduced on *voir dire* tended to show that defendant came voluntarily and unaccompanied to the Law Enforcement Center in Shelby. He submitted to a polygraph test, and even though not in custody, was read his rights by Agent Stout. Defendant signed a waiver acknowledging that he was free to end the test and to leave at any time. His meeting with Stout lasted from shortly after 9 o'clock a.m. until approximately 11:45 a.m. Stout testified that defendant's appearance was good and that he did not seem to be under the influence of drugs. Defendant was offered and given coffee twice. After completing the polygraph test, Stout informed defendant that, in his opinion, defendant was not telling the truth. At this point, the defendant made his statement to Stout. After defendant made the statement to Stout, Agent Lee again advised defendant of his constitutional rights.

According to Agent Lee's testimony on *voir dire*, the defendant was not under arrest during his questioning on 31 May 1979. When Lee told defendant that he and Agent Bradley wanted to talk to him but that the defendant could leave anytime, defendant indicated he wanted to talk to them. When Lee told defendant that he had to advise him of his rights, defendant said it was not necessary. After Lee indicated to defendant that he might be arrested for the fire, defendant gave his statement. When Agent Lee was ready to leave, defendant made a request to talk to Agent Bradley with whom Lee left him. At 2:30 p.m., Lee checked to see if the defendant needed anything and to tell the defendant he could leave if he wanted to. The defendant did not leave, nor did he request anything. At 4:00 p.m., Lee returned to the room and asked the defendant if he were ready to leave, and at this time the three men left and walked to defendant's car in the parking lot. The defendant was not arrested until some three weeks later.

No threats, no promises of rewards or hope for rewards were made to defendant. Neither was there any promise or commitment that defendant's statement would be held in confidence. Defendant was not deprived of sustenance. The evidence on *voir dire* shows no "coercive environment". Defendant, free to leave at any time, was not in custody when he made his inculpatory statements.

The officers questioning defendant advised him several times of his constitutional rights, as would have been necessary in a custodial environment. Prior to administering the polygraph test, Agent Stout informed defendant of his rights, and defendant, a college graduate, signed a waiver which read, in pertinent part:

> I, James E. Jeffries, being 32 years of age and of sound mind voluntarily without threats, duress, coercion, force, promises of immunity or reward and understandingly agree and stipulate to take a polygraph examination for the mutual benefit of myself, the State Bureau of Investigation and Shelby Police Department, I fully realize that I am not required to take this examination, I may first consult with an attorney or anyone I wish before either signing this form or taking the examination, I have the right to remain silent the entire time that I am here, anything I may say can be used against me in any court of law.
>
> I have the right to talk to a lawyer for advice before answering any questions and to have him present during questioning. If I cannot afford an attorney and desire one, an attorney will be appointed for me before any questioning if I wish. If I decide to answer questions now without a lawyer present, I will still have the right to stop answering at any time. I also have the right to stop answering at any time until I have talked to a lawyer, and I have the opportunity to exercise all these rights at any time I wish during the entire time I am here. Nevertheless, I voluntarily request and authorize A. S. Stout to proceed with the examination.
>
> I do hereby authorize the State Bureau of Investigation, its officers, and/or employees to disclose both orally and in writing the examination results and opinions to employees and/or representatives of the Shelby Police Department. I have had the above read to me and fully understand the true contents thereof.
>
> Witness by myself and signed by Mr. Jeffries. This examination was concluded at 11:45 a.m. on the above date. I completely reaffirm my above agreement. I knowingly and intelligently continue to waive all rights, including those listed in the second paragraph above and I willingly made all statements that I did. I also certify that during the entire time I was well treated, submitted myself freely to the ex-

> amination knowing that I could stop at any time so desired by merely saying I wished to stop or that I wished to consult an attorney. I remained of my own free will knowing that I could leave this room at any time I so desired and that there were no threats, promises, or any harm done to me during the entire period I have been here, either in connection with the examination or the signing of this consent.

After the test, Agent Lee offered to read defendant his rights, but he indicated then to Lee and later to Richardson that he understood those rights.

Defendant also contends that the statements he made to the law enforcement officials were involuntary and should have been suppressed. We must also disagree with this contention.

In ruling on the admissibility of an inculpatory statement, the trial judge should focus on "the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined . . .". *Rogers v. Richmond*, 365 U.S. 534, 5 L.Ed. 2d 760, 81 S.Ct. 735 (1961). When defendant claims that he made a statement involuntarily, it is the duty of an appellate court to examine the record and to make a determination on the ultimate issue of voluntariness. *Beckwith v. United States*, 425 U.S. 341, 48 L.Ed. 2d 1, 96 S.Ct. 1612 (1975). We recognize that a person's will may be overcome by hope or fear, or by physical or psychological coercion. In the instant case, however, we find no evidence that defendant's will to resist was overcome by coercion or other devious means.

Defendant came voluntarily to the Law Enforcement Center. He submitted voluntarily to a polygraph test, and, when he was told that the person administering the test did not believe he was telling the truth, defendant made the first of three similar statements. The evidence was uncontradicted that defendant was reminded generally of his rights, that he actively declined to have them read to him again, and that he declined to exercise those rights. Defendant was neither threatened nor offered any reward or hope of reward. While the defendant makes much of the length of time he remained at the Center, there was evidence that he was told on several occasions that he could go. He was offered

food and drink, and he appeared normal. He was free to leave and did so, finally, at 4:00 p.m.

Defendant also argues that Lee's partner Bradley coerced him into making statements in confidence and that, thereafter, the defendant was coerced into repeating the statement to Agent Stout. In response to this, we note first that the trial court refused to allow the State to introduce the statement made to Bradley. Secondly, defendant's theory that such "confidence" carried into his statement to Stout is unsupported by the evidence. These assignments are overruled.

II.

We next consider defendant's two broad assignments of error relating to the admission of evidence. He first assigns as error the admission of "exhibits and related testimony arising out of discovery materials which the prosecution failed to timely and meaningfully furnish to the defense in compliance with the court's pretrial discovery orders and by sanctioning [the] prosecutorial concealment of exculpatory material". Defendant notes 108 exceptions he took to the introduction of such evidence which included cans of vinyl flooring, tests conducted by witnesses Maddry and Grotts, reports by witness Kelleher, numerous photographs, and a tape recording of the fire dispatcher's conversation with witness Skinner.

[2] Under Article 48 of Chapter 15A of our General Statutes, a party seeking discovery must first request in writing that the other party comply voluntarily with the discovery request before filing any motion with a judge. G.S. 15A-902(a). If the other party fails, within seven days, to respond or to respond adequately, then the first party may file a motion for discovery concerning any matter the second party failed to furnish or furnished inadequately. *Id.* Under G.S. 15A-903(d) and (e), on defendant's motion, the trial court is directed to order the prosecutor to allow the defendant to inspect and copy or photograph documents, tangible objects, and reports of examinations and tests.

This record contains neither defendant's initial G.S. 15A-902 letter, nor defendant's motion. The record does, however, contain the trial court's order that the State allow the defendant to inspect, copy, and photograph certain documents and pieces of

evidence. Sanctions for failure of the State to comply with the order are governed by G.S. 15A-910, which allows the court, in addition to exercising its contempt powers, to:

(1) Order the party to permit the discovery or inspection, or

(2) Grant a continuance or recess, or

(3) Prohibit the party from introducing evidence not disclosed, or

(4) Enter other appropriate orders.

The trial court's action in such matters is discretionary. *Id. See State v. Stevens*, 295 N.C. 21, 243 S.E. 2d 771 (1978).

Defendant argues that the trial judge should have exercised his discretion under G.S. 15A-910(3) to exclude the cans of vinyl flooring. When the State sought to introduce the evidence, defendant entered a general objection which was overruled. Defendant failed to state the basis of his objection, and he failed to request any of the other remedies available to him under G.S. 15A-910. In this regard, we feel compelled to emphasize again the complexity of this trial, in which well over 100 exhibits were introduced. There has been no allegation that the prosecuting attorneys acted in bad faith. Based on these facts, we find no abuse of the trial court's discretion in allowing the State to introduce the cans of vinyl flooring into evidence.

[3] As to defendant's arguments concerning tests conducted by witnesses Maddry[1] and Grotts,[2] the record shows that the trial court conducted an *in camera* examination concerning these tests as well as some tests conducted by witness Kelleher. The trial judge found that defendant was not prejudiced by the State's failure to furnish copies of tests which indicated that the fire did not originate in the building's electrical system or furnace. The court offered the defendant a reasonable time period in which to review the reports. We find no abuse of discretion by the trial court.

1. Witness Maddry qualified as an expert in electrical systems and testified that, in his opinion, the fire did not originate within the electrical system.

2. Witness Grotts, an employee of the North Carolina Utilities Commission, was *not* allowed to give his opinion as to the role of natural gas leaks in starting the fire.

It is difficult to determine from the record which of the numerous photographs offered by the State had been seen by the defendant's counsel prior to trial. None of the photographs have been tendered to this Court for our review. In light of this and in view of the fact that the court permitted defense counsel time to review the photographs, we find that the trial court did not abuse its discretion in allowing the photographs into evidence.

The final item about which defendant specifically complains is the tape recording of witness Skinner's phone call reporting the fire. The record shows, however, that defense counsel stated that he had no objection to the playing of the portions of the tape actually played. We find no error.

[4, 5] We turn now to the trial court's admission of testimony which defendant contends was "irrelevant, immaterial, incompetent, remote, prejudicial and inflammatory". Defendant contends the admission of such testimony violated his constitutional rights to a fair trial, to due process of law, and to equal protection of the laws. First, defendant contends that the trial court erred by permitting certain State's witnesses to testify in detail about the appearance of the five men who died fighting the fire, to give misleading and confusing testimony about the location of the bodies, and to introduce inflammatory photographs and film footage.

The excepted-to photographs and film footage are not included in the record. This is a violation of App. R. 9(b)(3) and makes it impossible for us to rule on the admissibility of the evidence. As to allowing the testimony of the eye witnesses, we can find no error. Witnesses Hollifield, Lynch and Humphries all observed the events occurring at the Gardner Building on 25 May 1979. Witness Smith investigated the area two days later. While the witness' descriptions of the fire and its victims are not pleasant, the testimony was in no way incompetent or irrelevant to the issues being tried. Neither do we find repetition which was prejudicial or inflammatory.

[6] Secondly, defendant contends that the court erred in allowing two firemen to speculate about the meaning of physical phenomena at the fire scene. Captain Rogers was allowed to testify that steam he observed was "an indication that they had hit the seat of the fire with the water in the back". It is unclear

from the testimony where the steam was coming from, and, when the prosecutor attempted to have Captain Rogers place the "seat of the fire" at Jeffries', the court sustained defendant's objection. We therefore find no prejudicial error. Fireman Price was allowed to testify that the smoke coming from Jeffries' smelled like "burning oil or some type of petroleum product or chemical". This testimony was admissible under the general rule that opinion evidence is permissible when the facts on which the opinion is based cannot be described in a manner which would allow the jury to draw their own inferences. *See, generally,* 1 Stansbury's *North Carolina Evidence* (Brandis Rev. 1973), § 125. These assignments are overruled.

III.

[7] Defendant also assigns error to the admission of witness Paul's testimony, identifying defendant as one of two men who had shopped for paint thinners in a local paint store several days before the fire. Defendant argues that the trial court should have excluded the testimony *ex mero motu* because the identification stemmed from a photographic display so egregiously and impermissibly suggestive as to violate defendant's constitutional rights. Upon defendant's objection to the identification testimony, the court conducted a *voir dire* examination of Paul and the Shelby Police Officer to whom Paul identified defendant. At the end of the *voir dire*, the following dialogue took place between counsel for defendant and the trial judge:

> MR. RANDALL: I have conferred with my client and the investigator in this case and I request, your Honor, to be permitted to withdraw the motion to suppress and to proceed with the examination of the witness Paul.
>
> COURT: Well, now, the court will observe for the record that counsel did in fact confer with the defendant and the investigator in this case and would permit the counsel to withdraw the motion to suppress the in-court identification of the defendant by the witness Paul, and in so doing the court will observe that the identification is of independent origin based solely upon the observations of the witness at the place of business in question, the Cal-Tone Paint Store, and is not based upon any photographic procedure or exhibits illegally or otherwise and that there is nothing of sufficient

value to indicate the witness' identification is mistaken. Call the jury back. The motion is allowed to withdraw the original motion to suppress.

While we do not know why the defense attorney chose to withdraw his objection to Paul's testimony, we do not believe the trial court is required to second-guess defense counsel, rejecting, *ex mero motu*, what may have been valid strategy on counsel's part. A defendant may, for whatever reason, waive the benefit of constitutional provisions by express consent. *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970), *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980). This assignment is overruled.

IV.

In defendant's fourth assignment of error, he contends that the court erred in refusing to allow him to cross-examine effectively several of the State's witnesses. Under this assignment, defendant lists nearly 100 exceptions he took to the exclusion of testimony. He failed, however, to present an argument as to all of the exceptions, and those which are not argued are considered abandoned. App. R. 28(b)(3). Of the exceptions defendant does argue, he has failed to show in the record what the excluded testimony would have been. *See generally*, 1 Stansbury's, supra, § 26. It is therefore impossible for this Court to determine what evidence was excluded and whether such exclusion was prejudicial to defendant. *See State v. Brooks*, 49 N.C. App. 14, 270 S.E. 2d 592 (1980) *disc. rev. denied* and *ap. dismissed*, 301 N.C. 723, 276 S.E. 2d 285 (1981). We overrule this assignment.

[8] Defendant also assigns error to the manner in which he was required to cross-examine William Kelleher, an expert in the field of fire origin and arson investigation. Kelleher was the final witness called by the State. On 11 April 1980, after Kelleher had almost completed his direct testimony and after court had recessed for the day, Kelleher was admitted to the hospital with a possible case of angina, a coronary condition. As a result of this development, on 12 April, the court excused the jury indefinitely until Kelleher was found to be able to undergo the remainder of direct examination and cross-examination. On 14 April, the trial judge noted that he had been informed by the witness' treating physician that Kelleher had not suffered a myocardial infarction, but that he was suffering from angina, was in a stable condition,

and could not return to court for at least two weeks. Upon inquiry by the court, the treating physician stated that Kelleher would be able to testify before videotape at the hospital if the physician could observe him.

Over defense counsel's objection, the trial court decided to videotape the remainder of Kelleher's testimony in the hospital. Defendant contends that this ruling violated his Sixth and Fourteenth Amendment rights to cross-examine and confront witnesses against him. *See Pointer v. Texas*, 380 U.S. 400, 13 L.Ed. 2d 923, 85 S.Ct. 1065 (1965).

North Carolina courts have fully acknowledged the absolute right of the accused to cross-examine adverse witnesses. *See e.g., State v. Bumper*, 275 N.C. 670, 170 S.E. 2d 457 (1969). However, defendant's assignment of error raises a novel question for this Court. Thus, we look to other jurisdictions for assistance in determining this issue.

In *United States v. King*, 552 F. 2d 833 (9th Cir., 1976), *cert. denied* 430 U.S. 966, 52 L.Ed. 2d 357, 97 S.Ct. 1646 (1977), defendants asserted that the trial court's admission of the depositions of two absent witnesses denied them their rights of confrontation. The government's case depended largely upon the testimony of two unindicted co-conspirators who were serving terms of imprisonment in Japan and who were therefore unavailable to testify at trial. Videotaped depositions were taken pursuant to 18 U.S.C. § 3503 at the Japanese prison, to which defendants and their attorneys traveled at government expense. Upset by restrictions imposed by the Japanese government, however, defendants and their counsel withdrew during the fourth day and returned to the United States. The government continued, completing its examinations. Defendants objected to the use of the videotapes, alleging, *inter alia*, that 18 U.S.C. § 3503 was unconstitutional in its application and on its face because the Supreme Court had never expressly authorized the use of an absent witness's deposition in lieu of trial testimony. In rejecting defendants' argument, the court noted that the Supreme Court had observed that "prior-recorded testimony has been admissible in appropriate cases". *Mancusi v. Stubbs*, 408 U.S. 204, 33 L.Ed. 2d 293, 92 S.Ct. 2308 (1972). The court in *King* wrote:

In *Mancusi*, the Court characterized its concern under the confrontation clause as being

> to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," *Dutton v. Evans*, (cites omitted), and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement," . . . . (cite omitted).

Confrontation meets the need for adequate reliability and evaluation in that it

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed. 2d 489 (1970).

United States v. King, supra. After analyzing the *Green* decision, which involved the use of a statement made by a key witness at a preliminary hearing, the *King* court held that a deposition taken under 18 U.S.C. § 3503 satisfied procedural safeguards required by the confrontation clause. Under that statute, such depositions are permitted only under "exceptional circumstances". Use of the testimony obtained is allowed only if the witness meets the following "unavailability" criteria: an authorized person must put the deponent on oath; defendants must be afforded the right to be present during the deposition and to be represented by counsel; as full a scope of examination must be allowed as would be allowed at trial; the entire procedure must be under the authority and supervision of the trial court, and the deposition process must expose the witness to rigorous cross-examination on all issues.

The *King* court also found 18 U.S.C. § 3503 constitutional as applied, on the grounds that the deponents were under oath, the presentation of the videotaped testimony adequately allowed the jury to observe the demeanor of the witnesses, and that the conditions under which the depositions were taken were not "oppressive, intimidating, and frightening," so as to constitute a denial of defendant's rights to effective cross-examination.

In *United States v. LaFatch*, 382 F. Supp. 630 (N.D. Ohio, E.D., 1974) *rev'd. on other grounds*, 565 F. 2d 81 (6th Cir. 1977), in a Supplemental Memorandum opinion, the trial court explained why it allowed the jury to view the videotaped testimony of a key defense witness, the wife of the defendant, who apparently had suffered a heart attack during the trial. Aware of the problems associated with a videotaped presentation, the trial court required measures to be taken to minimize the hospital setting. Those steps included showing only the head and shoulders of the witness, not allowing doctors to be present and omitting any reference to the witness' condition.

Although the factual situations differ, we find the analyses of *King* and *LaFatch* persuasive to our resolution of the question. *King* began its analysis with a discussion of cases allowing the admission into evidence of prior-recorded testimony. This Court has likewise held that prior-recorded testimony is admissible under certain circumstances. *State v. Biggerstaff*, 16 N.C. App. 140, 191 S.E. 2d 426 (1972). Holding that the prior-recorded testimony of one of the State's witnesses, who was available for defendant's preliminary hearing but who could not be located for defendant's trial, was admissible, the Court weighed the following factors: the reason for the witness' unavailability at trial, the diligence of the Sheriff's inquiry as to the whereabouts of the witness, the fact that defendant had the same counsel at both hearings, the accuracy of the court reporter's transcription of the witness' testimony at the preliminary hearing, and a good faith effort on the part of the State to secure the presence of the witness at the trial. *State v. Biggerstaff, supra.*

In accordance with these opinions, we hold that the admission of a witness' videotaped testimony in a criminal case does not constitute an inherent violation of defendant's right to confront witnesses against him. The conditions under which

videotaped testimony is allowed, however, must be carefully controlled. First, there must be exceptional circumstances necessitating the procedure. As noted in *King, supra*, the witness must be unavailable to testify within a period of time after which the trial itself would be subject to mistrial. The videotaped session must be under the control and supervision of the trial judge, and the defendant and his attorney must be allowed to attend. Effective cross-examination by defendant must be unimpeded, and all measures must be taken to eliminate possible prejudicial effects due to location or condition of the witness. Furthermore, the videotape shown to the jury must be clear, allowing the jurors to observe clearly the demeanor of the witness.

Applying those criteria to the facts of this case, we find that defendant's trial was in its sixth week when Kelleher, the last witness for the State, was hospitalized. Kelleher's physician would not allow him to return to the courtroom for at least two weeks, but would allow Kelleher to testify *via* videotape from the hospital. The trial judge presided over the videotaping session at which defendant, his counsel, and his expert advisor were present. Since the record does not contain a copy of the videotape, we cannot determine whether the court took sufficient steps to minimize any prejudicial effect arising out of the location or the appearance of the witness. We note, however, that since Kelleher was not a victim of the alleged crime, sympathy for his condition would not necessarily translate into prejudice against the defendant. The crucial issue is whether defendant's attorney was thwarted in his efforts to conduct a vigorous cross-examination of the witness. From the record defense counsel's cross-examination appears thorough and unrestrained. It filled some 49 pages of the record, and, after it was completed, the trial judge noted to defense counsel that "not only have you vigorously cross examined the witness Kelleher, but the State . . . would indicate . . . you have done so as you justifiably ought to do."

In summary, we find that the trial court acted in the interest of justice in allowing the videotaped presentation of witness Kelleher's testimony and that the defendant was allowed full opportunity to conduct a rigorous cross-examination. Defendant's right to confront witnesses against him was not violated and this assignment is overruled.

V.

Defendant's next assignments of error pertain to the trial court's instructions to the jury. We first consider defendant's contention that the court erred in instructing the jury that a fire could be considered a deadly weapon. This charge related only to the question of defendant's guilt in the felony-murder charge. Since defendant was found guilty of involuntary manslaughter, if this instruction was error, it was harmless. *See State v. Casper*, 256 N.C. 99, 122 S.E. 2d 805 (1961), *cert. denied* 376 U.S. 927, 11 L.Ed. 2d 622, 84 S.Ct. 691 (1964).

[9] Next we consider defendant's argument that the trial court erred in instructing the jury that a verdict of involuntary manslaughter was permissible. Defendant cites *State v. Cates*, 293 N.C. 462, 238 S.E. 2d 465 (1977), for the definition of involuntary manslaughter:

> Involuntary manslaughter is the unintentional killing of a human being without malice, premeditation or deliberation which results from the performance of an unlawful act not amounting to a felony or not naturally dangerous to human life; or from the performance of a lawful act in a culpably negligent way; or from the culpable omission to perform some legal duty. . . .

Defendant argues that under the State's theory, defendant and Sammy Guest deliberately set the fire from which the five deaths resulted; thus, the deaths were caused by an unlawful, felonious act. The crime of involuntary manslaughter, being founded upon a non-felonious crime, was, therefore, inconsistent with the evidence and should not have been submitted to the jury.

While we agree that submission to the jury of the offense of involuntary manslaughter was error, we find that it was not prejudicial error. While it is the established rule in North Carolina that the erroneous submission of a lesser-included offense not supported by the evidence is not prejudicial error, *State v. Vestal*, 283 N.C. 249, 195 S.E. 2d 297, *cert. denied*, 414 U.S. 874 (1973), our Supreme Court has qualified this rule by applying a harmless error test to the particular facts and circumstances in each case. *State v. Ray*, 299 N.C. 151, 261 S.E. 2d 789 (1980). In *Ray*, the defendant was charged with first degree murder; at the close of

the evidence, the trial court submitted to the jury verdicts of second degree murder, manslaughter, involuntary manslaughter, not guilty, not guilty by reason of self-defense and defense of another. Defendant was convicted of involuntary manslaughter. All the evidence adduced at trial, however, showed that the defendant intentionally shot the victim; there was evidence of self-defense and defense of another person. In vacating the judgment of the trial court, the court found that if the jury had been required to face squarely the defenses raised by the defendant, there was a reasonable possibility that they would have returned a verdict of not guilty.

> We emphasize that the result reached here should not be read as casting any doubt on the validity of earlier decisions of this Court or of the Court of Appeals. Our decision today does no more than recognize that a verdict based upon the erroneous submission of a lesser included offense not supported by the evidence does not invariably constitute error favorable to a defendant as a matter of law. Whether such an error is harmless depends instead upon the facts and circumstances peculiar to each case. We hold simply that the facts and circumstances peculiar to the instant case warrant a conclusion that, absent the erroneous submission of involuntary manslaughter, there is a reasonable possibility that the jury would have returned a verdict of acquittal. The error complained of was therefore prejudicial to the defendant. G.S. 15A-1442. . . .

State v. Ray, supra.

In *State v. Summitt,* 301 N.C. 591, 273 S.E. 2d 425 (1981), defendant, indicted on the charge of first degree rape, complained that the court had erred in submitting to the jury the lesser included offense of second degree rape for which there was no evidence but for which he was convicted. Our Supreme Court stated:

> The harmless error test, other than in constitutional matters, requires a finding of prejudice to a defendant when there is a reasonable possibility that had the error not been committed a different result would have been reached at the trial.
>
> . . .

> In [the] instant case, defendant's sole defense was that he did not commit the act upon which the greater and lesser offenses were based. There is no contention that there was anything in the charge to the jury which clouded that defense. Thus, the jury's verdict finding him guilty of second-degree rape implicitly, but clearly, rejected his defenses that he did not commit the act upon which the charges were based. When the jury discarded defendant's sole defense, all the evidence pointed to the greater crime of first-degree rape. Therefore, the submission of the lesser-included offense was not prejudicial to defendant but to the contrary was in his favor.

Our conclusion that defendant suffered no prejudice is consistent with *Summitt* and *Ray*. As in *Summitt*, defendant's sole defense here was that he did not commit the act upon which the charges were based. Thus, the jury's verdict finding him guilty of involuntary manslaughter implicitly but clearly rejected his defense that he did not commit the act upon which the charges were based. When the jury discarded defendant's sole defense, all the evidence pointed to the greater crime of felony murder. Therefore, the submission of the lesser included offense of involuntary manslaughter was not prejudicial to defendant, but, on the contrary, was in his favor.

Similarly, we reject defendant's contention that the jury's inconsistent verdicts were prejudicial to him. We believe that " 'the jury, by an act of grace,' has found . . . [the defendant] guilty of a lesser offense". *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956).

[10] Defendant contends further that his conviction of involuntary manslaughter and unlawful burning arising out of the same transaction constituted double jeopardy. Defendant is attempting to broaden the merger doctrine of felony-murder which provides that if a defendant is convicted of first degree murder on the felony-murder doctrine, he cannot be convicted of both the underlying felony and the first degree murder charge which relied on that felony to supply premeditation. *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). If defendant had been convicted of felony murder instead of involuntary manslaughter, the guilty verdict on the unlawful burning charge would have to be ar-

rested. *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). Since this was not the situation in defendant's case, we overrule this assignment.

VI.

The final assignment of error which we consider is defendant's contention that the trial court erred in denying his motion to dismiss on the grounds that there was insufficient evidence to go to the jury. On defendant's motion to dismiss, the State is entitled to the benefit of every reasonable inference arising from the evidence. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). There was sufficient evidence for the jury to consider each charge for which defendant was convicted and sentenced. The trial court did not err in denying defendant's motion.

Defendant was given a fair trial, free from prejudicial error.

No error.

Chief Judge MORRIS and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. JULIUS LEE CASS

No. 8123SC251

(Filed 5 January 1982)

1. **Criminal Law § 75.1— unreasonable seizure of person—statements inadmissible**

Statements obtained during an unreasonable seizure of the person are not admissible.

2. **Criminal Law § 75.1— no seizure of person—admissibility of incriminating statements**

Defendant was never "seized" within the meaning of the Fourth Amendment to the U.S. Constitution, and his incriminating statement to officers at the sheriff's office prior to his formal arrest was thus not rendered inadmissible by Fourth Amendment exclusionary principles, where an officer first contacted defendant at his home at 4:00 p.m. and told defendant he needed to talk to him with reference to the death of defendant's wife; defendant sat in the patrol car at the officer's request and later agreed to accompany the officer to the jail; prior to 7:00 p.m. defendant voluntarily participated in the investigation of his wife's death when he submitted to interrogation; defendant would

have been permitted to leave at any time he expressed a desire to do so; although the officer thought he had probable cause to arrest defendant at 7:00 p.m., he did not arrest defendant at that time; defendant was interrogated between 7:00 p.m. and 10:00 p.m., when he made the incriminating statement; and defendant's initial assent to submit to investigatory questioning and to accompany the officer to the jail remained unchanged throughout the evening. Furthermore, defendant's statement was properly considered in determining probable cause for issuance of a warrant for defendant's arrest, and defendant's subsequent statements to officers while he was in custody pursuant to an arrest warrant based on probable cause were not rendered inadmissible by Fourth Amendment exclusionary principles.

3. Criminal Law §§ 75.11, 75.14— incriminating statements—waiver of constitutional rights—competency of defendant

The evidence on voir dire supported findings by the trial court, with regard to each of defendant's incriminating statements, that the officers fully explained his constitutional rights to him, that he indicated he understood them, and that defendant had in fact understood his rights and voluntarily waived them. Testimony elicited on voir dire that defendant did not sign a waiver form, that the officers did not know whether defendant could read or write, and that defendant jumped from one subject to another during questioning did not compel a finding that defendant was incompetent to waive his rights voluntarily and knowingly.

4. Criminal Law § 76.4— reopening of voir dire testimony—leading questions

The trial court did not abuse its discretion in permitting the State to reopen the voir dire examination of a deputy sheriff during a hearing on defendant's motion to suppress incriminating statements or in allowing leading questions to the deputy upon the reopened voir dire.

5. Searches and Seizures § 14— seizure of pistol—consent to search

An officer lawfully seized a pistol which he found between the mattress and springs of a bed in defendant's house where uncontradicted evidence showed that defendant knowingly and voluntarily consented to the officer's search of his house.

6. Homicide § 20— identity of pistol as murder weapon

A pistol was sufficiently identified as the weapon used in the murder of defendant's wife for its admission into evidence where an officer testified that he found the pistol between the mattress and springs of a bed in defendant's house on the afternoon decedent was killed, that defendant told him that when he went to decedent's house that afternoon he had carried the pistol with him, and that the pistol was a small caliber weapon and the wound he observed on decedent's body was a small caliber wound, and where medical testimony established that decedent died from a single gunshot wound to the neck.

7. Criminal Law § 63.1— prior I.Q. tests—inadmissibility

The trial court did not err in refusing to permit a psychiatrist who testified as to the result of an I.Q. test administered to defendant while defendant was being evaluated in connection with this case to give further

testimony as to the results of other I.Q. tests previously administered to defendant where there was no evidence indicating when the prior tests were administered, since the relevance of these tests to defendant's mental capacity at the time the alleged crime was committed thus was not established.

8. Criminal Law § 29.1— mental capacity to stand trial at earlier time

The trial court properly excluded testimony by a psychiatrist that defendant was incapable of standing trial when he was admitted to a hospital for evaluation six days after decedent's death and eleven months before trial since the issue of defendant's capacity to stand trial should have been determined prior to the trial, and since the appropriate issue would have been defendant's capacity to stand trial at the time of trial, not at the time of his hospitalization eleven months earlier.

9. Criminal Law § 63.1— prior hospitalizations for mental treatment—remoteness

The trial court properly excluded testimony by an expert psychiatric witness as to what defendant had told him regarding his previous hospitalizations for mentally related problems during a period between 1958 and 1967 since such testimony concerned times too remote to have any relevance to defendant's mental condition at the time of decedent's death.

10. Criminal Law §§ 33.3, 63.1—mental competency—irrelevant testimony—absence of prejudice

The defendant in a homicide case was not prejudiced by the testimony of a psychiatrist that sixty to seventy percent of the population has a neurosis and that, if the jurors are average citizens, a little over half of them have a neurosis.

11. Criminal Law § 63.1— insanity at time of crime—competency of testimony

Testimony by a psychiatrist that "in the general sense" defendant knew the difference between right and wrong was relevant and admissible on the issue of whether defendant was legally insane and thereby exempt from criminal responsibility.

12. Homicide § 21.9— voluntary manslaughter—sufficiency of evidence

The State's evidence, including incriminating statements made by defendant, was sufficient to support the conviction of defendant for involuntary manslaughter of his wife.

13. Homicide § 27.2— instructions on involuntary manslaughter—meaning of criminal negligence

The trial court did not err in instructing that involuntary manslaughter is the unintentional killing of a human being by an unlawful act not amounting to a felony or by an act done in a criminally negligent way without explaining the meaning of "criminal negligence" where the court further explained that to find defendant guilty of involuntary manslaughter, the jury must find that defendant's act was unlawful, and that the act was unlawful if it was an assault with a deadly weapon.

State v. Cass

APPEAL by defendant from *Mills, Judge.* Judgment entered 14 November 1980 in Superior Court, WILKES County. Heard in Court of Appeals 15 September 1981.

On 7 December 1979 at approximately 2:35 p.m. defendant's estranged wife (hereinafter decedent) was found in her house dead from a single gunshot wound in the neck. Defendant was charged with murder and was convicted of voluntary manslaughter. From a judgment of imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Sarah C. Young, for the State.

Paul W. Freeman, Jr., for defendant appellant.

WHICHARD, Judge.

ADMISSIBILITY OF DEFENDANT'S STATEMENTS

Defendant challenges the admissibility of three inculpatory statements which he made, one in the late evening of 7 December 1979 prior to his formal arrest, and two the following morning subsequent to his arrest and while he was in custody. He contends (1) his statements were the product of a seizure which violated his fourth amendment rights, and (2) he lacked the mental capacity to waive his fifth and sixth amendment rights.

The following facts surrounding the making of the statements: Deputy Sheriff Nick Nixon arrived at decedent's residence at approximately 4:00 p.m. on 7 December 1979. After observing the scene briefly he drove to defendant's residence. Nixon "asked defendant whether he would go have a seat in the patrol car," and defendant agreed to do so. Nixon identified himself as a detective with the sheriff's department, explained that defendant's wife had been found dead in her house, and told defendant he needed to talk to him with reference to his wife. Nixon advised defendant of his Miranda rights, explained them to him, and began to question defendant in the patrol car. After a brief period of questioning Nixon "got [defendant] out of the car" and requested permission to search the house. Defendant consented to the search, which produced a .22 caliber pistol found between the mattress and springs of a bed.

Defendant, still not under arrest, agreed to accompany Deputy Nixon to the jail. When they arrived at the jail at approximately 5:45 p.m., Nixon again advised defendant of his constitutional rights. Beginning at 5:45 p.m. Nixon and two other officers questioned defendant for approximately an hour in the jail area. They then moved defendant to the Sheriff's office and continued questioning him until approximately 10:00 p.m. when defendant made an inculpatory statement. Defendant was formally arrested and served with a warrant shortly after 10:00 p.m.

The following morning at approximately 9:43 a.m. State Bureau of Investigation Agent Steve Cabe and Sheriff Kyle Gentry again questioned defendant who was then in custody. Before beginning their questioning Cabe and Gentry advised defendant of his Miranda rights. After Cabe and Gentry questioned defendant, defendant repeated the statement he had made the previous night. Cabe then left the room, and Gentry continued the questioning. Defendant made a further statement to Gentry.

1. *Fourth Amendment*

[1] "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV [applicable to the states through the fourteenth amendment, *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961)]. Statements obtained during an unreasonable seizure of the person are not admissible. *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 824, 99 S.Ct. 2248 (1979); *Brown v. Illinois*, 422 U.S. 590, 45 L.Ed. 2d 416, 95 S.Ct. 2254 (1975); *Davis v. Mississippi*, 394 U.S. 721, 22 L.Ed. 2d 676, 89 S.Ct. 1394 (1969). The fourth amendment reasonableness requirement prohibits formal arrests except upon probable cause. *See Gerstein v. Pugh*, 420 U.S. 103, 111-112, 43 L.Ed. 2d 54, 64, 95 S.Ct. 854, 862 (1975). The reasonableness requirement applies to investigatory seizures, as well as to the more intrusive technical arrest. The United States Supreme Court has stated that "to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment." *Davis*, 394 U.S. at 726, 22 L.Ed. 2d at 680, 89 S.Ct. at 1397. "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16, 20 L.Ed. 2d 889, 903, 88 S.Ct. 1868, 1877

(1968). With the limited exception of a brief "stop and frisk" based upon reasonable suspicion of criminal conduct supported by articulable and objective facts, any "seizure," whether it bears the cloak of a formal arrest or merely amounts to an investigatory detention, must be founded upon probable cause. *Dunaway*, 442 U.S. at 214, 60 L.Ed. 2d at 837, 99 S.Ct. at 2257.

The Constitution does not, however, prevent law enforcement officers from questioning anyone willing voluntarily to answer. The governmental interest in effective crime control permits officers in appropriate circumstances and in an appropriate manner to direct questions to citizens even though they have no probable cause for an arrest. *Terry*, 392 U.S. at 22, 20 L.Ed. 2d at 906-907, 88 S.Ct. at 1880. But, "while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes[,] they have no right to compel them to answer." *Davis*, 394 U.S. at 727 n. 6, 22 L.Ed. 2d at 681, 89 S.Ct. at 1397.

[2] The issue for determination here, pursuant to the foregoing fourth amendment principles, is whether defendant's inculpatory statements were the product of an unreasonable seizure. The case does not fall within the limited exception to the probable cause requirement espoused in *Terry v. Ohio*, because the investigation was neither brief nor a mere "stop and frisk." In addition, Deputy Nixon admittedly began his investigatory interrogation of defendant without probable cause to arrest. The *Davis*, *Brown*, and *Dunaway* line of cases does not require exclusion of defendant's statements, however, because defendant was never "seized" within the meaning of the fourth amendment.

The trial court found the following facts: Defendant sat in the patrol car at Nixon's request and agreed to go to the jail with Nixon. Prior to seven o'clock defendant voluntarily participated in the investigation of his wife's death when he submitted to interrogation. He would have been permitted to leave at any time had he expressed a desire to do so.

These findings are supported by Deputy Nixon's voir dire testimony and therefore are conclusive on appeal. *State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776 (1979). On these facts, no seizure of defendant occurred between approximately 4:00 p.m. when Nixon first contacted defendant at his home and 7:00 p.m.

that evening. *Terry*, 392 U.S. at 22, 20 L.Ed. 2d at 906-907, 88 S.Ct. at 1880.

The State presented conflicting evidence concerning the period between 7:00 p.m. and 10:00 p.m. During the initial voir dire on the motion to suppress defendant's first inculpatory statement, Nixon stated that from the time he took defendant to the jail, defendant was not free to leave, and that only when defendant gave his statement did Nixon obtain sufficient evidence to secure an arrest warrant. Following a recess, when counsel for the State and the defendant indicated they had no further questions of Nixon on voir dire, the State requested and received permission to recall Nixon for additional voir dire. During the second portion of the voir dire, Nixon stated that at 7:00 p.m., based on defendant's responses to interrogation and information obtained from an investigator who had questioned decedent's friends, he had obtained evidence which he "felt" gave him probable cause to arrest defendant for the murder. Nixon stated that until 7:00 p.m. had defendant asked to leave he would have been permitted to do so, but that after 7:00 he would not have been allowed to leave.

Although Nixon testified when recalled that he "felt like [he] had probable cause to arrest [defendant] at [7:00 p.m.]," he did not arrest defendant at that time; and there has been no judicial determination that probable cause for defendant's arrest existed at 7:00 p.m. Therefore, the interrogation of defendant between 7:00 and 10:00 cannot be justified as occurring during custody based on probable cause. However, the court's findings of fact, based upon competent evidence, indicated that defendant began the interrogation as a voluntary participant and at no time became a non-voluntary participant. His initial assent to submit to investigatory questioning and to accompany Nixon to the jail remained unchanged throughout the evening. Defendant, therefore, was at no time prior to making his first inculpatory statement "seized" within the meaning of the fourth amendment. Consequently, the statement was not rendered inadmissible by fourth amendment exclusionary principles. In addition, because the statement was not impermissibly obtained, it was properly considered in determining probable cause for issuance of a warrant for defendant's arrest.

Defendant's subsequent statement to Agent Cabe and Sheriff Gentry, and his further statement to Gentry alone, were made while in custody pursuant to an arrest warrant based on probable cause. Thus they, too, were not made while defendant was illegally seized in violation of the fourth amendment, and were not thereby rendered inadmissible by fourth amendment exclusionary principles.

2. *Fifth and Sixth Amendments*

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V [applicable to the states through the fourteenth amendment, *Malloy v. Hogan*, 378 U.S. 1, 12 L.Ed. 2d 653, 84 S.Ct. 1489 (1964)]. "In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI [applicable to the states through the fourteenth amendment, *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963)]. The right to the assistance of counsel attaches when a person is subjected to custodial interrogation, *Escobedo v. Illinois*, 378 U.S. 478, 12 L.Ed. 2d 977, 84 S.Ct. 1758 (1964), and "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination," *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L.Ed. 2d 694, 706, 86 S.Ct. 1602, 1612 (1966). The *Miranda* Court prescribed the following procedural safeguards:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.

384 U.S. at 444, 16 L.Ed. 2d at 706-707, 86 S.Ct. at 1612.

[3] We need not determine whether defendant's statements were the product of "custodial interrogation," because the evidence unequivocally shows that several times prior to making the inculpatory statements defendant was fully advised of his *Miranda* rights. The question presented is whether defendant

knowingly and intelligently waived effectuation of these rights. He contends he was not mentally competent to make a knowing and intelligent waiver.

The trial court found, with regard to each of defendant's statements, that the officers fully explained his constitutional rights to him and that he indicated he understood them. The court also found that defendant had understood his rights and voluntarily waived them. The court's findings are supported by the officers' testimony on voir dire and, therefore, are conclusive on appeal. *State v. Small*, 293 N.C. 646, 239 S.E. 2d 429 (1977). The testimony elicited on voir dire that defendant did not sign a waiver form, that the officers did not know whether defendant could read or write, and that defendant jumped from one subject to another during questioning, did not compel a finding that defendant was incompetent to waive his rights voluntarily and knowingly. Determinations of admissibility are the function of the trial court after a hearing out of the presence of the jury. G.S. 15A-977. Competent evidence not presented during the suppression hearings, such as the subsequent testimony before the jury that defendant had a prior history of mental unfitness, was not before the court when it ruled on the admissiblity of defendant's statements. Although "[t]he courts must presume that a defendant did not waive his rights [and] the prosecution's burden is great," *North Carolina v. Butler*, 441 U.S. 369, 373, 60 L.Ed. 2d 286, 292, 99 S.Ct. 1755, 1757 (1979), we find that the State carried its burden of proving an effective waiver on each inculpatory statement.

For the foregoing reasons, the trial court properly admitted defendant's statements.

RE-OPENING OF VOIR DIRE;
LEADING QUESTIONS

[4] Defendant assigns error to the court's allowing reopening of the voir dire examination of Deputy Nixon. "It is within the discretion of the trial judge to permit, in the interest of justice, the examination of witnesses at any stage of trial. . . . This discretion to determine the order of testimony will not be interfered with unless it is abused." *State v. Johnson*, 23 N.C. App. 52, 57, 208 S.E. 2d 206, 210, *cert. denied* 286 N.C. 339, 210 S.E. 2d

59 (1974). We find no abuse of discretion in the re-opening of Deputy Nixon's voir dire examination.

Defendant also assigns error to the court's allowing leading questions to Deputy Nixon upon the re-opened voir dire. " '[I]t is firmly entrenched in the law of this State that it is within the sound discretion of the trial judge to determine whether counsel shall be permitted to ask leading questions, and in the absence of abuse the exercise of such discretion will not be disturbed on appeal.' " *State v. Davis*, 290 N.C. 511, 536, 227 S.E. 2d 97, 113 (1976), *quoting from State v. Greene*, 285 N.C. 482, 492, 206 S.E. 2d 229, 235 (1974). We find no abuse of discretion in the allowance of the questions asked of Deputy Nixon on the re-opened voir dire.

ADMISSIBILITY OF PISTOL

[5] Defendant challenges the admissibility of the pistol which Deputy Nixon found between the mattress and springs of a bed in defendant's house. He contends (1) the pistol was the product of an impermissible seizure, and (2) there was insufficient evidence that it was the weapon used in the killing of his wife.

Deputy Nixon had testified as follows:

> I . . . told [defendant] I would like to search his home for a gun and ask[ed] whether it would be all right if I looked around [,] and he told me to go ahead and look all I wanted to. . . .
>
> . . . .
>
> At the time that I asked him whether I could search his residence, he voluntarily told me to go right ahead and do it. He did not in any way try to prevent me from searching his residence.

This testimony was uncontradicted. Nothing in the record compelled a finding that defendant lacked the requisite mental capacity to give a voluntary and knowing consent to search. "Consent to search, freely and intelligently given, renders competent the evidence thus obtained." *State v. Frank*, 284 N.C. 137, 143, 200 S.E. 2d 169, 174 (1973). We have held, *supra*, that defendant was not illegally seized when he gave the consent to search. We thus

find without merit defendant's contention that the pistol was the product of an impermissible seizure.

[6] We also find without merit defendant's contention that there was insufficient evidence that the pistol was the weapon used in the killing of his wife. Deputy Nixon had testified without objection that he found the pistol between the mattress and springs of a bed in defendant's house on the afternoon decedent was killed. He further testified without objection that defendant had told him that when he went to decedent's house that afternoon he had carried the pistol with him, and that the pistol was a small caliber weapon, and the wound he had observed on decedent's body was "a small caliber wound." Medical testimony had established that decedent died from a single gunshot wound to the neck.

"[W]eapons may be admitted where there is evidence tending to show that they were used in the commission of a crime . . . ." *State v. Miller*, 288 N.C. 582, 592, 220 S.E. 2d 326, 334 (1975). The foregoing evidence clearly tends to show that the pistol admitted was the weapon used to kill decedent. Hence, we hold that it was properly admitted. As in *Miller*, however, "if it be conceded, *arguendo*, that [the pistol] had not been sufficiently identified so as to render its admission erroneous," in view of defendant's statements and other evidence tending to link him to the crime, its admission was harmless beyond a reasonable doubt. 288 N.C. at 592, 220 S.E. 2d at 334.

EVIDENTIARY RULINGS ON PSYCHIATRIC TESTIMONY

Defendant assigns error to five evidentiary rulings during the testimony of Dr. James Groce, an expert in forensic psychiatry who testified as a witness for defendant.

I.

[7] Dr. Groce testified regarding the result of an I.Q. test administered to defendant at his direction while defendant was hospitalized for evaluation in connection with this case. The court then disallowed his proffered testimony as to the results of other I.Q. tests previously administered to defendant. Neither the disallowed testimony nor the testimony preceding it indicated when the prior tests were administered. The relevance of these tests to defendant's mental capacity at the time the alleged crime was committed thus was not established, and it was not error to

exclude the proffered testimony. *See* 1 Stansbury's North Carolina Evidence § 77 *et seq.* (Brandis Rev. 1973).

II.

[8] The court disallowed Dr. Groce's proffered opinion that when defendant was admitted to the hospital for evaluation, six days after decedent's death and approximately eleven months before trial, he was incapable of standing trial. The issue of a defendant's capacity to stand trial "should be determined prior to the trial . . . for the crime charged in the indictment." *State v. Propst*, 274 N.C. 62, 69, 161 S.E. 2d 560, 566 (1968). It was not properly raised during testimony of the last of nineteen witnesses at trial. Even so, the appropriate issue would have been defendant's capacity to stand trial at the time of trial, not at the time of his hospitalization eleven months earlier. It thus was not error to exclude the proffered testimony.

III.

[9] The court disallowed Dr. Groce's proffered testimony as to what defendant had told him regarding his previous hospitalizations "for mentally related problems." It was established on voir dire that these hospitalizations occurred during a period commencing in 1958 and terminating in 1967. While an expert psychiatric witness may recount his out-of-court conversations with a defendant in a criminal trial in order to explain his diagnosis to the jury, *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979), such evidence is nevertheless properly excluded if it concerns times too remote to have any relevance to defendant's mental condition at the time of the crime for which he is charged. *State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980). The evidence in question concerned times too remote to have any relevance to defendant's mental condition at the time of decedent's death. It therefore was not error to exclude it.

IV.

[10] Dr. Groce testified that he "would estimate [that] sixty percent, perhaps seventy percent of the population has a neurosis." He was then asked: "Q. So, based on that, there are twelve people on the jury. How many have a neurosis?"

He answered, over objection: "It would be difficult to say without my interviewing them. I would say that if they are

average citizens, a little over half of them." Defendant contends this testimony was "irrelevant and inflammatory." While perhaps it was irrelevant, we do not believe there is a reasonable possibility that a different result would have been reached had this testimony been excluded. Defendant thus has failed to sustain his burden of showing prejudice from its admission. G.S. 15A-1443.

V.

[11] The court allowed Dr. Groce to testify on cross examination that "in the general sense" defendant knew the difference between right and wrong. This testimony was relevant and admissible on the issue of whether defendant was legally insane and thereby exempt from criminal responsibility. *See State v. Franks*, 300 N.C. 1, 10, 265 S.E. 2d 177, 182 (1980); *State v. Potter*, 285 N.C. 238, 249, 204 S.E. 2d 649, 656 (1974). There is thus no merit to defendant's assignment of error to its admission.

MOTIONS TO DISMISS

[12] Defendant assigns error to the denial of his motions to dismiss. He contends that, without his statements, the evidence was inadequate to sustain the conviction. We have held the statements properly admitted, however; and with the statements in evidence, " 'there is substantial evidence to support a finding both that an offense charged in the bill of indictment has been committed and that defendant committed it.' " *State v. Joyner*, 301 N.C. 18, 27, 269 S.E. 2d 125, 131 (1980), *quoting from State v. Roseman*, 279 N.C. 573, 580, 184 S.E. 2d 289, 294 (1971). The motions to dismiss thus were properly denied.

INSTRUCTION ON INVOLUNTARY MANSLAUGHTER

[13] The court instructed on the possible verdict of guilty of involuntary manslaughter as follows:

> Involuntary manslaughter is the unintentional killing of a human being by an unlawful act, not amounting to a felony or by an act done in a criminally negligent way.
>
> For you to find the defendant guilty of involuntary manslaughter, the State must prove two things beyond a reasonable doubt. First, that the defendant acted unlawfully and the defendant's act was unlawful if it was an assault with a deadly weapon. An assault with a deadly weapon is the in-

> tentional and unjustified pointing of a deadly weapon or a pistol at one by another. And a .22 caliber pistol is a deadly weapon. Second, the State must prove that this unlawful act proximately caused [decedent's] death.
>
> . . . .
>
> [I]f you do not find the defendant guilty of second degree murder or voluntary manslaughter, but the State has proved beyond a reasonable doubt that the defendant did not act in self defense, then you must determine whether the defendant is guilty of involuntary manslaughter. If you find from the evidence beyond a reasonable doubt that . . . [defendant] assaulted [decedent] with a deadly weapon, thereby proximately causing [her] death, it would be your duty to return a verdict of guilty of involuntary manslaughter.

Defendant contends the court erred by failing to explain the meaning of "criminal negligence." The court explained, however, that to find defendant guilty of involuntary manslaughter, the jury must find that defendant's act was unlawful, and that the act was unlawful if it was an assault with a deadly weapon. "An intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of life or limb, which proximately results in injury or death, *is culpable negligence.*" *State v. DeWitt*, 252 N.C. 457, 458, 114 S.E. 2d 100, 101 (1960) (emphasis supplied). G.S. 14-32, which establishes the offense of assault with a deadly weapon, is a statute designed for the protection of life or limb. The court's explanation regarding the unlawful act of assault with a deadly weapon thus included, in substance, a definition of culpable negligence. It therefore, while not a model charge, see N.C.P.I.—Crim. 206.30, sufficed to "explain the law arising on the evidence" in this case. G.S. 15A-1232.

RESULT

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

No error.

Judges HEDRICK and HILL concur.

STATE OF NORTH CAROLINA v. LAVERN RAY IRWIN

No. 818SC562

(Filed 5 January 1982)

1. **Robbery § 4.2— common law robbery—sufficiency of evidence**

The evidence was sufficient to show the life of the victim of the wrongful taking of property was endangered or threatened and to permit an instruction on common law robbery where it showed defendant wielded a knife and the victim testified that he was scared the defendant might hurt him if given the chance. Where there is evidence that the robber wielded a dangerous weapon, testimony by the victim that he was scared is sufficient to meet any requirement that the victim be endangered or threatened.

2. **Kidnapping § 1; False Imprisonment § 1— false imprisonment—lesser offense of kidnapping**

False imprisonment is a lesser included offense of kidnapping and could properly be submitted to the jury where kidnapping was charged in the indictment.

3. **Robbery § 5.3— common law robbery—hypothetical in instructions**

The defendant did not show prejudice in the court's giving a hypothetical example contrasting a temporary and permanent taking in response to a request by a juror.

4. **Assault and Battery § 14.5— assault with intent to kill—insufficiency of evidence**

A specific intent to kill is an essential element of the offense of assault with intent to kill. Hence an intent to kill the victim by means of the assault, as opposed to an intent merely to intimidate, must accompany the assault. Therefore, the court improperly submitted to the jury the charge of assault with a deadly weapon with intent to kill where the evidence tended to show: Defendant grabbed a jail matron, held a knife to her throat and inadvertently caused the knife to make a small abrasion on her left cheek; he told the jailer and others that he would kill the matron if he had to, that "[D]on't any of [you] be no damn hero, I will kill this woman," and that "I don't want to kill this woman but I don't have any choice"; and once he locked the matron and others in a jail cell he fled without killing her. This was not evidence that defendant committed an assault the intent of which was to kill.

Judge MARTIN (Harry C.) concurring in part and dissenting in part.

APPEAL by defendant from *Tillery, Judge.* Judgments entered 15 January 1981 in Superior Court, WAYNE County. Heard in the Court of Appeals on 12 November 1981.

Defendant was charged in a proper bill of indictment with armed robbery, assault with a deadly weapon with intent to kill inflicting serious injuries, and three counts of kidnapping.

Upon defendant's plea of not guilty, the State offered evidence tending to show the following:

On 20 May 1980, defendant was confined in the Wayne County jail awaiting trial on charges not related to these cases. At approximately 8:30 p.m., defendant was allowed by the jailer, Dewey Brogden, to come out of his cell to answer a telephone call. When defendant finished his telephone conversation, the jailer told defendant to return to his cell. Defendant then grabbed Ellen Sampson, a matron who was present, around the rib cage and held a knife to her throat. Defendant stated that he did not want to hurt anyone but that he did not have anything to lose and would kill Ms. Sampson if he had to. Defendant also said, "I don't want to hurt this woman but I don't have any choice," and "[D]on't any of [you] be no damn hero, I will kill this woman." After defendant held the knife to Ms. Sampson's throat, jailer Brogden, who was unarmed, became afraid of defendant, and scared that he would hurt someone and scared that the defendant might hurt Brogden if given the chance. Defendant ordered the jailer and Rodney Brogden, George Benson, Sylvester Williams, Howard Bebout, and Franklin Spence to get into a cell. Defendant, still holding the knife at the matron's throat, then followed jailer Brogden, Rodney Brogden, George Benson, and the other men as they went down the hall to the cell as ordered. Before jailer Brogden entered the cell and while he was at a distance of about ten feet from defendant, defendant told him to throw his (Brogden's) billfold and keys to the floor; Brogden did so, and defendant took the keys, some of which were to jailer Brogden's pickup truck. Thereafter, jailer Brogden, Rodney Brogden, George Benson, Sylvester Williams, Howard Bebout, and Franklin Spence, along with Ellen Sampson, went into the cell, and defendant slammed and locked the door. Defendant exited the jailhouse by the front door and was apprehended while attempting to get into the jailer's truck.

Defendant offered no evidence.

The jury returned a verdict finding defendant guilty of common law robbery, assault with a deadly weapon with intent to kill upon Ellen Sampson, and of three counts of false imprisonment. From judgments sentencing defendant to prison for a term of two years for common law robbery, five years for assault with a dead-

ly weapon with intent to kill, and two years for each count of false imprisonment, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Fred R. Gamin, for the State.

Hulse & Hulse, by Herbert B. Hulse, for defendant appellant.

HEDRICK, Judge.

Defendant first assigns as error the court's failure to grant defendant's motion to dismiss the charge of armed robbery for insufficiency of the evidence. Since defendant was acquitted of that offense, this assignment of error is groundless.

[1] Defendant's next assignment of error is the court's instruction to the jury on the offense of common law robbery. Defendant argues there was insufficient evidence to permit instruction on that offense in that the State presented no evidence of an essential element of common law robbery, to wit, that the life of the *victim* of the wrongful taking of property, here Dewey Brogden, was endangered or threatened. Defendant contends that the State's evidence tended to show that only Ellen Sampson's, not Brogden's, life was threatened by defendant.

Common law robbery is the taking of money or goods with felonious intent from the person of another, or in his presence, against his will, by violence or putting him in fear. *State v. Moore*, 279 N.C. 455, 183 S.E. 2d 546 (1971). Without commenting on whether the endangerment or threat must be posed to the victim of the robbery as opposed to some third person, suffice it to say that evidence in the present case tended to show that defendant accomplished the robbery of personal property from Brogden by endangering or threatening the life of Brogden himself. Defendant was wielding a knife and could at any moment have turned its use towards Brogden if Brogden balked at defendant's demands. Brogden testified that he was scared that defendant might hurt him (Brogden) if given the chance. When there is evidence that the robber is wielding a dangerous weapon, testimony by the victim that he was scared is sufficient to meet any requirement that the victim be endangered or threatened. *See State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399, *appeal dismissed and cert. denied*, 402 U.S. 1006, 91 S.Ct. 2199, 29 L.Ed. 2d

428 (1971). Furthermore, the mere fact that the victim complied with the assailant's demands is itself indicative of fear. *State v. Hammonds*, 28 N.C. App. 583, 222 S.E. 2d 4 (1976). The State, therefore, put on evidence of all essential elements of common law robbery, including the "violence or fear" requirement, and this assignment of error is without merit.

[2] Defendant also assigns as error the court's instructions to the jury on the offense of false imprisonment. Defendant argues that false imprisonment is not a lesser included offense of the offense charged in the indictment, *i.e.*, kidnapping, and therefore should not have been submitted for the jury's consideration. This argument is without merit. "[W]hen a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense which is charged in the bill of indictment contains all the essential elements of the lesser." *State v. Hunter*, 299 N.C. 29, 38, 261 S.E. 2d 189, 195 (1980). False imprisonment is a lesser included offense of kidnapping, *State v. Fulcher*, 34 N.C. App., 233, 237 S.E. 2d 909 (1977), *aff'd*, 294 N.C. 503, 243 S.E. 2d 338 (1978), and therefore the court's instruction thereon was not improper. This assignment of error has no merit.

[3] Defendant's next assignment of error is the court's use of a hypothetical illustration in instructions it gave to the jury after a juror requested further elaboration on the "permanent taking" element of common law robbery.

In explaining legal principles to a lay jury, the trial judge's use of illustrations should be carefully guarded to avoid suggestions susceptible of inferences as to facts beyond intended, but the mere use of hypothetical illustrations will not result in vacating the verdict on appeal unless the appellant can show that he was materially prejudiced by their use. *Rea v. Simowitz*, 226 N.C. 379, 38 S.E. 2d 194 (1946). A judge's charge to the jury is to be construed as a whole, and if, when so construed, it is sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed, any exception to it will not be sustained even though the instruction could have been more aptly worded. *State v. Williams*, 299 N.C. 652, 263 S.E. 2d 774 (1980).

In the present case, the court gave a hypothetical example contrasting a temporary and a permanent taking. Defendant has

in no way shown how the instruction prejudiced him, and in fact, the instruction fairly and correctly presented the law in response to a question of a juror. This assignment of error is therefore overruled.

[4] Finally, defendant assigns as error the court's failure to grant his motion to dismiss, for insufficiency of the evidence, the charge of assault with a deadly weapon with intent to kill. Defendant argues that the State presented no evidence that defendant had the requisite intent to kill.

"[T]here must be substantial evidence of all material elements of the crime charged to withstand the motion to dismiss." *State v. Murphy*, 49 N.C. App. 443, 444, 271 S.E. 2d 573, 574 (1980). A specific intent to kill is an essential element of the offense of assault with intent to kill. *State v. Cooper*, 8 N.C. App. 79, 173 S.E. 2d 604 (1970); *see also State v. Parks*, 290 N.C. 748, 228 S.E. 2d 248 (1976) and *State v. Christy*, 26 N.C. App. 57, 215 S.E. 2d 154 (1975). Hence an intent to kill the victim by means of the assault, as opposed to an intent merely to intimidate, must accompany the assault. To sustain a conviction of assault with intent to kill, there must be an assault the intent of which is to kill. The requisite intent to kill must be proven by the State, and may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances. *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972). Furthermore, evidence that a defendant would have had an intent to kill only if a particular event occurred is not sufficient to meet the requirement that there be evidence of an actual, existing, and present intent to kill, since such a conditional intent to kill will never be actualized if the condition precedent upon which it is based never occurs. *Stroud v. State*, 131 Miss. 875, 95 So. 738 (1923); *see also Craddock v. State*, 204 Miss. 606, 37 So. 2d 778 (1948) and *Lindley v. State*, 234 Miss. 423, 106 So. 2d 684 (1958).

In the present case, the State presented evidence that defendant grabbed the matron and held a knife to her throat and inadvertently caused the knife to make a small abrasion on her left cheek and that defendant said that he would kill Ms. Sampson if he had to, and that he said "[D]on't any of [you] be no damn hero, I will kill this woman" and "I don't want to hurt this woman but I don't have any choice." Even if this evidence tended to show that

defendant had an intent to kill Ms. Sampson *eventually,* it is not evidence of the requisite intent to kill her by means of the assault, *i.e.,* it is not evidence that defendant committed an assault the intent of which was to kill.

The State's evidence really tended to show that defendant threatened to kill Ms. Sampson only if she and other persons present at the jail failed to comply with his orders. This evidence is evidence of only a conditional intent to kill, the converse of which is a specific intent *not to kill* anyone if Brogden and the others complied with defendant's demands. The State presented evidence of an intent to kill which would be activated only upon the captives' noncompliance; the State presented no evidence that the intent was ever activated; rather, the fact that the captives did comply and that Ellen Sampson was not killed or exposed to an attempt by defendant to kill her negates the possibility that defendant ever intended to kill her. The State's evidence shows only that defendant committed an assault with the intent to intimidate. The trial judge, therefore, improperly submitted to the jury the charge of assault with a deadly weapon with intent to kill, and defendant's conviction of that offense must be reversed.

There was ample evidence that defendant, using an instrument capable of producing great bodily harm, committed a show of violence causing Ms. Sampson to have a reasonable apprehension of immediate bodily harm. Hence, the State presented sufficient evidence to allow the judge to submit to the jury the offense of assault with a deadly weapon. The jury, in finding beyond a reasonable doubt that defendant committed assault with a deadly weapon with intent to kill, necessarily found beyond a reasonable doubt that defendant had committed the elements of the lesser included offense of assault with a deadly weapon. Hence, this case will be remanded solely for entry of a verdict of guilty of assault with a deadly weapon, and for a proper judgment on that verdict. *See State v. Goss,* 293 N.C. 147, 235 S.E. 2d 844 (1977); *State v. Keeter,* 35 N.C. App. 574, 241 S.E. 2d 708 (1978); *State v. Cornell,* 51 N.C. App. 108, 275 S.E. 2d 857 (1981). There has been no showing that a new trial would produce a different result as to the jury's findings on defendant's guilt of assault with a deadly weapon, and therefore a new trial is not warranted. *State v. Mathis,* 293 N.C. 660, 239 S.E. 2d 245 (1977).

The result is: for the trial on common law robbery and false imprisonment, no error; for the judgment on assault with a deadly weapon with intent to kill, vacated and remanded.

No error in part; vacated and remanded in part.

Judge CLARK concurs.

Judge MARTIN (Harry C.) concurs in part and dissents in part.

Judge MARTIN (Harry C.) concurring in part and dissenting in part:

I concur in the majority opinion finding no error in the trial of the common law robbery and false imprisonment charges. For the reasons set forth below, I dissent from the portion of the opinion with respect to the charge of assault with a deadly weapon with the intent to kill.

The majority holds that the state failed to present sufficient evidence of defendant's intent to kill to allow the felonious assault charge to be submitted to the jury. They argue that any intent on the part of defendant to kill Ellen Sampson was conditional and, relying upon a 1923 Mississippi case, hold that the evidence is insufficient on the element of intent to carry the case to the jury on this charge. I cannot agree.

From the majority's holding comes the inescapable conclusion that evidence of intent to kill is insufficient as a matter of law in any hostage-taking situation where a deadly weapon is used as a coercive device to force compliance with the defendant's demand. Moreover, by logical extension of this reasoning, it would be possible for any defendant to negate the intent element as a matter of law by simply informing his victim that he does not intend to kill or promising not to kill as long as the victim submits. To be sure, the law does not contemplate that the accused can control the degree of his culpability in this fashion.

Intent is a condition of the mind, seldom, if ever, capable of direct or positive proof, but is arrived at by such just and reasonable deductions from the acts and facts proven as the guarded judgment of a reasonably cautious and prudent person

would ordinarily draw therefrom. It is usually shown by facts and circumstances known to the party charged with the intent and may be evidenced by the acts and declarations of the party.

Intent to kill is a mental attitude and ordinarily must be proved by circumstantial evidence, that is, by proving facts from which the intent may be reasonably inferred. Intent to kill may be inferred from the act in question, the nature of the assault, the manner in which it was made, the purpose of the assault, the conduct of the parties, and other relevant circumstances. *State v. Cauley*, 244 N.C. 701, 94 S.E. 2d 915 (1956); *State v. Revels*, 227 N.C. 34, 40 S.E. 2d 474 (1946); *State v. Smith*, 211 N.C. 93, 189 S.E. 175 (1937). Ordinarily, it must be left to the jury to decide, from all the facts and circumstances, whether the ulterior criminal intent existed. *State v. Allen*, 186 N.C. 302, 119 S.E. 504 (1923).

In determining whether a charge should be submitted to the jury, the evidence must be considered in the light most favorable to the state, and the state is entitled to every reasonable intendment thereon and every reasonable inference therefrom. Discrepancies and contradictions in the evidence are disregarded, as they are matters for the jury and do not warrant nonsuit. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977); *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). If there is any evidence tending to prove the fact of guilt or which reasonably leads to that conclusion as a logical and legitimate deduction, the issue is one to be decided by the jury. *Smith*, 291 N.C., *supra*.

Applying the above rules to the facts of this case, I find ample evidence to take the case to the jury on the issue of intent to kill. Defendant was a prisoner in the Wayne County jail. In escaping from the jail, he grabbed Ellen Sampson, a female employee in the jail, from behind, holding her around the body with one arm and putting and holding a knife to her throat with his other arm. He kept the knife at her throat at all times until he left the jail, a period of some five to seven minutes. He held her up with such force that she lost her shoes. When he first assaulted her, he had the knife at her face, causing a small abrasion on her cheek. Then he lowered the knife to her throat. I find no evidence that the small cut or abrasion to her face was "inadvertent," as it is described by the majority. The statements of defendant, when

placed upon this background of a desperate prisoner escaping from jail by threatening the life of Ellen Sampson, do not negate as a matter of law the inferences as to defendant's intent arising from the circumstances of the assault. His statement, "don't any of [you] be no damn hero, I will kill this woman," is in no way conditional.

The jury had no difficulty in considering all the evidence and resolving the issue of defendant's intent when he assaulted Ellen Sampson. It was the jury's province to do so. *Allen, supra.*

I find no error in the trial of the felonious assault charge.

IN THE MATTER OF THE CONSTRUCTION OF A HEALTH CARE FACILITY BY WILKESBORO, LIMITED, A PARTNERSHIP

No. 8123SC321

(Filed 5 January 1982)

Administrative Law § 5; Hospitals § 2.1— health care facility—exemption from certificate of need requirement—final agency decision—aggrieved party—judicial review

A letter from the Department of Human Resources informing respondent that the Department was satisfied that respondent had commenced construction of a health care facility prior to 1 January 1980 and could proceed without meeting the requirements of the Certificate of Need Law, G.S. 131-175 *et seq.*, was a final agency decision in a contested case as required for judicial review pursuant to G.S. 150A-43. Furthermore, petitioner, a prospective competitor of respondent, was a "person aggrieved" and could seek judicial review of the Department's decision that respondent was not required to obtain a certificate of need in order to construct the health care facility. G.S. 131-176(6), (9); G.S. 131-185(b); G.S. 150A-2.

APPEAL by petitioner from *Rousseau, Judge.* Order entered 13 February 1981, in Superior Court, WILKES County. Heard in the Court of Appeals 11 November 1981.

This action arose out of the proposed construction of a health care facility in Wilkes County. The petition filed in the cause set forth the following allegations: The respondent, Wilkesboro, Limited (hereinafter Wilkesboro), obtained approval for the pro-

posed health care facility under § 1122, P.L. 92-603.[1] Petitioner, Vespers, Inc. (hereinafter Vespers), operates a skilled nursing facility within two miles of the site selected by respondent. Prior to 1 January 1980, the petitioner had closely monitored all construction activities of respondent and had determined that respondent had not commenced construction prior to that time. After 1 January 1980, petitioner, through its corporate officers, notified respondent Department of Human Resources[2] (hereinafter DHR) on several occasions that respondent Wilkesboro had not started construction and that the exemption from compliance with the Certificate of Need Law, G.S. §§ 131-175 *et seq.*, as outlined in Session Laws 1977, 2nd Sess., c. 1182, s. 4, no longer applied to Wilkesboro. On 22 May 1980, DHR wrote Wilkesboro informing it that DHR was satisfied that Wilkesboro had commenced construction and that it could proceed without meeting the requirements of the Certificate of Need Law. The petitioner requested a reconsideration of DHR's decision. On 28 July 1980, the Certificate of Need Section, DHR, denied the petitioner's request.

Thereafter, petitioner sought judicial review of the denial of its request for reconsideration. Both of the respondents filed motions to dismiss the action which were granted by the trial court. The court found that the petitioner was not an aggrieved party under G.S. § 150A-2, and that the 22 May 1980 letter from DHR was not a final agency decision in a contested case as required for judicial review by G.S. § 150A-43. From this order, petitioner appealed.

1. Section 1122, P.L. 92-603 is a reference to § 221 of P.L. 92-603 amending § 1122 of the Social Security Act. See footnote 3 below.

2. The State respondents in this action are Dr. Sarah Morrow, Secretary of Human Resources; I. O. Wilkerson, Jr., Director, Division of Facility Services, North Carolina Department of Human Resources; Gary Vaughn, Chief, Certificate of Need Section, Division of Facility Services, North Carolina Department of Human Resources; Mike Pedneau, Director, Division of Plans and Operations, North Carolina Department of Human Resources; Chief, State Health Planning and Development Agency, Division of Plans and Operations, North Carolina Department of Human Resources; and Robert Hillman, Assistant Attorney General, North Carolina Department of Justice. For simplicity, we shall refer to them collectively as the respondent DHR or simply DHR.

Attorney General Edmisten, by Assistant Attorney General Robert L. Hillman, for the State respondents.

McElwee, Hall, McElwee & Cannon, by William H. McElwee, III and William C. Warden, Jr., for petitioner appellant.

Bode, Bode & Call, by Robert V. Bode, for respondent Wilkesboro, Limited.

MORRIS, Chief Judge.

The North Carolina Certificate of Need Law, G.S. 131-175 et seq., effective 1 January 1979, recognized, among other things, the "trend of proliferation of unnecessary health care facilities and equipment" and the resulting "costly duplication and underuse of facilities," G.S. 131-175(4). The General Assembly, in enacting the Law, found further:

> That the general welfare and protection of lives, health and property of the people of this State require that new institutional health services to be offered within this State be subject to review and evaluation as to type, level, quality of care, feasibility, and other criteria as determined by provisions of this Article or by the North Carolina Department of Human Resources pursuant to provisions of this Article prior to such services being offered or developed in order that only appropriate and needed institutional health services are made available in the area to be served.

G.S. 131-175(7). Under the law, no person can undertake new institutional health services or health care facilities without first applying for (G.S. 131-180) and obtaining a certificate of need. G.S. 131-178(a).

North Carolina Session Laws 1977, 2d Sess., c. 1184, s. 4 provided that the act would not apply to any project which had received approval under the program of 42 U.S.C. § 1320a-1 (Section 1122 of the federal Social Security Act, as amended by § 221, P.L. 92-603,[3]) prior to 1 January 1979, so long as construction of

3. Session Laws 1977, 2d Sess., c. 1182, s. 4 actually referred to Section 1122, P.L. 92-603. P.L. 92-603, however, contains no Section 1122, but does contain Section 221 amending Section 1122 of the Social Security Act. It is the amended section to which the session law refers.

the project commenced before 1 January 1980. The amended Section 1122 provided a procedure by which the federal government, in cooperation with the various states, reviewed proposed capital expenditures for health care facilities in order to eliminate expenditures for unnecessary facilities. It is logical, therefore, that North Carolina's exemption from the Certificate of Need Law of projects approved under the federal program before 1 January 1979, and on which construction had commenced prior to 1 January 1980, was designed to avoid two review processes, one by the federal government and one by the State. On the other hand, by requiring commencement of construction prior to 1 January 1980, the legislature recognized that a delay in construction of a federally-approved project could be extensive enough to warrant a new State review.

Judicial review of actions taken under the Certificate of Need Law is governed by the North Carolina Administrative Procedure Act (hereinafter NCAPA), Chapter 150A of the General Statutes:

> Any proponent of a new institutional health service or capital expenditure project or any person who qualifies as a "party" or "person aggrieved" under G.S. 150A-2 shall have all the rights of appeal and judicial review available under Articles 3 and 4 of Chapter 150A.

G.S. 131-185(b). Article 4 of Chapter 150A governs the right to judicial review:

> Any person who is aggrieved by a final agency decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this Article, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.

G.S. 150A-43. In order, therefore, for a person to be entitled to judicial review under the NCAPA, (1) he must be a person aggrieved; (2) the agency decision must be a final one; and (3) the case in which the review is sought must be a contested one.

Definitions of "contested case" and "person aggrieved" are found in G.S. 150A-2:

> (2) "Contested case" means any agency proceeding, by whatever name called, wherein the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing. Contested cases include, but are not limited to proceedings involving rate-making, price-fixing and licensing. Contested cases shall not be deemed to include rule making, declaratory rulings, or the award or denial of a scholarship or grant.
>
> . . . .
>
> (6) "Person aggrieved" means any person, firm, corporation, or group of persons of common interest who are directly or indirectly affected substantially in their person, property, or public office or employment by an agency decision.

Furthermore, G.S. 131-176(9) defines a "final decision" under the Certificate of Need Law as "an approval, a denial, an approval with conditions, or a deferral."

With this statutory scheme as background, we have reviewed the action taken by petitioner Vespers, Inc. in order to determine whether the trial court properly dismissed the action. We decide that the trial court erred in concluding that petitioner was not an aggrieved party and that the 22 May 1980 letter was not a final agency decision in a contested case. Dismissal of the action was, therefore, improper.

The action taken by respondent DHR in its 22 May 1980 letter relieving Wilkesboro, Limited of the requirement to apply for a certificate of need amounted to an agency determination of the legal duties of Wilkesboro, Limited. Although the record reveals no adjudicatory hearing, we believe that the case was a contested one. According to the petition filed by Vespers, the officials of respondent DHR had been informed that there was a question as to whether respondent Wilkesboro had commenced construction on the proposed health care facility before 1 January 1980. DHR, as the designated State Health Planning and Development Agency, had the duty to fulfill the purpose of the Certificate of Need Law, G.S. 131-177, and should have determined whether Wilkes-

boro had commenced construction before 1 January 1980, or whether it had a legal duty to submit an application for a certificate of need. The term *commencement of construction* as used in the act has a specific definition, found at G.S. 131-176(6):

> "Commencement of Construction" means that all of the following have been completed with respect to a project:
>
> a. A written contract executed between the applicant and a licensed contractor to construct and complete the project within a designated time schedule in accordance with final architectural plans;
>
> b. Required initial permits and approvals for commencing work on the project have been issued by responsible governmental agencies; and
>
> c. Actual construction work on the project has started and a progress payment has been made by the applicant to the licensed contractor under terms of the construction contract.

This definition, almost verbatim, is also found at N.C.A.C. 10 3R .0104(11). There is nothing in the record which discloses that respondent DHR had made determinations concerning construction contracts, permits, or progress payments. It nevertheless had approved Wilkesboro's continued development of the health care facility, thereby exempting Wilkesboro from the certificate of need requirement.

Furthermore, we find that the 28 July 1980 letter of respondent DHR refusing petitioner's request for a reconsideration of the issue constituted a final agency decision under G.S. 131-176(9). The letter set forth three types of hearings available under the administrative code and erroneously concluded, as made apparent by this opinion, that none of the three was applicable:

> A "contested case" hearing is one "wherein the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing." G.S. 150A-2(2). Vespers is not entitled to a contested case hearing pursuant to 10 NCAC 1B .0200 because it is not seeking a determination of its legal rights, duties or privileges. Rather, Vespers is seeking a determination of Wilkesboro's legal rights, duties or privileges.

Vespers is also not entitled to either a reconsideration or certificate of need hearing under 10 NCAC 3R .0801 and .0803. Both are available only after the Certificate of Need Section has made a decision on an application for a certificate of need. Further, only an "aggrieved person" is entitled to either a reconsideration or certificate of need hearing and Vespers is not a "person aggrieved" by the agency's decision.

> "Person aggrieved" means any person, firm, corporation, or group of persons of common interest who are directly or indirectly affected substantially in their person, property, or public office or employment by an agency decision.

G.S. 150A-2(6). The sole basis advanced in the Request as to why Vespers is a person aggrieved is that it is a competitor of Wilkesboro. Vespers has not stated that this agency's decision has a substantial impact on it and this agency cannot find such an impact.

For the reasons set forth above, the Request of Vespers is hereby denied. Any right of appeal which Vespers may have under Article 4 of Chapter 150A of the General Statutes may be waived if a petition is not filed within 30 days after this decision is served.

It is obvious from this letter that the agency had reached its final decision concerning Wilkesboro's exemption and that judicial review was the appropriate avenue for relief.

Finally, we have determined that Vespers, Inc. was a person aggrieved within the meaning of the NCAPA and was, therefore, eligible to seek judicial review of DHR's decision that Wilkesboro, Limited was not required to undergo the review process of the Certificate of Need Law. In *Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 265 S.E. 2d 890, *disc. rev. denied* 301 N.C. 94, 273 S.E. 2d 299 (1980), this Court adopted the Supreme Court's interpretation of "person aggrieved" as that term was used in the Judicial Review Act, the predecessor to the NCAPA:

> The expression "person aggrieved" has no technical meaning. What it means depends on the circumstances involved. It has been variously defined: "Adversely or injuriously affected; damnified, having a grievance, having

> suffered a loss or injury, or injured; also having cause for complaint. More specifically the word(s) may be employed meaning adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights."
>
> *In re Halifax Paper Company, Inc.*, 259 N.C. 589, 595, 131 S.E. 2d 441, 446 (1963), (citations omitted).

Id. at 360, 265 S.E. 2d at 899. The "person aggrieved" provision determines the "standing" of a person to invoke judicial review. Daye, *North Carolina's Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. Rev. 833 (1975).

We believe that Vespers, Inc. which already operated a nursing care facility in Wilkes County was injuriously affected by DHR's decision that Wilkesboro had commenced construction prior to 1 January 1980, and, therefore, need not apply for a certificate. As a prospective competitor, Vespers had a substantial stake in the outcome of the controversy that would cause it to seek full adjudication of the issue it sought to raise. This Court can, in fact, think of no better person to assure complete review of this issue. We think, therefore, that Vespers should have been allowed a hearing by DHR on the question of when construction was commenced by Wilkesboro. That determination, in turn, would have settled the question of whether Wilkesboro had to apply for a certificate of need.

For the foregoing reasons the order of the trial court is vacated, and the case is remanded to DHR for action consistent with this opinion.

Vacated and remanded.

Judges ARNOLD and BECTON concur.

Kennedy v. Whaley

ALICE HOUSTON KENNEDY, JOHN HENRY KENNEDY, JR., FRANCES KENNEDY MATHIESON & HUSBAND, JAMES ERIC MATHIESON, JAMES KENNEDY, CAROLYN KENNEDY BLAKE, PATSY ANN KENNEDY BRYSON & HUSBAND, JERRY BRYSON, DORTHA KENNEDY CAMPBELL & HUSBAND, ELTON RAY CAMPBELL, VERTIE MAE WILLIAMS KENNEDY (WIDOW), ANNETTE KENNEDY CANADY & HUSBAND, WILLIAM ARTHUR CANADY, SR., JEANETTE KENNEDY FOY & HUSBAND, RENZELL FOY, HARRY G. BROWN (WIDOWER), BONNIE LOU KENNEDY WILLAFORD & HUSBAND, LEROY WILLAFORD, WILLIAM PICKETT KENNEDY & WIFE, RHONDA JARMAN KENNEDY, DIANA SUE KENNEDY GWYNN & HUSBAND, LEONARD PHILIP GWYNN, SHARON PATRICE KENNEDY EDWARDS & HUSBAND, GARDNER EUGENE EDWARDS, BRAXTON GEORGE KENNEDY & WIFE, DELPHIA COSTIN KENNEDY, KATHLEEN KENNEDY JONES (WIDOW), ALBERT KENNEDY & WIFE, RACHEL TYNDALL KENNEDY, ELIZA KENNEDY FOUNTAIN & HUSBAND, MURPHY FOUNTAIN, ARTHUR KENNEDY & WIFE, RUBY SUMMERLIN KENNEDY & RUBY KENNEDY TYNDALL & HUSBAND, LYNWOOD TYNDALL v. IDA WHALEY, WALTER WHALEY, JR., & WIFE, LOUISE WHALEY, ELENOR MARIE WHALEY COLEY & HUSBAND, RAY COLEY, REBA FAYE WHALEY THIGPEN & HUSBAND, GERALD THIGPEN, ANNETTE WHALEY CAVENAUGH & HUSBAND, GENE CAVENAUGH, VIRGINIA WHALEY BALL & HUSBAND, DEWEY BALL, VANCE B. GAVIN, TRUSTEE, GRADY MERCER, SR., TRUSTEE, COASTAL PRODUCTION CREDIT ASSOCIATION, BARBARA HORNE & IRENE COLE

No. 814SC154

(Filed 5 January 1982)

Adverse Possession § 10; Ejectment § 12; Trespass to Try Title § 2.1— common source of title—evidence of title in third person—adverse possession

In an action in which both plaintiffs and defendants claimed title to the property in question through a common source, defendants could show foreclosure of a mortgage on the property and conveyance of the property to a third person pursuant to the foreclosure sale so as to divest the title of the person through whom plaintiffs claimed and defeat plaintiffs' claim of record title as heirs and remaindermen where the third person acquired his title after the common source. Therefore, defendants' possession of the property for over 30 years was not adverse to any remaindermen, and they acquired title to the property by adverse possession for more than 20 years and by adverse possession under color of title for more than seven years. G.S. 1-38; G.S. 1-39.

APPEAL by plaintiffs from *Strickland, Judge.* Judgment entered 17 September 1980 in Superior Court, DUPLIN County. Heard in the Court of Appeals 16 September 1981.

This action was instituted by the plaintiffs as heirs at law of Susan Ann Kennedy on 27 January 1979, to recover real property

and damages. The parties stipulated that defendants are in possession of the lands in question and they and those under whom they claim have been in continuous possession of the lands for more than 30 years prior to the institution of this action. The parties waived trial by jury and agreed that the court should hear the evidence and make findings of fact and conclusions of law. The trial judge found that John W. Kennedy conveyed to his wife, Susan Ann, a tract in Duplin County consisting of approximately 70 acres on 4 November 1929. On 10 September 1943, Susan Ann Kennedy died intestate survived by her husband, John W. Kennedy, and the children born of their marriage. John W. Kennedy executed a deed dated 19 September 1944, purporting to convey the above stated property to Tommy Whaley. Tommy Whaley and wife, by deed dated 5 January 1945, then purported to convey the same property to Walter Whaley. Walter Whaley died testate on 30 May 1951, and, by the terms of his will, devised all interest in any lands held by him at the time of his death to his wife, Ida Whaley, and their children. On 21 October 1957, in a special proceeding, the land was partitioned, a portion allotted to Eleanor Marie Whaley Cole, and the remainder given to Reba Faye Whaley Thigpen.

On 7 December 1961, Eleanor W. Cole and husband, Ray W. Cole, executed a deed purporting to convey the lands allotted to Eleanor W. Cole in the partitioning proceeding to Carl W. Powell and wife, Iris K. Powell. On the same day, Carl W. Powell and wife executed a deed purporting to convey said land to Ray W. Cole and wife, Eleanor W. Cole, as tenants in common. John W. Kennedy died 5 October 1972, and now plaintiffs, heirs of Susan Ann Kennedy, seek to recover the property as remaindermen whose right of possession of the property did not mature until the death of their father.

The trial judge found that John W. Kennedy lived on the 70 acres until 1944, when he moved from the tract, and that since 1944 Eleanor Marie Whaley and Reba Faye Whaley and their predecessors in title have been in possession, have listed the property for tax purposes and paid the taxes thereon, and have had no notice of adverse claim.

Defendants offered in evidence a commissioners deed dated 11 February 1936, conveying the 70 acres in controversy to I. J.

Sandlin by virtue of foreclosure of a mortgage dated 26 December 1929 and registered 20 January 1930, from J. W. Kennedy and wife, Susan Kennedy, to I. J. Sandlin, to secure the debt described in the mortgage deed.

The court found that plaintiffs were divested of any claim or record title to the tract by reason of the foreclosure of the mortgage and foreclosure sale, and that defendants were possessed of the land under known and visible lines and boundaries under color of title for more than seven years and had adversely possessed the land for more than 20 years preceding the commencement of the action. The court found further that the public records of Duplin County disclosed a title transaction affecting the property which had been of record for more than 30 years, purporting to vest title in defendants, thus establishing prima facie a marketable record title pursuant to Chapter 47B of the General Statutes of North Carolina, no notice having been given by the plaintiffs pursuant to law. The court declared defendants to be the owners of the land, and plaintiffs appeal.

Kornegay, Rice and Edwards, by Robert T. Rice, for plaintiff appellants.

Vance B. Gavin and Russell J. Lanier, Jr., for defendant appellees.

MORRIS, Chief Judge.

Plaintiffs argue that the court erred in ruling that the foreclosure sale divested them of any claim of title to the property. They also allege error in the court's ruling that defendants had acquired title by adverse possession for more than 20 years and for more than seven years under color of title, urging that land cannot be held adversely to the interests of the remaindermen.

This case turns on the issue of whether defendants may show foreclosure of the mortgage from J. W. Kennedy and Susan A. Kennedy, and conveyance of the land in controversy to I. J. Sandlin pursuant to an order of sale. We find that defendant is entitled to prove this outstanding interest, which defeats plaintiffs' claim of record title.

Plaintiffs invoke the common source doctrine, arguing that John W. Kennedy is the source of title of both plaintiffs and defendants, but that plaintiffs possess better title from him, which shows, prima facie, their right to recover. *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889).

> The doctrine of common source of title is the well-established rule, in actions involving the title to or the right to possession of realty or an interest therein, that when the adverse parties claim title from the same source, it is not necessary for the plaintiff to trace the title back of the common source.

Annot., 5 A.L.R. 3d 375, 381 (1966). Quoted in *Finance Corporation v. Leathers*, 272 N.C. 1, 7, 157 S.E. 2d 681 at 685 (1967). "[W]hile ordinarily . . . the plaintiff must recover on the strength of his own title and not on the weakness of that of his adversary, such rule is inapplicable where the parties trace their titles to a common source, in which case plaintiff need only show a title good as against defendant." 65 Am. Jur. 2d Quieting title § 44 (1975). The rule, therefore, limits the inquiry to the question of which party has superior title from the common source. Annot., 5 A.L.R. 3d 375 (1966).

Plaintiffs contend that at the time he executed the deed to Tommy Whaley purporting to convey fee simple title, John W. Kennedy was merely a life tenant by curtesy consummate and could convey no more than a life estate. With this contention we have no quarrel, and we agree that plaintiffs, the surviving children of Susan A. Kennedy, were remaindermen whose right of possession did not mature until the death of John W. Kennedy on 5 October 1972. Thus, they had no right to maintain an action for the possession of the property until after the expiration of the life estate of their father. *Narron v. Musgrave*, 236 N.C. 388, 73 S.E. 2d 6 (1952). Where a life tenant executes a deed in fee, the possession of the grantee cannot be adverse to the remaindermen until the death of the life tenant. *Lovett v. Stone*, 239 N.C. 206, 79 S.E. 2d 479 (1954); *Walston v. W. H. Applewhite and Co.*, 237 N.C. 419, 75 S.E. 2d 138 (1953). Under this view of the facts, the defendants would have held adversely for less than seven years.

Plaintiffs rely on the proposition that "while defendant can defend by showing that he has a better title in himself than that of the plaintiff, derived from the person from whom they both

claim or from some other person who had such better title, he is not at liberty to show a better title outstanding in a third person." *Stewart v. Cary*, 220 N.C. 214, 222, 17 S.E. 2d 29 at 33 (1941). Plaintiffs urge us to adopt this thesis, integral to their argument, which would require that we ignore the outstanding interest in I. J. Sandlin acquired pursuant to the foreclosure sale in 1939. We think that the law is otherwise, however. Defendants have not attempted to go behind the deed of the common grantor, John W. Kennedy, to show a paramount title outstanding in a third person. Defendants' evidence did show an outstanding title in I. J. Sandlin, "[h]owever, this was in no way violative of the common source doctrine. That doctrine only prevents a defendant who claims under a source common to plaintiff from showing a title outstanding in a third party which is paramount to the common source itself." *Finance Corp. v. Leathers*, supra at 9, 157 S.E. 2d at 687.

> The rule that a defendant in ejectment cannot show title in a third person independent of the common source without connecting himself with it is limited to paramount titles older than the common source, and does not preclude the defendant from showing an outstanding title which accrued subsequent to that of the common source, and the defendant . . . may defeat the plaintiff's recovery by showing that the title of the common source is outstanding in a third person by virtue of a tax sale, or by virtue of an encumbrance created by the common source prior to the plaintiff's title.

Annot., 5 A.L.R. 3d, supra, at 404-05. Quoted with approval in *Finance Corp. v. Leathers*, supra, at 9, 157 S.E. 2d at 686-87. Thus, "the doctrine does not prevent a defendant from showing that it or *a third party* has a better title than the plaintiff *under* the common source. Annot., 5 A.L.R. 3d, supra." *Finance Corp. v. Leathers*, supra at 687.

We find that Susan A. Kennedy's interest in the property was sold at the foreclosure sale in 1935. Hence, there was no life estate in John W. Kennedy, and nothing for plaintiffs to inherit.

As set forth in G.S. 1-39, no action for the recovery or possession of real property may be undertaken by a plaintiff unless he shows that he or one under whom he claims was seized or possessed of the premises in question within 20 years before the

action commenced. Further, no action to recover possession of real property may be maintained when the party in possession, the defendants in the action, or those under whom the defendant claims has been in possession of the property under known and visible lines and boundaries adverse to all other parties for 20 years. G.S. 1-40. The evidence adduced at trial clearly shows that defendants or their predecessors in title had been in adverse possession of the land since 1945. The trial judge properly ruled that defendants had acquired good title to the land.

The defendants are also the legal owners pursuant to G.S. 1-38(a), which stipulates that "[w]hen a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under color of title, for seven years, no entry shall be made or action sustained against such possessor" by the true owner after said seven years and the possession is a perpetual bar. "Color of title" is a writing which purports to convey the land described therein, but fails to do so because of a want of title in the grantor or some defect in the mode of conveyance. *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E. 2d 1 (1973). We find that the plaintiffs are barred from advancing their claim to ownership by G.S. 1-38, as defendants have been in possession under color of title for more than seven years.

Defendants' possession had, at the time the action was brought, been actual, open, visible, notorious, continuous and hostile for 35 years. This fulfills both the seven and 20-year statutory requirements enumerated in the statutes, barring any action upon a showing of possession under color of title for more than seven years and possession for more than 20 years, respectively.

Among the court's findings of fact was the finding

> that the said Eleanor Marie Whaley and Reba Faye Whaley Thigpen and Ray W. Cole and the devisees under his will are persons having the legal capacity to own real property in this state, who together with their predecessors in title have been vested with an estate in real property of record for more than thirty years and that the public records of Duplin County disclose a title transaction affecting the real property that is the subject of controversy herein which has been of

record for more than thirty years, purporting to create such estate in the aforesaid Eleanor Marie Whaley, Reba Faye Whaley Thigpen and Ray W. Cole and his devisees and the persons by and through whom they claim title with nothing appearing of record purporting to divest such claimants of the interest claimed, listing the same for taxation and paying said taxes on said lands to Duplin County and have established a prima facie Marketable Record Title pursuant to Chapter 47B of the General Statutes of North Carolina.

Among the court's conclusions of law was the following:

And the defendants, Eleanor Marie Whaley (being one and the same person as Eleanor Marie Whaley Kelly, Eleanor Marie Whaley Cole and Eleanor Marie Whaley Coley) Reba Faye Whaley Thigpen and the devisees of Ray W. Cole are persons who have the legal capacity to own real property in this state, who together with their predecessors in title have been vested with an estate in real property of record for more than thirty years and that the public records of Duplin County disclose a title transaction affecting the real property that is the subject of controversy herein, which has been of record for more than thirty years, purporting to create such estate in the aforesaid Eleanor Marie Whaley, Reba Faye Whaley Thigpen and Ray W. Cole and his devisees and the persons by and through whom they claim title with nothing appearing of record purporting to divest such claimants of the interest claimed; listing the same for taxation and paying taxes on said land to Duplin County and have established prima facie a Marketable Record Title pursuant to Chapter 47B of the General Statutes of North Carolina, no notice having been given by the plaintiffs pursuant to law.

Appellants attempt to argue in their brief the effect, if any, of the Real Property Marketable Title Act upon their title. Appellants, however, did not except to the finding of fact or the conclusion of law set out above. Since the question is not properly before us, we do not discuss it, except to say that there was competent evidence to support the finding, the conclusion is supported by the finding, and the conclusion would support the judgment in this case.

We find no error in the court's admission into evidence of defendants' exhibits, as they were material and relevant to the showing of title in a third party.

No error.

Judges CLARK and WELLS concur.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS POWELL

No. 8116SC457

(Filed 5 January 1982)

1. **Criminal Law § 91.6— codefendant pleads not guilty—motion for continuance denied**

There was no abuse of discretion in the denial of defendant's motion for a continuance on grounds that a codefendant's decision to plead guilty and testify for the State, made shortly after the case was called for trial, came as a surprise and hindered his ability to impeach the codefendant's testimony. Defense counsel was never assured the codefendant would plead not guilty, the taking of his plea was out of the presence of the jury and was a proper procedural matter, and defendant was given an opportunity to cross-examine the codefendant.

2. **Criminal Law § 34.8; Larceny § 6— testimony of prior crimes—competent to show plan or scheme**

Testimony that defendant, who was charged with conspiracy to commit larceny, dealt regularly in the purchase and resale of stolen goods was admissible to show intent to commit a conspiracy to effect larceny and to show a plan or scheme for the commission of the crime.

3. **Criminal Law § 74.3— testimony concerning codefendant's guilty plea proper**

Questions posed to a codefendant concerning his guilty plea were not improper as he testified for the State concerning facts tending to establish his own guilt and his guilty plea was not used as evidence of defendant's guilt.

4. **Conspiracy § 6— conspiracy to commit larceny—sufficiency of the evidence**

The trial judge did not err in failing to grant defendant's motions for nonsuit, to set aside the verdict, and for a new trial in a prosecution for conspiracy to commit larceny. Evidence that defendant and the State's witness, Foust, talked several times about procuring stolen tobacco; that Foust and another conspirator, Burgess, discussed getting a load of tobacco from defendant; that arrangements were made to secure the tobacco; that Foust and Burgess were prepared to pick up and pay for the tobacco; and that the tobacco was owned by someone other than defendant was sufficient to withstand

the motions. The implied understanding that the tobacco would be stolen was sufficient and no overt act was necessary to establish the conspiracy.

5. Conspiracy § 5.1— statement of coconspirator—not in furtherance of conspiracy

Admission of a statement of a coconspirator which was not made in furtherance of the conspiracy was not sufficiently prejudicial as to require the granting of a new trial as the statement was not the only evidence in the record tending to show the existence of the conspiracy.

6. Criminal Law § 102.2— argument not immoderate

The district attorney's argument was not immoderate, and because the supposed impropriety of a challenged remark was not extreme or calculated to prejudice the jury, the Court declined to review the trial court's exercise of discretion.

7. Larceny § 8— instructions—application of law to charges

There was no merit to defendant's argument that the judge failed to charge the jury on the application of the law to the particular allegations in the indictment which charged defendant with conspiracy to commit larceny.

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 1 April 1980 in ROBESON County Superior Court. Heard in the Court of Appeals 19 October 1981.

Defendant, Boyd Burgess, and Benjamin H. Foust were indicted for conspiracy to commit larceny.

The state's evidence tended to show that defendant ran a salvage business, and that in April and July of 1979 defendant told Jeffrey Stoddard, an acquaintance, that he could use any kind of stolen tractors, pipes, scrap, or material that could be used in the salvage business. Stoddard said he was not interested. Defendant approached Stoddard a third time and indicated that he could get Stoddard $10,000 for a load of tobacco if Stoddard would transport it. Stoddard conversed with defendant again on 11 August at the 74 Truck Stop in Lumberton, at which time defendant pointed out a truck load of tobacco and offered Stoddard $10,000 to take it to Greensboro or Wilson, North Carolina. Stoddard declined. The load was stolen, and Stoddard later saw two men drive it away.

Stoddard in August agreed to assist the State Bureau of Investigation in an undercover investigation of tobacco theft, after being contacted by the S.B.I. About 21 or 22 August, defendant, still interested in a load of tobacco, and Stoddard, agreed to meet

at the 74 Truck Stop on a certain night, at which time defendant would give Stoddard instructions. Stoddard and Special Agent Bobby W. Massey met defendant at the truck stop with a loaded truck on 24 August 1979. Defendant directed them to Greensboro and told the men to deliver the tobacco to Ben Foust or another man. They went to Greensboro but were unable to make delivery and returned to Lumberton. On 19 or 20 September, Stoddard and Massey met with the defendant and were directed to deliver a load of tobacco to Siler City, for which they would be paid $5,000. Driving a Burton Motor Lines truck loaded with tobacco belonging to J. P. Taylor Company, Inc., Stoddard and Massey were met in Siler City by defendant, who led them to Boyd Burgess's farm where they were paid $2,500 by Foust. Defendant and the others were then arrested.

Foust, testifying for the state, indicated that he had bought tobacco, cars, pickup trucks, tractors, trailers, and farm implements from defendant. He testified that he and defendant had discussed stolen tobacco a number of times, defendant indicating that he could acquire tobacco if Foust could sell it. Foust also said that he had talked with Boyd Burgess about Burgess's buying stolen tobacco. Burgess told Foust that he would buy some tobacco. Foust told defendant that he and a friend would buy tobacco, and defendant indicated that he could supply it.

Burgess was found innocent, but defendant was convicted of felony conspiracy to commit larceny. Defendant appeals from the verdict and a judgment of imprisonment.

Attorney General Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

Angus B. Thompson, Jr., for defendant appellant.

MORRIS, Chief Judge.

[1] When the cases of defendant, Foust and Burgess were initially called for trial, all three defendants were seated at the defense table, in the presence of prospective jurors. The court excluded all jurors from the courtroom, and Foust pled guilty to conspiracy and receiving stolen goods and then became a witness for the state. Defendant and Burgess waived arraignment months earlier and entered pleas of not guilty. Defendants moved, upon entry of

Foust's plea, for a continuance, but the motion was denied. Defendant assigns error to the denial, alleging that he was prejudiced by Foust's sitting at the defense table and by the district attorney's statement, made in the presence of the jurors, of the charges against all defendants. He contends that the procedure was calculated by the prosecution to suggest that all three men cooperated in the criminal acts charged, and that the plea came as a surprise, preventing him from marshalling evidence with which to rebut Foust's testimony and impeach his credibility.

We find no merit in this contention. It is clear from the record that defense counsel was never assured that Foust would plead not guilty, but that the state had informed counsel of the real possibility that he might not be a codefendant, that the taking of his guilty plea was a proper procedural matter, that the plea was entered out of the presence of the jury, and that defendant was given an opportunity to cross-examine Foust. Defendant also fails to indicate what witnesses he would have called or the probability of obtaining their appearance. A motion for a continuance is addressed to the sound discretion of the trial judge, and his ruling thereon is not subject to review absent an abuse of that discretion. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979); *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973). The denial was clearly within justifiable bounds and this assignment of error is overruled.

[2] Defendant's second assignment relates to the court's denial of several motions to strike testimony referring to crimes said to have been committed by defendant. In a prosecution for a particular crime, the state may not, as a general rule, offer evidence tending to show that the accused has committed another independent or separate offense. *State v. Fowler*, 230 N.C. 470, 53 S.E. 2d 853 (1949). There are several well-recognized exceptions to this rule, however, such as where the evidence helps prove intent or design. The testimony to which objection was made tended to show that defendant dealt regularly in the purchase and resale of stolen goods. We find that the evidence is admissible to show intent on the part of defendant to commit a conspiracy to effect larceny, and to show a plan or scheme for the commission of the crime. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); *State v. Fowler*, supra.

[3] Defendant variously excepts to the admission of testimony which he regards as unresponsive, incompetent, and containing non-expert opinion. He further contends that questions posed to Foust concerning his guilty plea in the case *sub judice* were improper and the answers thereto incompetent, pursuant to the rule that neither a conviction nor a guilty plea by one defendant is competent as evidence of the guilt of a codefendant on the same charges. *State v. Campbell*, 296 N.C. 394, 250 S.E. 2d 228 (1979). This legal maxim was not violated, however, as the defendant who pled guilty testified as a witness for the state to facts tending to establish his own guilt. Thus, his guilty plea, standing alone, is not sufficiently prejudicial to warrant a new trial. *State v. Kerley*, 246 N.C. 157, 97 S.E. 2d 876 (1957), and cases cited and referred to therein. Neither has it been shown that defendant suffered substantial prejudice by the admission of the other testimony to which exception was taken. All the exceptions subsumed in defendant's second assignment of error are, therefore, rejected.

[4] Defendant next assigns error to the trial judge's denial of his motions for nonsuit, to set aside the verdict, and for a new trial, alleging that the evidence fails to show a conspiracy. We find, on the contrary, that there is plenary evidence of conspiracy to commit larceny—enough, clearly, to withstand defendant's motions. The state must present evidence of each element of the offense charged in order to overcome a motion for nonsuit. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). A criminal conspiracy is defined as "the unlawful conference of two or more persons in a scheme or agreement to do an unlawful act or to do a lawful act in an unlawful way." *State v. Covington*, 290 N.C. 313, 326, 226 S.E. 2d 629, 639 (1976). All evidence admitted is to be considered in the light most favorable to the state and the state is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

Evidence adduced by the state indicates that on several occasions the defendant and Foust talked about the procurement of stolen tobacco. Defendant alleges, however, that there is nothing in the record to show that defendant and Foust agreed to steal or commission another to steal the tobacco said to be the object of the conspiracy. Yet, "[t]o constitute a conspiracy it is not

necessary that the parties should have come together and agreed in express terms to unite for a common object; rather, a mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense." *State v. Abernethy*, 295 N.C. 147, 164, 244 S.E. 2d 373, 384 (1978). Therefore, no overt act is necessary to establish a conspiracy. *Id.* The record is replete with evidence of such an implied understanding among defendant, Foust, and Burgess. Foust and Burgess were shown to have discussed the possibility of getting a load of tobacco from defendant. Arrangements for securing the tobacco were made in conversations with defendant. Defendant contacted Foust and Stoddard several times, and Foust and Burgess were shown to be prepared to pick up and pay for the tobacco. Finally, testimony from Agent Massey showed that the tobacco was owned by J. P. Taylor Company and was on consignment to Burton Motor Lines. The evidence was thus sufficient to go to the jury, and the trial court properly refused to allow defendant's motion for nonsuit at the end of state's evidence.

Nor did the court err by refusing to grant defendant's motion to set aside the verdict as contrary to the weight of the evidence. Such a motion is addressed to the discretion of the court, and a refusal to grant the motion is not appealable absent manifest abuse of discretion. *Williams v. Boulerice*, 269 N.C. 499, 153 S.E. 2d 95 (1967). Defendant also contends that the trial court erred by failing to grant his motion for a new trial. We agree with the state that there was no abuse of discretion and that defendant is not entitled to relief on either issue.

[5] Defendant lists a number of other exceptions as part of his third assignment of error. We have already spoken to his rationale in making several of these exceptions and have found no merit in them. His additional exceptions deal with objections to leading questions and unresponsive answers. We find that defendant was not prejudiced by the court's failure to sustain these objections. Defendant also excepts to the admission of a statement of Foust, said to lack proper foundation, allegedly not made in furtherance of the conspiracy. We agree that a declaration of one conspirator, to be admissible against coconspirators, must have been made while the conspiracy was still in progress. However, the declaration of Foust is not the only evidence in the record tending to show the existence of the conspiracy, and we rule,

therefore, that its admission was not sufficiently prejudicial as to require the granting of a new trial.

[6] In his fourth assignment of error, defendant alleges that the district attorney was allowed to make erroneous, inflammatory, and abusive remarks to the jury, and that the remarks constituted prejudicial error. He also objects to the quotation of biblical verse in the district attorney's closing argument.

"The argument of counsel is left largely to the control and discretion of the presiding judge . . ." *State v. Britt*, 288 N.C. 699, 711, 220 S.E. 2d 283, 291 (1975). Counsel may argue the facts in evidence, reasonable inferences to be drawn from the facts, and the relevant law. *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974). We deem the district attorney's argument not immoderate, and because the supposed impropriety of the remark was not extreme or calculated to prejudice the jury in its deliberations, we decline to review the trial court's exercise of discretion.

[7] Defendant brings forward as grounds for relief the court's failure to charge the jury as to the application of the law to specifics alleged in the bill of indictment. He submits that the jury should have been instructed that a conspiracy to steal the 39,466 pound load of tobacco consigned to Burton Motor Lines must have been consummated. The record indicates, however, that the defendant had the benefit of an instruction that he and at least one other person must have entered an agreement, that the agreement was to commit the crime of larceny, and that the defendant and at least one other person intended at the time of the agreement that the agreement be carried out. Specific reference to the charge in the indictment was made. The indictment itself was quite explicit, charging conspiracy to steal 39,466 pounds of tobacco valued at $57,308.40, the property of J. P. Taylor Company, Inc., on consignment to bailee Burton Motor Lines. There is thus no merit in the argument that the trial court failed to charge the jury on the application of the law to the particular allegations in the indictment.

In his sixth and final assignment, defendant contends that the guilty verdict is without specific reference to the charge and is therefore insufficient to support the judgment. Defendant offers *State v. Ingram*, 271 N.C. 538, 157 S.E. 2d 119 (1967), as support for this proposition. His reliance on *Ingram* is misplaced,

however, as in that case defendant was charged with breaking and entering, but found guilty of larceny. In the case at bar, defendant was charged with felonious conspiracy to commit larceny and found guilty as charged.

For the reasons stated above, in the defendant's trial we find

No error.

Judges ARNOLD and BECTON concur.

PAUL HAIGLER WEEKS v. DOROTHY WALSH HOLSCLAW AND GARY LEE WALSH

No. 8125SC264

(Filed 5 January 1982)

1. **Evidence § 50.1— expert testimony—permanency of injuries—reference to length of time**

The trial court properly permitted plaintiff's expert medical witness to state his opinion, based upon a hypothetical question, that "after this long a time" plaintiff's injuries would have some permanency, since the witness's reference to the passage of time reflected one of the bases of his opinion and did not negate his testimony as an expert witness.

2. **Evidence § 50.1— expert medical testimony—witness's experience with similar injuries**

The trial court properly permitted plaintiff's expert medical witness to state the experience he had had with injuries similar to those plaintiff sustained in an automobile accident and to explain to the jury generally how he determined the presence of pain in a person suffering such injuries.

3. **Damages § 17.5— reimbursement for sick leave—no reduction of damages for personal injury**

In an action to recover damages for injuries received in an automobile accident, the trial court properly instructed the jury that plaintiff's damages should not be reduced because plaintiff was reimbursed for sick leave which he took from his employment.

4. **Damages § 3.4— continuous pain—argument of per diem formula for damages**

It was proper for plaintiff's attorney to argue a per diem formula for determining damages for injuries received in an automobile accident where plaintiff presented evidence that he suffered severe and continuous pain from the injuries which persisted up to the date of the trial.

APPEAL by defendants from *Wood, Judge.* Judgment entered 9 March 1981, in Superior Court, CALDWELL County. Heard in the Court of Appeals 12 October 1981.

Plaintiff sued defendants for injuries sustained when the automobile plaintiff was driving was hit in the rear by an automobile driven by defendant Holsclaw and owned by defendant Walsh. At trial, the defendants stipulated that defendant Holsclaw was negligent in the operation of the automobile and that her negligence would be imputed to defendant Walsh, the owner. The case was tried, therefore, solely on the question of damages sustained by the plaintiff.

Plaintiff's evidence tended to show that, after the 18 April 1979 automobile accident, plaintiff was examined by Dr. Theodore Hairfield, a physician, at the Caldwell Memorial Hospital Emergency Room. Plaintiff complained of neck pain as a result of having been driven forward by the blow to his automobile. After examining plaintiff, the physician diagnosed plaintiff's ailment as being a cervical sprain, i.e., a sprain of the neck on the left side, and he prescribed a muscle relaxant with pain-relieving qualities. Several times after the initial diagnosis, Dr. Hairfield was again consulted by plaintiff. On 23 April, Dr. Hairfield found that plaintiff continued to experience tenderness in the big folder muscle in his shoulder and the left side of his neck. There was motion pain in each direction of neck movement. Dr. Hairfield recommended continued use of the muscle relaxant. On 2 May, plaintiff returned to Dr. Hairfield with the same complaints, and the doctor asked him to restrict the use of his left arm and left extremities. On 8 May, Dr. Hairfield prescribed a pain medication with some inflammation suppression. Again, on 24 May, Dr. Hairfield examined plaintiff and found continued pain in the lower part of his neck. Shortly after that visit, on 13 June, plaintiff began to show improvement, and the doctor started exercises to improve muscle tone and power. Plaintiff, however, continued to experience discomfort with flexion of the neck and limitation of range of motion in the left arm. Dr. Hairfield was allowed to testify, over defendants' objections, that, in his opinion, plaintiff's injuries would have some permanency.

Plaintiff himself testified that, as a result of the accident, he suffered constant pain causing him to curtail normal activities

such as lawn mowing, jogging, cutting wood, and golfing. As a result of his physical inability to fit clothes, he found it necessary to cease working at a men's clothing store and to find other work which did not require manual labor. Plaintiff stated that the pain was located from the bottom of his scalp, down his neck and to his left elbow. His wife also testified and corroborated plaintiff's description of curtailed activities and continued physical difficulties.

The defendants offered no evidence, and the case was submitted to the jury on the following issue:

> What amount of damages, if any, is the plaintiff, Paul Haigler Weeks, entitled to recover for personal injury?

The jury answered the issue, "$10,780.00." Defendants appealed.

Beal and Beal, P.A., by Beverly T. Beal, for plaintiff-appellee.

Todd, Vanderbloemen and Respass, by James R. Todd, Jr., for defendant-appellants.

ARNOLD, Judge.

[1] Defendants bring forward two assignments of error related to the trial court's admission into evidence of testimony by Dr. Hairfield. First, defendants argue that the court improperly allowed the following question and answer:

> Q. Doctor, if the jury should find by the greater weight of the evidence that on or about April 18, 1979, Mr. Weeks was driving a Ford automobile two miles east of Lenoir, at approximately forty miles an hour, and that his vehicle was struck from behind by a vehicle driven by Mrs. Dorothy Holsclaw, and that when his car was struck, Mr. Weeks experienced pain in his neck, back, and shoulder immediately after the collision, and that you examined Mr. Weeks on April 18, 1979, and found the injuries which you have testified to, and that you examined Mr. Weeks on April 23, May 2, May 8, May 24, June 13, August 7, and December 10, and that you found his condition to be as you have testified, do you have an opinion satisfactory to yourself as to whether those injuries could or might be permanent injuries which Mr. Weeks will experience for the remainder of his life?

A. Yes sir.

Q. What is your opinion?

A. My opinion would be that after this long a time that they would have some permanency.

Defendants contend that the doctor's opinion was based on the length of time he had observed plaintiff and not on reasonable medical certainty. We find nothing wrong with the admission of his testimony. The witness had been qualified as a medical expert; he had testified about his numerous examinations of plaintiff and of his diagnosis of plaintiff's injury. The doctor's reference to the passage of time reflected one of the bases of his opinion and should not be read to negate his testimony as an expert witness. *See generally* 1 Stansbury § 135 (Brandis Rev. 1973). This assignment of error is overruled.

[2] Next defendants contend that the trial court erred in allowing Dr. Hairfield to testify about his experiences with other patients who had injuries similar to those of plaintiff. The record reveals that defendants objected to the following questions asked of Dr. Hairfield:

Q. Have you had opportunities to examine other persons with similar injuries?

A. Yes.

Q. Doctor, in regard to the report of pain by a person as Mr. Weeks reported the pain, was the report of pain that he expressed consistent with your experience with injuries of the same type?

A. Yes, sir, I would say so.

Q. Doctor in the practice of medicine in injuries of this type, what is the method used to determine whether or not pain exists?

A. Well, when the person tells you that "I can't reach up on the table and get a salt shaker without lifting my elbow because my shoulder hurts so bad, that is real impressive to me. I know that he is having difficulty because he wouldn't go to this sort of description. Also, if I lift his arm up and it makes his [*sic*] holler, or if I feel scraping and grating or

> movement that causes pain, this is all we can use to judge how much pain someone has.

Plaintiff apparently wanted to show to the jury the experience the doctor had had with injuries similar to those plaintiff had sustained in the automobile accident and to show the jury generally how he determined the presence of pain. We find no prejudicial error in the admission of this evidence.

[3] Defendants also assign as error the trial court's instructions concerning damages plaintiff suffered by virtue of his having to take sick leave from his employment. Defendants' position is that, since plaintiff was reimbursed for those days of sick leave, he suffered no damages compensable by defendants. We reject this argument. The record shows that, during the course of plaintiff's testimony, the trial court entered the following instruction:

> Ladies and Gentlemen, the fact that he was paid for sick leave, you are not to give the defendant the benefit of that, if you should find that this man was injured as a result of this accident. That is something that he earned from his work. You will not consider that as a benefit to the defendant. You will consider that he was out six days or whatever you find that he was out.

Since defendants failed to include in the record the trial court's final charge to the jury, we cannot determine what the court's eventual instructions were. We assume, however, for the sake of argument that those instructions mirrored the ones quoted hereinabove. Defendants cite no case directly supporting their contention, and we have been unable to find a case decided in this jurisdiction on point. We believe, however, that there are analogous situations which provide the principle upon which to decide the question. In *Spivey v. Wilcox Company*, 264 N.C. 387, 141 S.E. 2d 808 (1965), the Supreme Court held that evidence of plaintiff's recovery of Workmen's Compensation benefits was inadmissible as being incompetent and irrelevant. If damages are awarded, "plaintiff . . . [is] entitled to recover the amount which will fairly compensate him for his injuries as if he had received no payments under the Workmen's Compensation Act." *Id.* at 390, 141 S.E. 2d at 811. Likewise, in *Young v. R. R.*, 266 N.C. 458, 146 S.E. 2d 441 (1966), the Court adopted the rule that the "plaintiff's recovery will not be reduced by the fact that medical expenses

were paid by some source collateral to the defendant, such as . . . by the plaintiff's employer. . . ." Id. at 466, 146 S.E. 2d at 446, quoting 22 Am. Jur. 2d, Damages § 207.

Based on the foregoing, we hold that the trial court's instructions to the jury to disregard plaintiff's use of sick leave, a collateral source of benefit to plaintiff, was not error. Defendants' assignment of error is overruled.

[4] Finally, defendants contend that the trial court erred in allowing plaintiff's attorney to make the following per diem argument:

> Now, ladies and gentlemen, I have done a little figuring, and you can focus your attention over here just a little bit. I want to ask you to look with me for just a moment at some figuring that I have been doing. Now, ladies and gentlemen, you will recall that the evidence was that Mr. Weeks is in continuous pain. That was the evidence that he testified to. You will recall that the doctor expressed an opinion about the permanency of the injury, and his opinion was that it is a permanent injury. You will also recall that it was his opinion that the accident did cause the injury that he found when he examined Mr. Weeks, my client, and so let's talk about this permanent, this pain and suffering a little bit. Now, according to my figures it has been 608 days since the accident occurred. Let's talk about 608 days of pain, and let's not even talk about 24 hours a day. Let's talk about maybe 15 hours a day. 608 days at 15 hours of pain a day. Now, ladies and gentlemen, you add this up. 9,120 hours is what I get.
>
> Mr. Beal: 9,120 hours, ladies and gentlemen, 60 minutes an hour, I find that to be 367,200 minutes. Let us talk about, as far as the pain and suffering is concerned, fifty cents a minute in terms of what my client ought to receive.
>
> Mr. Beal: Well, let's talk about ten cents a minute, ten cents a minute from the time of the accident until now. I get that to be $36,720.00.

On this question, we find controlling the case of *Thompson v. Kyles*, 48 N.C. App. 422, 269 S.E. 2d 231, *disc. rev. denied*, 301 N.C. 239, 269 S.E. 2d 231 (1980), where this Court held that it was proper for plaintiff's attorney to argue a per diem formula for

determining damages where there was evidence of continuous pain. In the case *sub judice*, plaintiff presented sufficient evidence from which the jury could determine that plaintiff was injured in the automobile accident and that that injury caused severe and continuous pain which persisted up to the date of the trial. In this regard, our holding is not inconsistent with *Jenkins v. Hines Co.*, 264 N.C. 83, 141 S.E. 2d 1 (1965), in which the Supreme Court held such per diem argument erroneous where there was no evidence of continuing pain.

We have also reviewed defendants' contention that the trial court should have instructed the jury that plaintiff's per diem arguments were mere illustrations and not evidence. Such an argument is well taken. Since, however, the defendants failed to submit for review the court's charge, we are unable to determine what instructions were given concerning plaintiff's argument. We, therefore, overrule defendants' assignment of error.

In the trial of this case, we find

No error.

Chief Judge MORRIS and Judge BECTON concur.

ELSIE NORTON FERGUSON v. MORRIS S. FERGUSON AND WIFE, PATRICIA A. FERGUSON

No. 8115DC319

(Filed 5 January 1982)

1. Trusts § 19— parol trusts—trial on constructive trust theory—no summary judgment on express trust theory

In an action to engraft a parol trust on a conveyance from plaintiff to her son and his wife, the denial of defendants' summary judgment motion will not be upheld on an express trust theory where plaintiff did not advance an express trust theory in her pleadings or at trial.

2. Trusts § 19— parol constructive trust—denial of summary judgment

In this action to establish a constructive trust in land conveyed by plaintiff to defendants, her son and his wife, the trial court properly denied defendants' motion for summary judgment where plaintiff's forecast of evidence tended to show that the parties orally agreed prior to the conveyance that de-

fendants would hold the property for plaintiff or for all of her children and that defendants made such representations merely to mislead her while having no intention of complying with their promises.

3. Trusts § 13.5— parol trust—clean hands doctrine

Plaintiff was not prohibited by the clean hands doctrine from seeking to impose a parol trust on land conveyed to defendants, her son and his wife, by the fact that plaintiff allegedly conveyed the land to defendants in order to qualify for governmental aid in the event she became ill.

4. Trusts § 18— action to establish parol trust—refusal of others to hold land for plaintiff—competency of evidence

In an action to establish a constructive trust on land conveyed by plaintiff to defendants, her son and his wife, upon the oral promise of defendants to hold the land for plaintiff or all of her children, plaintiff's testimony that each of her three daughters refused to permit her to transfer the land to them on the condition that they would hold it until plaintiff's death and then divide the land equally among all the children was competent to bolster the credibility of and corroborate the plaintiff's version of the transaction.

5. Trusts § 19— parol trust—sufficiency of evidence

Plaintiff's evidence was sufficient for the jury in an action to establish a constructive trust on land conveyed by plaintiff to defendants, her son and his wife, upon the oral agreement by defendants to hold the land for plaintiff or for all of her children.

APPEAL by defendants from *Peele, Judge.* Judgment entered 27 October 1980 in District Court, ORANGE County. Heard in the Court of Appeals 11 November 1981.

This is an appeal from a verdict and judgment imposing a constructive trust on land conveyed by a mother to her son and his wife.

Plaintiff alleged the following in her verified Complaint. Prior to 1 April 1971, plaintiff and her since-deceased husband owned a four and one-half acre tract of land in Orange County. Plaintiff's husband incurred substantial medical expenses during his last illness. He was unable to obtain adequate financial or medical assistance from governmental authorities because he was record owner of the tract of land in question. When plaintiff's husband died on 1 April 1971, plaintiff became the fee simple owner of the land. Cognizant of the possibility of contracting a serious illness herself, plaintiff discussed with her children methods of preserving her savings and her land for them. After plaintiff's three daughters refused to take title to the land, plaintiff's son, Morris Ferguson, Jr., "agreed to put the . . . land in his name and hold it for Plaintiff, so she would qualify for government aid dur-

ing a serious illness and so her property would be preserved for all of her children." (Complaint, Paragraph 7) In accordance with this agreement, plaintiff, on 8 June 1976, conveyed the land to her son and his wife, the defendants. The deed was prepared at the direction of defendants and by counsel obtained by defendants. In the autumn of 1978, plaintiff discovered that the defendants had mortgaged the land. Alleging that the defendants furnished no consideration for the deed transferring the land to them and that the defendants procured title by misrepresentation and fraudulent statements of intent, plaintiff prayed for a constructive trust.

Defendants filed an Answer denying the material allegations of the Complaint and later filed a motion for summary judgment based on the pleadings and plaintiff's deposition. By Order dated 6 December 1979, the trial court denied defendants' motion for summary judgment.

The case was tried at the 9 June 1980 session of Civil District Court of Orange County. The jury found that defendants had promised to hold the land for the benefit of plaintiff or for her children, that plaintiff had relied on that promise, and that defendants did not intend to comply with the promise when they made it. Defendants moved for a new trial or, in the alternative, for a judgment notwithstanding the verdict, contending that the evidence was insufficient to justify the verdict. The motion was denied, and a Judgment was entered in accordance with the jury verdict. Defendants appeal.

Northen & Bagwell, by O. Kenneth Bagwell, Jr., for defendant appellants.

J. Anderson Little, for plaintiff appellee.

BECTON, Judge.

Defendants argue (1) that their motion for summary judgment should have been granted because no evidence of actual or constructive fraud was presented to support a constructive trust; (2) that the court erred in admitting testimony that plaintiff sought to get her three daughters to hold the land for the benefit of all the children; and (3) that their motions for a directed verdict and a new trial should have been granted because plaintiff failed to carry her burden of proof. We reject defendants' arguments.

I

SUMMARY JUDGMENT

Because this case involves a dispute over the existence and contents of an agreement to hold real property for the benefit of others, summary judgment was properly denied for the reasons that follow.

[1] A. Plaintiff first argues that "[a] parol trust may be engrafted onto a deed valid on its face, even in the absence of fraud." Although this is a correct statement of the law relating to *express trusts,* it forms no basis for our holding since plaintiff in her complaint merely prayed for a constructive trust. Plaintiff incorrectly uses the terms "parol trust" and "constructive trust" interchangeably in her brief. An express trust arises by agreement of the parties. Constructive trusts "exist purely by construction of law, without reference to any actual or supposed intention to create a trust, for the purpose of asserting rights of parties or of frustrating fraud. . . ." *Avery v. Stewart,* 136 N.C. 426, 435, 48 S.E. 775, 778 (1904). It should be noted that a parol agreement may form the basis for an express trust or a constructive trust.

"North Carolina is one of a minority of states that has never adopted the Seventh Section of the English Statute of Frauds which requires all trusts in land to be manifested in writing." *Bryant v. Kelly,* 279 N.C. 123, 129, 181 S.E. 2d 438, 441 (1971). Indeed, our courts have "always upheld parol trusts in land in the 'A to B to hold in trust for C' situation" even when there is no consideration to support the transfer. *Id.* at 129-130, 181 S.E. 2d at 442. In this context, however, an express trust, not a constructive trust, is created. An express trust thus created may be proved by "parol evidence, which is clear, strong and convincing." *Electric Co. v. Construction Co.,* 267 N.C. 714, 719, 148 S.E. 2d 856, 859-60 (1966).

In the case *sub judice,* the evidence of an express trust seems clearly sufficient to submit the case to the jury. However, because parol trusts and constructive trusts are not synonomous and because plaintiff never advanced an express thrust theory in her pleadings or at trial, the denial of defendants' summary judgment motion will not be upheld on an express trust theory.

[2] B. Summary judgment was properly denied since, as plaintiff next argues, "[a] parol trust may be engrafted onto a deed valid on its face if the elements of fraud exist." In this context, we speak of a constructive trust.

> The principle in its direct application to our case has been thus stated: "Where a party acquires property by conveyance or devise secured to himself under assurances that he will transfer the property to, or hold and appropriate it for, the use and benefit of another, a trust for the benefit of such other person is charged upon the property, not by reason merely of the oral promise, but because of the fact that by means of said promise he had induced the transfer of the property to himself."

136 N.C. at 435-36, 48 S.E. at 779, *quoting Glass v. Hulbert*, 102 Mass. 24, 39, 3 Am. Rep. 418, 430 (1869).

The mere failure, nothing else appearing, to perform an agreement or to carry out a promise does not give rise to a constructive trust, since such a breach would not constitute fraud or a breach of a fiduciary relationship. *Bank v. Insurance Co.*, 265 N.C. 86, 143 S.E. 2d 270 (1965). Moreover, the mere relationship of parent and child does not raise the presumption of fraud. *Willetts v. Willetts*, 254 N.C. 136, 118 S.E. 2d 548 (1961); *Walters v. Bridgers*, 251 N.C. 289, 111 S.E. 2d 176 (1959). However, it is fraudulent for a child, as grantee, to make a promise which deceives a parent, as grantor, and induce the parent to act when the child making the promise knows at the time it is made that he does not intend to perform the promise. *See Avery v. Stewart.*

To establish fraud the false representation must be of some material fact that is past or existing. And, although a promise, standing alone, relates to something that is to be done in the future, the state of mind of the promisor at the time of the promise is a past or existing material fact which can be falsely represented. *See* Lee, North Carolina Law of Trusts, pages 78-79 (1978). So, if defendants in this case made a promissory representation, intending at that time not to comply with the promise but rather to induce the plaintiff to act, such misrepresentation is fraudulent and will support the imposition of a constructive trust. As stated in *Lamm v. Crumpler*, 240 N.C. 35, 44, 81 S.E. 2d 138, 145 (1954):

> What [a person's] condition of mind was at the time and his intent in respect to the fulfillment of the promise presents a question for the jury.
>
> . . . The state of any person's mind at a given moment is as much a fact as the existence of any other thing. . . .

In this case, plaintiff clearly alleged that there existed an oral agreement between the parties prior to the legal conveyance of the land and further alleged that the defendants made promissory representations merely to mislead her while having no intention of complying with their promises. It is this forecast of evidence that distinguishes this case from *Cornatzer v. Nicks*, 14 N.C. App. 152, 187 S.E. 2d 385, *cert. denied* 281 N.C. 154, 188 S.E. 2d 365 (1972). In *Cornatzer*, plaintiff alleged that because she and her husband were too old to get a loan and build a home on their lot, they conveyed legal title to the lot to their son and his wife. Their son agreed to obtain a loan, build a house on the lot, and later to reconvey the property to plaintiff and her husband. The son later died, and his widow refused to convey the property to plaintiff. Significantly, the plaintiff in *Cornatzer* sought to require her son's wife to fulfill an oral agreement made between plaintiff and her son, which agreement the son had intended to fulfill but was prevented from doing so by his death. The son's wife had made no promise. Thus, there was no past or existing fact at issue and no evidence of fraud in *Cornatzer*.

In this case, the plaintiff alleged that the defendants never intended to fulfill their oral agreement when they induced her to convey the land to them. Because genuine issues of material fact concerning fraud were present, summary judgment was properly denied.

[3] C. The pleadings suggest that plaintiff conveyed her land to defendants in order to qualify for governmental aid in the event she became ill. Defendants, therefore, argue that the clean hands doctrine applies when a "grantor seeks to defraud creditors or secrete funds from government agencies." We summarily reject their argument that plaintiff came "into equity . . . with [un]clean hands."

The doctrine of clean hands is not one of absolutes that applies to every unconscionable act of a party. *Trust Co. v. Gill*,

State Treasurer, 286 N.C. 342, 364, 211 S.E. 2d 327, 342 (1975). Whether plaintiff committed an unconscionable act and whether her actions were more egregious than those of defendants, are questions of material fact to be decided by a jury and not by the court. *High v. Parks*, 42 N.C. App. 707, 257 S.E. 2d 661 (1979), *disc. review denied* 298 N.C. 806, 262 S.E. 2d 1 (1979). *See also* 30 C.J.S., Equity, § 98(a) (1965). Moreover, as we said in *High v. Parks:*

> [I]f the [plaintiff] did anything inequitable—and this is a material issue of fact for trial—it was not against defendants but against [a party] not involved in the property dispute in any way. A person is not barred from his day in court in a particular case because he acted wrongfully in another unrelated matter or because he is generally immoral. [Citations omitted.]

Id. at 711, 257 S.E. 2d at 663.

II

THE EVIDENTIARY RULINGS

[4] At trial, plaintiff testified that she, on separate occasions, asked each of her three daughters if they would allow her to transfer the land to them on the condition that they hold it until plaintiff's death and then divide the land equally among all the children. Plaintiff testified that each of her three daughters refused the offer. Each of the three daughters then corroborated plaintiff by testifying that the offer was made and refused. Defendants contend that the admission of this testimony was prejudicial and confusing. The relevancy of the testimony is apparent. It also tends to bolster the credibility of and corroborate the plaintiff's version of the transaction. As stated by plaintiff in her brief:

> the fact that the Plaintiff conveyed her land to the Defendant was not an isolated transaction. It was the final act in a conveyance that she had been attempting for some time, but had not been able to complete due to the lack of a willing participant among her family members. Testimony about her attempts to get another of her children to accept the land, then, was part and parcel of the transaction with the Defendants, which is the subject matter of this action.

Consequently, we are not persuaded that the trial court erred in its evidentiary rulings.

III

THE POST TRIAL MOTIONS

[5] By their final assignment of error, defendants contend that plaintiff failed to meet her evidentiary burden at trial as a matter of law and thus: (1) "a verdict should have been directed against her pursuant to Rule 50 of the North Carolina Rules of Civil Procedure; or (2) the jury verdict in her favor should have been overturned pursuant to Rule 59 of the North Carolina Rules of Civil Procedure."

In passing on a motion for directed verdict or judgment notwithstanding the verdict, the evidence is to be taken in the light most favorable to the non-moving party, and that party is entitled to all reasonable inferences that can be drawn from it. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). We believe the trial court correctly submitted the plaintiff's case to the jury after determining that plaintiff had submitted evidence which, if believed by the jury, was sufficient to prove her claim. Plaintiff's case for the imposition of a constructive trust on the land which she conveyed to the defendants is clearly supportable. Plaintiff presented evidence that a false promissory representation of a past or existing material fact was made by the defendants; that the defendants made the promise intending at the time they made it not to comply with it, but rather to induce the plaintiff to convey her property to them; and that the plaintiff did in fact rely upon defendants' misrepresentation of their intent.

Defendants have presented no compelling arguments showing that they are entitled to a new trial. Accordingly, we find

No error.

Chief Judge MORRIS and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM H. QUILLIAMS

No. 8127SC586

(Filed 5 January 1982)

1. **Burglary and Unlawful Breakings § 5.8; Larceny § 7.8— intent to commit larceny—sufficiency of evidence**

The evidence was sufficient to raise a reasonable inference that defendant broke and entered two premises with intent to commit larceny where it tended to show: Defendant, a stranger to each of the owners, rang a doorbell and uninvitedly entered one set of premises when no one answered and then fled when discovered by one of the occupants. Thereafter, defendant threw a propane tank through a glass door at other premises and entered without permission when the owner was absent and then removed a screen on another door and fled when discovered by the owner's neighbor. Defendant continued to flee in his automobile when pursued by police.

2. **Criminal Law § 102.6— jury argument—objected portion not in record—correct instructions on objected point**

Where the record was not clear as to what a district attorney said in his challenged argument, the record did not contain defense counsel's argument—leaving open the possibility misstatements by the district attorney were provoked, and where the trial judge correctly instructed the jury on the law, any error in the district attorney's argument was found to be nonprejudicial.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 27 January 1981 in Superior Court, GASTON County. Heard in the Court of Appeals on 16 November 1981.

Defendant was charged in two proper bills of indictment with breaking and entering the homes of Pleas G. Hill and Delores Wilson "with the intent to commit a felony therein, to wit: larceny."

Defendant was found guilty as charged, and from a judgment that defendant be imprisoned for not more than seven nor less than five years, he appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney Michael Rivers Morgan, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler for defendant appellant.

HEDRICK, Judge.

Defendant assigns error to the denial of his motion for judgment as of nonsuit.

The evidence presented by the State tends to show the following: On the morning of 12 October 1980, Delores Wilson was awakened by the ringing of her doorbell; she heard the door open, and upon looking into her hallway, she saw defendant standing at her bedroom door; she asked defendant what he was doing and he responded that he had rung the doorbell and was looking for Alice. Ms. Wilson responded that Alice did not live there, and began screaming. Defendant then ran out of the house and got into a white Toyota. Defendant did not have permission to be in Ms. Wilson's home, and no one by the name of Alice lived in the neighborhood. Also on the morning of 12 October 1980, defendant was seen by William H. McConnaughney at the carport of McConnaughney's next door neighbor, Pleas G. Hill. Mr. Hill was not at home that morning and McConnaughney had gone to inspect Hill's home after his wife saw a strange car in Hill's carport and heard glass breaking next door. When defendant saw McConnaughney, defendant left in a white Toyota. McConnaughney then further inspected Mr. Hill's residence and discovered that a screen to the carport entrance had been cut and pulled out and that a propane tank had been thrown through a glass door leading from the patio into the basement of the house. The night bolt on the door leading from the basement to the main part of the house was bent; a door leading to a workshop in the basement had been opened, and a panelled door had been kicked in. Defendant did not have permission to enter Mr. Hill's house. Later that morning, two law enforcement officers in an unmarked police car attempted to stop defendant, whom they spotted driving a white Toyota, by flashing their blue light. They had recognized his car as being one reported as involved in a breaking and entering. When the officers pulled alongside the defendant and called for him to pull over, defendant accelerated to a speed in excess of fifty five miles per hour. These officers followed defendant for six or seven miles, until a tire on the Toyota blew out, at which point defendant stopped his car and ran on foot. One of the officers chased the defendant a quarter of a mile and caught him.

[1] In his brief, defendant argues:

I. The trial court erred in denying defendant's motions to dismiss the charges because there was not sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that defendant intended to commit larceny when he entered the homes.

A motion for judgment of nonsuit is correctly denied if there is competent evidence to support the allegations contained in the bill of indictment; evidence tending to support these allegations must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from such evidence. *State v. Summitt*, 301 N.C. 591, 273 S.E. 2d 425, *cert. denied*, 451 U.S. 970, 101 S.Ct. 2048, 68 L.Ed. 2d 349 (1981). To establish a prima facie case of felonious breaking and entering, the State must present evidence that the defendant is guilty of "breaking or entering of a building with intent to commit larceny therein. G.S. § 14-54(a)." *State v. Bronson*, 10 N.C. App. 638, 640, 179 S.E. 2d 823, 824 (1971). The requisite intent is seldom provable by direct evidence; it ordinarily must be proved by circumstances from which it may be inferred. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). In the absence of a showing of a lawful motive, an intent to commit larceny may be reasonably inferred from an unlawful entry. *State v. Hill*, 38 N.C. App. 75, 247 S.E. 2d 295 (1978). Evidence that the defendant, a stranger to each of the owners, rang a doorbell and uninvitedly entered one set of premises when no one answered and then fled when discovered by one of the occupants, and that defendant threw a propane tank through a glass door at other premises and entered through that door without permission when the owner was absent and then removed a screen on another door and fled when discovered by the owner's neighbor, and that defendant continued to flee in his automobile when pursued by police is sufficient to raise a reasonable inference that the defendant broke and entered the two premises with intent to commit larceny therein. *See State v. Hill, supra* and *State v. Avery*, 48 N.C. App. 675, 269 S.E. 2d 708 (1980). *See also State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976); *State v. Hedrick*, 289 N.C. 232, 221 S.E. 2d 350 (1976); *State v. Accor*, 13 N.C. App. 10, 185 S.E. 2d 261 (1971), *aff'd*, 281 N.C. 287, 188 S.E. 2d 332 (1972). This assignment of error is without merit.

[2] Defendant's next assignment of error is the court's "allowing the prosecutor, over defense counsel's objection, to materially misstate the law by telling the jury that if the defendant broke into a building, there was a presumption that he did so with the intention of committing a felony." Defendant contends that the prosecutor's argument was erroneous and prejudicial in that proof of a breaking and entering into a building can do no more than allow an inference, as opposed to a presumption, of a felonious intent. Defendant also contends that the prosecutor's argument was erroneous and prejudicial in that it suggested to the jury that a mere felonious intent, as opposed to the larcenous intent alleged in the indictment, was all the State had to prove.

"When the district attorney's argument to the jury is challenged as improper, the argument of defense counsel should be placed in the record on appeal to enable appellate courts to determine whether the challenged argument has been provoked." *State v. Smith*, 291 N.C. 505, 522, 231 S.E. 2d 663, 674 (1977). "[W]hen a portion of the argument of either counsel is omitted from the record on appeal, the arguments must be presumed proper." *State v. Bradsher*, 49 N.C. App. 507, 271 S.E. 2d 915, 920 (1980). Ordinarily, the exercise of the trial judge's discretion in controlling jury arguments will not be reviewed unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the defendant in the eyes of the jury. *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976). Furthermore, an improper argument ordinarily may be corrected by instructions given during the court's charge to the jury. *State v. Rose*, 270 N.C. 406, 154 S.E. 2d 492 (1967).

In the present case, the record is not clear as to what the district attorney said in his jury argument since his argument is not reproduced in the record in full or in part. The only indication of the argument's content comes from a colloquoy among the judge, the defense counsel, and the district attorney, during which the judge stated the following:

> THE COURT: Let the record show the Court will reconstruct the record to show that the District Attorney did argue to the jury that if the defendant broke into a building, and after entering into that building, that there was a presumption he did this with the intention of committing a

felony, and the defense attorney objected and the Court overruled that objection.

Nowhere does the record contain the defense counsel's jury argument, and, hence, the possibility remains that the district attorney's statements were provoked. Nevertheless, even assuming arguendo that the district attorney did make an unprovoked and erroneous statement as to the law with respect to intent, the trial judge correctly instructed the jury on the law in this regard. Under the circumstances, we find any error with respect to the defendant's challenge of the district attorney's argument to the jury to be nonprejudicial. *See State v. Corbin*, 48 N.C. App. 194, 268 S.E. 2d 260, *disc. rev. denied*, 301 N.C. 97, 273 S.E. 2d 301 (1980).

Defendant's final assignment of error is the admission into evidence of testimony that when defendant was arrested, a television, a radio cassette, and a camera were found in the back seat of defendant's car. Defendant argues that this testimony was not relevant, but that it "was highly prejudicial since it suggested to the jury that defendant may have committed other breaking and enterings in which he did take some items and thereby improperly bolstered the State's deficient evidence as to whether defendant intended to commit larceny at the Wilson and Hill homes."

An error in the admission of evidence in a criminal trial constitutes grounds for appellate relief only when such error is prejudicial to the defendant. G.S. § 15A-1442(4)(c). In cases not involving constitutional rights, such prejudice exists when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. G.S. § 15A-1443(a). The burden of showing such prejudice is upon the defendant. G.S. § 15A-1443(a).

In the present case, defendant himself stated, "There was simply not even a possible connection between this property [found in defendant's car] and the breaking and enterings for which defendant was on trial." We agree, and therefore think the following quotation from *State v. White*, 271 N.C. 391, 395, 156 S.E. 2d 721, 724 (1967) is dispositive: "Even if the evidence were incompetent as contended by defendant, it is, in our opinion, so speculative and uncertain as to have had no probative force on the minds of a jury and would not justify a new trial. . . ." Since

defendant has failed to show any prejudice incurred from the admission of the challenged testimony, this assignment of error is overruled.

We hold the defendant had a fair trial free of prejudicial error.

No error.

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

LESTER TAYLOR ABERNATHY AND NANCY A. ABERNATHY, HIS WIFE v. RALPH SQUIRES REALTY CO., INC.

No. 8119DC365

(Filed 5 January 1982)

Unfair Competition § 1— unfair trade practices—insufficient evidence

Plaintiffs' evidence was insufficient to show that defendant real estate broker engaged in unfair and deceptive trade practices in violation of G.S. 75-1.1 in the sale of plaintiffs' house or in the sale of another house to plaintiffs where it tended to show only that (1) defendant altered the contract for sale of plaintiffs' home so that plaintiffs would receive "50% of net proceeds (expenses including closing costs, mortgage payments, grass cutting, general maintenance, etc.) at closing" rather than the original language of "50% of net proceeds," since the alteration did not change the import of the term "net proceeds"; (2) defendant received a commission on the sale of the house to plaintiffs and, without their knowledge, acted for both the buyer and the seller of the house; and (3) defendant's agent responded affirmatively when asked whether all of the conditions for sale of the house to plaintiffs had been met when in fact the seller had failed to perform his contractural obligation to paint a bedroom, to put insulation beneath a floor, and to allow plaintiffs to inspect the roof.

APPEAL by plaintiffs from *Warren, Judge.* Judgment entered 23 October 1980 in District Court, CABARRUS County. Heard in the Court of Appeals 17 November 1981.

Plaintiffs' action against the corporate defendant alleges breach of contract and commission of unfair and deceptive trade practices. After the defendant answered, denying the material allegations of plaintiffs' complaint, the case was tried before a jury.

At the trial, plaintiffs' evidence tended to show that in July 1977, plaintiffs talked to Vivian Hawkins, then a real estate agent of defendant, about selling their home (the Delganey property) and purchasing another home. Plaintiffs entered into a listing agreement and authorized use of the Multiple Listing Service. Thereafter Hawkins found a home (the Rocky River house) which met plaintiffs' needs, and plaintiffs entered into a contract to purchase the house. The purchase contract stipulated, among other things, that the seller would allow plaintiffs to inspect heating, plumbing, and electrical systems, appliances, and the roof, and further stipulated that seller would paint the water-damaged wall in a bedroom and would finish the insulation.

To ensure that plaintiffs would have the money to purchase the Rocky River house, plaintiffs and defendant entered into an agreement by which the defendant agreed to buy the Delganey property if it had not been sold by the closing date for the Rocky River house. Defendant was to pay plaintiffs $13,400.00 in equity and was to assume a mortgage of $9,400.00. In addition, the agreement provided that, upon sale of the Delganey property, defendant was to pay plaintiffs all proceeds in excess of the expenses involved in the sale of the house.

Originally, the closing date for the Rocky River house was set for November 1977, but for mutually beneficial reasons, plaintiffs and seller of the Rocky River house moved the date up to September. As a consequence of this, the seller and plaintiffs, through the defendant, renegotiated the price on the Rocky River house from $51,900.00 to $50,458.00. Plaintiffs reinstated the same provisions concerning the roof inspection, painting and insulation. In addition, plaintiffs and defendant renegotiated their contract for sale of the Delganey property increasing the equity plaintiffs were to receive and allowing for sale prior to the September closing date of the Rocky River house. By this contract, according to plaintiffs, plaintiffs were to receive 50% of the net proceeds after the Delganey property was sold.

After moving into the Rocky River house, plaintiffs discovered that, contrary to their agreement, seller had not put insulation under the floor of the recreation room. Additionally, the roof leaked and had to be repaired. Plaintiff Lester Abernathy testified that Hawkins had assured him prior to closing that all matters concerning the house had been attended to.

In June 1978, the Delganey house was finally sold. The gross profit from that sale, however, was reduced substantially by such maintenance charges as payments for painting and for a new vinyl floor and by such settlement charges as the loan origination fee, loan discount (VA points), title examination and insurance fees, survey fee, and an ERA warranty. The sale showed a net loss of $381.97, and plaintiffs, consequently, received no further proceeds from their contract with defendant.

At the close of their evidence, plaintiffs waived their contract theory and elected to proceed on the theory that defendant, through its agent Hawkins, had employed unfair and deceptive trade practices in failing to disclose the remaining faults in the Rocky River property and in deducting from gross profits on the Delganey property some of the items enumerated above. Defendant then put on evidence tending to show that agent Hawkins had asked plaintiff Lester Abernathy if the Rocky River contract provisions had been taken care of to his satisfaction, and plaintiff indicated they had. Furthermore, contrary to Abernathy's testimony, the contract to sell the Delganey property to defendant specifically stated that "Lester T. Abernathy [was] to be refunded 50% of net proceeds (expenses including closing costs, mortgage payments, grass cutting, general maintenance, etc.) at closing."

At the close of all the evidence, defendant moved for a directed verdict which was allowed. Plaintiffs appeal.

Grant & Hastings, P.A., by Randell F. Hastings, for plaintiff appellants.

Parham, Helms & Kellman, by James H. Morton, for defendant appellee.

BECTON, Judge.

The sole issue for our determination is whether the trial court erred in allowing defendant's motion for a directed verdict.

Plaintiffs elected to try their case on "unfair or deceptive acts or practices" theories. G.S. 75-1.1. Whether the facts found by the jury regarding defendant's conduct constitute a violation of G.S. 75-1.1 is a question of law for the trial court's determination. *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975).

In the instant case the question presented by defendant's motion for a directed verdict was whether the evidence, considered in the light most favorable to the plaintiffs, was sufficient to show that defendant engaged in unfair and deceptive trade practices in its business dealings with the plaintiffs. *See Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). We conclude that the evidence was not sufficient for submission to the jury.

The concept of unfair and deceptive trade practices has been an elusive one in our courts. The statute does not define the terms "unfair" or "deceptive," and case law, until recently, has shed little light on their meanings. References to the same language in the Federal Trade Commission (FTC) Act, 15 U.S.C. § 45(a)(1), have been made. *See Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980); *Hardy v. Toler.* In *Johnson*, the Supreme Court, noting the broad langauge of the FTC Act, stated that "[w]hat is an unfair or deceptive trade practice usually depends upon the facts of each case and the impact the practice has in the marketplace." [Citations omitted.] 300 N.C. at 262-63, 266 S.E. 2d at 621. The Court went on to define an unfair practice as one which "offends established public policy as well as . . . [one which] is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." [Citations omitted.] *Id.* at 263, 266 S.E. 2d at 621. A deceptive practice is one which has the "capacity or tendency to deceive;" proof of actual deception is not necessary. *Id.* at 265, 266 S.E. 2d at 622. "In determining whether a representation is deceptive, its effect on the average consumer is considered." *Id.* at 265-66, 266 S.E. 2d at 622.

With these definitions in mind, we have reviewed the evidence in the light most favorable to plaintiffs, and we have paid particular attention to evidence highlighted in plaintiffs' arguments. First, plaintiffs emphasize that, if their evidence were believed, defendant altered the contract in which plaintiffs agreed to sell defendant the Delganey house, so that instead of reading "50% of net proceeds," it read "50% of net proceeds (expenses including closing costs, mortgage payments, grass cutting, general maintenance, etc.) at closing." Assuming that defendant did alter the contractual language by adding the parenthetically noted items, we do not find that the alteration changed the import of the term "net proceeds." Equally important, the expenses incurred in selling the Delganey property were charged equally

against defendant's potential profit and it, therefore, behooved defendant none to incur unnecessary expenses in order to sell the house.

Had the plaintiffs pursued their contract theory, the jury might have been called upon to determine whether the contract was altered and, if so, what the parties intended by the term "net proceeds." Plaintiffs, however, misinterpreting *Marshall v. Miller*, 47 N.C. App. 530, 268 S.E. 2d 97 (1980), *petition for disc. review by plaintiffs denied* 301 N.C. 401, 274 S.E. 2d 226 (1980), *petition by Attorney General for rehearing allowed* 301 N.C. 721, 274 S.E. 2d 229 (1981), *modified and affirmed* 302 N.C. 539, 276 S.E. 2d 397 (1981), waived their right to proceed on this theory and thereby waived this issue. The *Marshall* case held erroneous jury instructions which allowed the jury to assess damages twice for the same default—once on a breach of contract theory and once under G.S. 75-1.1. The prohibition against double recovery should not be read to mean that the two theories of recovery cannot be submitted to the jury for its determination of the basis, if any, of liability.

The second portion of evidence highlighted by plaintiffs was that agent Hawkins received a commission on the sale of the Rocky River house. Plaintiffs contend that, in receiving such commission, Hawkins acted without their knowledge for both the buyer and the seller of the house, thereby violating G.S. 93A-6(a)(4). That is, plaintiffs contend that defendant's interests were adverse to plaintiffs' interest since the higher the sale price on the Rocky River property, the higher defendant's commission would be. This problem, however, exists in many real estate transactions. In the absence of any evidence that defendant knowingly and wilfully negotiated the sale price for the plaintiffs, we can find nothing deceptive or unfair in this practice.

Finally, plaintiffs argue that the evidence showed that defendant, through agent Hawkins, made substantial and wilful misrepresentations concerning the seller's performance of his contractual obligations to paint the bedroom, to insulate the Rocky River house, and to allow plaintiffs to inspect the roof. Plaintiffs' only evidence regarding these "misrepresentations" was that plaintiff Lester Abernathy asked Hawkins, just prior to closing, whether all the terms of the contract had been met. We cannot

find that Hawkins' affirmative response to such a broad question amounted to an intentional misrepresentation. Furthermore, plaintiffs were in as good a position as defendant to determine whether these items had been attended to. Finally, we note that, if the seller of the Rocky River house had failed to perform his contractual obligations, plaintiffs had a cause of action against him for breach of contract.

In summary, we conclude that the acts of defendant about which plaintiffs complained did not rise to the level of unfair and deceptive trade practices and that the trial court properly granted defendant's motion for a directed verdict.

Affirmed.

Judge CLARK and Judge WHICHARD concur.

WALTER E. HUMPHREY, JR. v. ROBERT HILL

No. 818SC221

(Filed 5 January 1982)

1. **Master and Servant § 8.1— employment contract—indefinite duration—failure of consideration**

Defendant's motion for a directed verdict was properly granted where plaintiff alleged an employment contract with defendant in which defendant was to give plaintiff certain stock in his company in consideration for plaintiff's refusal to accept a tentative offer of employment elsewhere as: (1) the period of time for which plaintiff was to render services was too indefinite to create an enforceable contract, and (2) plaintiff did not provide sufficient consideration by waiving his right to pursue other employment.

2. **Rules of Civil Procedure § 50.3— failure to state specific grounds for directed verdict**

There was no merit to plaintiff's contention that defendant failed to state the specific grounds for his motion for directed verdict as required by G.S. 1A-1, Rule 50(a), where defendant moved for a directed verdict on the ground that plaintiff's evidence failed to state a case for the jury. The motion obviously challenged the sufficiency of the evidence and created no misapprehension on the part of the judge or plaintiff.

APPEAL by plaintiff from *Small, Judge.* Judgment entered 30 October 1980 in Superior Court, LENOIR County. Heard in the Court of Appeals 12 October 1981.

The evidence showed that plaintiff, an accountant, worked with several corporations owned by defendant between July 1970 and March 1977. Working full time, he assisted defendant in the development of nursing homes and performed bookkeeping functions and was compensated therefor.

Plaintiff alleges that on 18 January 1975, he told defendant that he had a tentative offer of employment elsewhere in the nursing home industry, and were he to remain in defendant's employ, he would expect to be made a one-third shareholder in Neil Realty Company, the corporation to which he had devoted the greatest amount of professional time. He alleged that defendant accepted his proposal on 8 July of 1975, with delivery of the stock to take place upon the placing of certain loans.

The evidence further tended to show that the original understanding was abandoned and replaced with an agreement to the effect that defendant would merge his corporations and convey to plaintiff a value in the consolidated entity equal to one-third the fair market value of Neil Realty Company.

Finally, plaintiff's testimony indicates that a second substitute agreement was reached in April 1977, between plaintiff, defendant, and a third party, Gene Ormond. It was agreed that each would receive one-third of the stock of Hilco, one of defendant's corporations.

The proposed stock transfers were to be in consideration for plaintiff's continued services and forbearance of pursuing other business opportunities. Plaintiff appeals from a directed verdict in favor of defendant.

Wallace, Langley, Barwick and Landis, by P. C. Barwick, Jr., and F. E. Wallace, Jr., for plaintiff appellant.

Johnson, Patterson, Dilthey and Clay, by Robert M. Clay and D. James Jones, Jr., for defendant appellee.

MORRIS, Chief Judge.

[1] We first address the question whether an enforceable contract existed between plaintiff and defendant. Case law in this

State and other well-reasoned authority indicate that this particular agreement or agreements were terminable at will because not supported by consideration additional to services.

Personal service contracts are subject to restrictive rules of interpretation, requiring for their enforcement certainty as to the nature and extent of the services to be performed, the place where and the person to whom services are to be rendered, and the compensation to be paid. *Beal v. Supply Co.*, 36 N.C. App. 505, 244 S.E. 2d 463 (1978); *McMichael v. Motors, Inc.*, 14 N.C. App. 441, 188 S.E. 2d 721 (1972); *Croom v. Lumber Co.*, 182 N.C. 217, 108 S.E. 735 (1921). Defendant's brief raises the question of adequate specificity of terms, alleging that the time, manner and place of transfer of stock were unclear, and that plaintiff was only to continue working for defendant as he had before, for an indefinite period. The specifics of where and when the services were to be performed, the nature of the services and how compensation was to be made do not make the contract fail for lack of certainty, however. "In contracts for general employment . . . there is seldom any stipulation respecting any matters other than the period of the service and the remuneration to be made; the remainder of the terms are such as the law implies." 53 Am. Jur. 2d, Master and Servant, § 21.

The period of time for which plaintiff was to render services is too indefinite to create an enforceable contract, however. Plaintiff testified under cross examination that there was no explicit understanding with defendant as to how long plaintiff would continue in his previous employment role. He said:

> In exchange for the one-third interest I was to continue to perform my services as I had. I did not say how long I would continue to perform the services if he agreed. There was no limit on that. . . .
>
> . . . I believe it was understood based on our past experiences that if Mr. Hill accepted my proposal that I would work for the company for the rest of my life but we did not specify that I would work for the rest of my life for him.

Where a contract of employment does not fix a definite term, it is terminable at the will of either party. *Nantz v. Employment Security Comm.*, 290 N.C. 473, 226 S.E. 2d 340 (1976); *Tatum v. Brown*, 29 N.C. App. 504, 224 S.E. 2d 698 (1976).

> The general rule is, that "permanent employment" means steady employment, a steady job, a position of some permanence, as contrasted with a temporary employment or a temporary job. Ordinarily, where there is no additional expression as to duration, a contract for permanent employment implies an indefinite general hiring, terminable at will. *McKelvy v. Oil Co.*, 52 Okla., 81, 152 P., 414. . . .

Malever v. Kay Jewelry Co., 223 N.C. 148, 149, 25 S.E. 2d 436, 437 (1943). We have been reluctant, however, in the presence of some indication of duration or of good consideration in addition to the services contracted to be rendered, to hold a "permanent" employment contract unenforceable merely because it fails to specify a term of employment. *See Tuttle v. Kernersville Lumber Co.*, 263 N.C. 216, 139 S.E. 2d 249 (1964); *F. S. Royster Guano Co. v. Hall*, 68 F. 2d 533 (4th Cir. 1934), *Jones v. Carolina Power and Light Co.*, 206 N.C. 862, 175 S.E. 167 (1934); *Stevens v. Southern Railroad*, 187 N.C. 528, 122 S.E. 295 (1924); *Fisher v. John L. Roper Lumber Co.*, 183 N.C. 486, 111 S.E. 857 (1922).

What constitutes sufficient consideration to prevent a contract of permanent employment from being terminable at the will of the employer varies among jurisdictions. 53 Am. Jur. 2d, Master and Servant, § 33. We have said that "[w]here the employee gives some special consideration in addition to his services, such as relinquishing a claim for personal injuries against the employer, removing his residence from one place to another in order to accept employment, or assisting in breaking a strike, such a contract may be enforced." *Burkhimer v. Gealy*, 39 N.C. App. 450, 454, 250 S.E. 2d 678, 682 (1979), *cert. denied*, 297 N.C. 298, 254 S.E. 2d 918 (1979). Never, however, has it been held in this State that the giving up of a job, business, or profession constitutes sufficient consideration.

We disagree with plaintiff's argument that he provided consideration by waiving the right to pursue other employment. Though the giving up of present or future jobs may be a detriment to the employee, it is also an incident necessary to place him in a position to accept and perform the contract. The abandonment of other activities and interests is "a thing almost every desirable servant does upon entering a new service, but which, of course, cannot be regarded as constituting any additional con-

sideration to the master." *Minter v. Tootle, Campbell Drygoods Co.*, 187 Mo. App. 16, 28, 173 S.W. 4, 8 (1915). In *Malever v. Kay Jewelry Co.*, supra, the North Carolina Supreme Court rejected the plaintiff's argument that the inducement to give up his job in another town would be sufficient consideration to support the agreement for permanent employment. Failure to seek employment elsewhere in reliance on a promise of permanent employment is equally insufficient, in our view, to be consideration for lifetime employment. *Winand v. Case*, 154 F. Supp. 529 (D.C. Md. 1957). Plaintiff has furthermore presented no evidence that defendant's position would have been enhanced by plaintiff's continued employment, as would perhaps have been the case were he contemplating entering into competition with defendant. *See Fletcher v. Agar Mfg. Corp.*, 45 F. Supp. 650 (W.D. Mo. 1942).

Because the agreements in issue do not rise to the level of an enforceable contract, we do not reach the question whether this was a contract for the sale of securities, rendered unenforceable for lack of a writing by G.S. 25-8-319, the Statute of Frauds.

[2] Plaintiff asserts that defendant failed to state the specific grounds for the motion for directed verdict as required by G.S. 1A-1, Rule 50(a). We find no merit in this contention. Although the provision in Rule 50(a) that a motion for directed verdict shall state the specific grounds therefor is mandatory, "the courts need not inflexibly enforce the rule when the grounds for the motion are apparent to the court and the parties." *Anderson v. Butler*, 284 N.C. 723, 729, 202 S.E. 2d 585, 588 (1974). The record indicates that defendant's motion was made upon the ground that plaintiff's evidence failed to state a case for the jury. Therefore, "it is obvious that the motion challenged the sufficiency of the evidence to carry the case to the jury. There was no misapprehension on the part of the trial judge or the adverse parties as to the grounds for the motion." *Id.* at 729. Even were the grounds stated too generally, we note that plaintiff waived his objection to the motion by failing to object at trial to the failure of defendant to state specific grounds for the motion. *Johnson v. Dunlap*, 53 N.C. App. 312, 280 S.E. 2d 759 (1981); *Pergerson v. Williams*, 9 N.C. App. 512, 176 S.E. 2d 885 (1970).

We find, based on the above, that plaintiff's evidence, taken in the light most favorable to plaintiff, failed to establish a case for the jury and was properly dismissed pursuant to Rule 50.

The judgment rendered is

Affirmed.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. PAT BURNETTE SHOOK

No. 8128SC525

and

No. 8128SC618

(Filed 5 January 1982)

Criminal Law § 70— tape recordings—admission without voir dire hearing

Where defendant objected to the introduction of tape recordings of conversations between a law officer and defendant, the trial court erred in admitting the tape recordings without conducting a voir dire hearing to determine whether the recordings met the applicable standards for admission.

APPEAL by defendant from *Kirby, Judge* in No. 8128SC525. Judgments entered 5 December 1980 in Superior Court, BUNCOMBE County. Appeal by defendant from *Thornburg, Judge* in No. 8128SC618. Order revoking defendant's appearance bond entered 24 March 1981 in Superior Court, BUNCOMBE County. Both cases heard in the Court of Appeals 11 November 1981.

Defendant was charged with conspiracy to commit the crime of prostitution. She was found guilty in District Court and appealed to Superior Court. Defendant was later indicted for offering a bribe to a detective of the Asheville Police Department. The prostitution charge and the bribery charge were consolidated for trial in Superior Court over defendant's objection. Following a jury verdict of guilty in both cases and an active prison sentence, defendant appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Swain & Stevenson, by Joel B. Stevenson and Kenneth T. Davies, for defendant appellant.

BECTON, Judge.

I

A. State's Evidence

During July and August 1980 the Asheville Police Vice Squad conducted an investigation of Classic Escort Service, a business owned and operated by defendant. During this period, Vice Squad detectives observed females employed by defendant leaving the business with males and accompanying them to motel rooms. Later four of these employees pleaded guilty to prostitution.

Detective Vance Smith testified that he initially went to defendant's place of business on 22 July 1980 to investigate a complaint of vandalism. At that time defendant asked him if he had any information regarding an investigation of her business. She informed Smith that such information "would be worth a dinner or something of that nature." Smith discussed this conversation with his supervisor and began tape-recording his subsequent conversations with defendant. On 8 August 1980 defendant told Smith she would pay him $200 a month for the information. Four days later defendant met with Smith in his van and paid him the $200 in cash. She was arrested upon leaving the van.

B. Defendant's Evidence

Defendant testified that she has known Smith since 1973 and had sexual relations with him at least six times in 1979 and 1980. She testified that she met with Smith in July 1980 to discuss his coming to work for her as a security guard for $200 a month and that Smith was the one who suggested the idea of his receiving money in exchange for information. Defendant denied having any knowledge that her employees were prostitutes.

II

In her prostitution and bribery cases, defendant brings forward five assignments of error. We have examined each one and deem Assignment of Error No. 2 to be dispositive on appeal. Therein defendant assigned error to the admission into evidence of various tape recordings of alleged conversations between her and Smith during August 1980. She alleged that the tapes were played to the jury over her objections and before any proper foundation was laid. Prior to their admission into evidence, Smith

testified about his conversations with defendant from 4 August until 12 August 1980. He then informed the jury that six of these conversations had been recorded. The State proceeded to play tapes of conversations between defendant and Smith which allegedly occurred on 6, 8, 11 and 12 August. The record on appeal indicates that portions of each tape were inaudible, and that the court reporter made no attempt to transcribe any of the tapes.

We agree with defendant that this evidence constituted prejudicial and reversible error. In *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971), our Supreme Court emphasized that tape-recorded evidence must be properly authenticated before it is admissible. The trial court must, therefore, conduct a *voir dire* hearing to determine the tapes' admissibility upon objection to their introduction. During such a *voir dire* hearing, the State must satisfy the trial court of the following:

> (1) That the recorded testimony was legally obtained and otherwise competent;
>
> (2) that the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded;
>
> (3) that the operator was competent and operated the machine properly;
>
> (4) the identity of the recorded voices;
>
> (5) the accuracy and authenticity of the recording;
>
> (6) that defendant's entire statement was recorded and no changes, additions, or deletions have since been made; and
>
> (7) the custody and manner in which the recording has been preserved since it was made. [Citations omitted.]

279 N.C. at 17, 181 S.E. 2d at 571. The *Lynch* Court further emphasized that such a *voir dire* enables the trial judge to determine whether the tapes are audible, intelligible, or fragmentary and whether they contain improper or prejudicial matter. In addition, the *voir dire* provides counsel the opportunity to object to portions of the tapes which he deems to be incompetent. Incompetent matters can, therefore, be kept from the jury.

In the case *sub judice* defendant timely objected to the playing of each taped conversation. The trial court overruled each objection and allowed the tapes to be played before the jury. No *voir dire* hearing was ever conducted. Detective Smith identified the voices on the tapes as his and defendant's. He testified that he operated the tape recorder; that the tapes had not been altered; and that the tapes had been stored in the safe since the meetings with defendant. His testimony, however, also reveals that large portions of the tapes were either inaudible or unintelligible. Indeed, as to one tape recording, the trial court was compelled to say:

> COURT: Can we agree that this recording is probably audible if someone uses a different type of listening device? To listen to it the way we are, apparently is a waste of our time.

These observations raise the question of whether the recording device was operated properly. More important, it raises doubts as to the accuracy of the recordings. Significantly, the trial court's remarks, that one of the inaudible recordings was probably audible if someone used a different type of listening device and that a transcript had been made of the tape, may have given the impression that the court believed the tape to be accurate. In addition, Smith was allowed to testify from alleged transcripts of the tapes, even though there appeared to be discrepancies in a transcript typed by the police department and one prepared for the defense.

Since the publicity surrounding the Watergate hearings and particularly the infamous "gap" in the Nixon tapes, we believe that the American public (indeed, a jury) may be inclined to view gaps or inaudible portions in a taped conversation between an accused person and others as containing evidence which would incriminate the accused. The trial court's conduct in the case *sub judice* lends credence to this belief. Defendant was clearly prejudiced by the failure of the trial court to follow the requirements as mandated by *Lynch* and is entitled to a new trial.

Other assignments brought forward by defendant involve matters that should not recur at a subsequent trial.

III

After giving notice of appeal following her conviction on prostitution and bribery charges, defendant was released upon posting a $30,000 bond which contained, among other things, the following special condition: "To cease and desist in any private enterprise, and to clear any business activities through the District Attorney's office, to be reviewed by the Presiding Judge." On 17 March 1981, the District Attorney, alleging that defendant was still the owner and operator of Classic Escort Service, a business engaged in prostitution, moved that defendant's bond be revoked and that she commence serving her prison sentence. A show cause order was issued on 17 March 1981, and the matter came on for hearing on 23 March 1981. The trial court made findings, concluded that defendant had violated the special condition of her bond, ordered her appeal bond revoked and placed her in custody. Defendant appealed and moved the trial court to stay execution of its order. The trial court denied her motion, and defendant then filed a petition for temporary stay and a petition for writ of supersedeas with this Court. We first granted the petition for a temporary stay and then granted the petition for a writ of supersedeas. Defendant's appeal then followed its normal course.

It is not necessary to address defendant's assignment of error concerning the order revoking her bond, since we granted her petition for a temporary stay and her petition for a writ of supersedeas. The issues she brings forward are moot. She has not suffered a loss in No. 8128SC618, the bond revocation proceeding, and she has been granted a new trial in No. 8128SC525, the prostitution and bribery cases.

For the foregoing reasons, defendant is entitled to a

New trial.

Chief Judge MORRIS and Judge ARNOLD concur.

NEVA S. McMULLAN, PLAINTIFF v. FRED W. GURGANUS, DEFENDANT AND J. VERNON GURGANUS AND DORIS GURGANUS, SURETIES

No. 812SC394

(Filed 5 January 1982)

Principal and Surety § 1— surety bond—failure of language to make bond conditional

A provision in a bond noting "defendant desires to give bond to stay execution" did not make the bond a conditional one. The statement expressing defendant's desire to stay execution against him was insufficient to give plaintiff notice that the sureties' promise was conditioned upon such stay.

APPEAL by sureties from *Brown, Judge.* Judgment entered 26 November 1980 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 19 November 1981.

This case involves a bond executed by the sureties (J. Vernon Gurganus and Doris Gurganus) in plaintiff's favor, in which they bound themselves to pay the amount of the judgment plaintiff had obtained against sureties' son, defendant Fred W. Gurganus, if he did not pay.

Plaintiff's complaint alleged that defendant executed a promissory note to North Carolina National Bank (NCNB) in the principal amount of $10,000. NCNB assigned the note to plaintiff. Plaintiff sought judgment against defendant for the outstanding balance due on the note plus interest.

In his answer, defendant admitted that he owed the valid holder of the note one-half of the outstanding balance. Defendant filed a third-party complaint against Mary Tucker McMullan, plaintiff's daughter. In this complaint, defendant alleged that he and third-party defendant were partners in a business that had since dissolved and that the funds from the promissory note were used in the operation of the partnership. Defendant sought recovery from third-party defendant for one-half of the amount of any judgment plaintiff might obtain against defendant.

Defendant's motion to consolidate this action with another suit brought by plaintiff and pending in District Court was denied. The District Court action was similar to the case *sub judice* but involved a different promissory note.

Plaintiff's motion for summary judgment was granted on 11 February 1980, and plaintiff was awarded a recovery of $12,601.60 from defendant. Summary judgment for plaintiff was also granted in the similar District Court case.

Plaintiff filed an application seeking to charge defendant's interest in a partnership known as Dockside Investments with payment of the unsatisfied judgment in the District Court case. The court continued the hearing on plaintiff's application, at defendant's request and upon his posting a bond, until after the May 1980 Civil Session of Superior Court.

On 17 April 1980 defendant's parents, J. Vernon and Doris Gurganus (hereinafter "sureties") executed a bond in which they agreed to be bound to pay plaintiff the amount of her judgment against defendant in the event he did not pay plaintiff.

Defendant's motion to stay execution of the judgment was denied. After execution against defendant had been issued and returned *nulla bona*, plaintiff moved to have the sureties' liability on the bond be adjudged absolute. Sureties responded that their intent, as shown on the face of the bond, was to post bond in order to stay execution against their son, the defendant. They alleged that plaintiff breached the conditions of the bond by issuing an execution. Sureties filed supporting affidavits and asked that plaintiff's motion be denied.

On 26 November 1980 judgment was entered on the bond against the sureties. From that judgment, the sureties appeal.

McMullan & Knott by Lee E. Knott, Jr., for plaintiff appellee.

Herman E. Gaskins, Jr., for sureties appellants.

CLARK, Judge.

The sureties present one argument for consideration. They contend that they are not liable on the bond because the bond was conditioned upon a stay of execution against defendant's property, and plaintiff later breached that condition by executing on the judgments.

The bond contained the following language:

"Whereas the above-named plaintiff instituted suit against the defendant and said suit resulted in a judgment for the plaintiff in the amount of $11,931.51;

And whereas, the defendant desires to give bond to stay execution;

We, and each of us, acknowledge ourselves bound unto Neva S. McMullan, the plaintiff herein named in this action, in the sum of $11,931.51 together with the cost of this action and interest thereon from February 11, 1980, to be void, however, if the within named defendant, Fred W. Gurganus, shall pay said sum to Neva S. McMullan, the plaintiff.

Witness our hands and seals this 17th day of April, 1980.

s/ J. VERNON GURGANUS (SEAL)
s/ DORIS W. GURGANUS (SEAL)"

A surety is a person who is primarily liable for the payment of a debt or performance of an obligation of another. A surety's liability is independent of any default by the debtor. *Trust Co. v. Creasy*, 301 N.C. 44, 269 S.E. 2d 117 (1980). "Where a surety seeks to avoid liability on the ground that his undertaking was delivered conditionally and the conditions were not performed, the courts ordinarily apply one of two rules, depending on the facts presented: When the surety's undertaking is complete and regular on its face and the obligee has no notice of conditions imposed by the surety, the surety will be liable; on the other hand, when the undertaking is so incomplete on its face as to suggest nonperformance of some condition imposed by a surety, it carries notice to the obligee and relieves the surety." 74 Am. Jur. 2d *Suretyship* § 124 at pp. 87-88 (1974).

The language used in the bond executed by sureties clearly binds sureties to pay plaintiff in the event their son, the defendant, fails to pay the judgment. The only question is whether the language "And whereas, the defendant desires to give bond to stay execution" is sufficient to give plaintiff notice that sureties intended their liability to be conditioned upon stay of execution of the judgment against defendant. We think that this statement expressing *defendant's* desire to stay execution against him is insufficient to give plaintiff notice that the sureties' promise was conditioned upon such stay.

It is evident from the record that the bond was to be executed for the purpose of inducing the court's continuance of the hearing on plaintiff's application to charge defendant's partnership interest. The order of Judge Ward dated 31 March 1980 contains the following language:

> "IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that upon the posting of a bond with sufficient surety to secure the aforesaid judgment debt of the defendant to the plaintiff no later than April 2, 1980 that the hearing upon the plaintiff's application be continued until after the May, 1980 Civil Session of Superior Court of Beaufort County."

There was no motion for a stay of execution pending at the time the bond was filed on 17 April 1980. On that date, the court issued an order in which he stated that the "defendant has this date posted a bond with good and sufficient surety as specified in the order heretofore entered March 31, 1980." Therefore, it was ordered that the hearing on plaintiff's application be continued. By affidavit dated 17 November 1980, plaintiff's attorney averred that he agreed to the continuance of the hearing based upon defendant's representations that defendant's parents owned several tracts of property and would execute the bond. He also averred that plaintiff was not notifed by defendant that the bond was for any purpose other than the one on which the parties had agreed: to continue the hearing on the application.

On the other hand, defendant's attorney by affidavit averred that plaintiff prepared and submitted the order for continuance and an unconditional bond, that he would not let the sureties execute the unconditional bond but prepared the conditional bond which was executed by them and filed with the court.

The record does not disclose that plaintiff or her attorney had any notice of the execution of the substituted bond, or that plaintiff understood or agreed to accept such bond. Regardless of any misunderstanding between the parties or their counsel, we find the provision in the bond that "defendant desires to give bond to stay execution" did not in fact make the bond a conditional one.

The judgment holding the sureties liable on the bond is

Affirmed.

Judges WHICHARD and BECTON concur.

IN THE MATTER OF THE FORECLOSURE OF DEED OF TRUST, EXECUTED BY MURRAY BONDER AND WIFE, ANN S. BONDER (PROPERTY NOW OWNED BY RICHARD S. ROBINSON AND WIFE, IRENE K. ROBINSON) DATED OCTOBER 6, 1972, AND RECORDED IN BOOK 739, PAGE 87, JOHNSTON COUNTY REGISTER OF DEEDS, CHARLES H. YOUNG, TRUSTEE

No. 8111SC332

(Filed 5 January 1982)

Mortgages and Deeds of Trust § 15— deed of trust on residential property—requirement of written consent for transfer of property—acceleration clause—increased rate of interest for transferee

Provisions of a deed of trust on residential real property permitting the lender to accelerate maturity of the debt upon a transfer of the property without the written consent of the lender could properly be used by the lender to require a transferee of the security property to pay an increased rate of interest in order to assume the loan on the property. Furthermore, in a foreclosure hearing held pursuant to G.S. 45-21.16, the trial court properly excluded and refused to consider evidence purporting to show that the consent to transfer provision was for the purpose of insuring the "credit worthiness" of those assuming the obligation and was not intended to allow extraction of enhanced interest, since the deed of trust in no way purported to restrict the lender's right to withhold consent to transfer to situations in which it deemed itself insecure.

APPEAL by respondents from *Brannon, Judge.* Ordered entered 13 November 1980 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 10 November 1981.

Respondents appeal from an order allowing a trustee to proceed with foreclosure of a deed of trust.

Purrington & Purrington, P.A., by A. L. Purrington, Jr. and J. Ward Purrington, for petitioner appellee.

Mast, Tew & Nall, P.A., by George B. Mast, Joseph T. Nall, and L. Lamar Armstrong, Jr., for respondent appellants.

WHICHARD, Judge.

A deed of trust on residential real property prohibited conveyance thereof without written consent of the lender. It also provided for acceleration of maturity of the debt upon noncompliance with this prohibition. The primary issue is whether the lender could use these provisions to extract enhanced interest upon conveyance of the security property. A subsidiary issue is whether evidence of legal defenses is admissible and proper for consideration in a hearing pursuant to G.S. 45-21.16. We answer both issues in the affirmative.

Murray Bonder and wife, Ann S. Bonder, executed a note to petitioner, Raleigh Federal Savings and Loan Association, secured by a deed of trust on residential real property. The deed of trust contained the following provision: "[The Bonders] will not convey the premises herein described without the consent in writing of the Association, its successors or assigns . . . ." It also provided:

> If . . . the [Bonders] . . . shall fail to observe, keep and perform any of the agreements, covenants and conditions herein set out . . . the entire amount of such note, loans, advances and any other amounts hereby secured, shall at the option of the holder of the note . . . immediately become due and payable; and upon application of the Association or the holder of the note . . ., it shall be lawful for and the duty of [the trustee] . . . to sell the land and premises . . . .

Respondents, Richard S. Robinson and wife, Irene K. Robinson, as prospective purchasers of the security property, thereafter contacted petitioner regarding assumption of the Bonder obligation. When informed that the assumption agreement would increase the interest rate from 7¾% to 12%, respondents did not complete or sign the application for assumption. When an attorney for the Bonders requested written consent to the conveyance, petitioner did not respond. The Bonders nevertheless proceeded to convey the property to respondents. The parties have stipulated that the petitioner did not consent in writing to the conveyance.

As a consequence of the conveyance without its written consent, petitioner, pursuant to the above quoted provisions, in-

stituted foreclosure. The clerk of superior court found no default and dismissed the proceeding. The superior court reversed, finding the conveyance absent petitioner's written consent an event of default in violation of the provisions of the deed of trust.

Respondents contend the court erred in refusing to admit evidence of and to consider their "legal defense" that the consent to transfer provision was included for the purpose of insuring the "credit worthiness" of those assuming the obligation, and was not intended to allow extraction of enhanced interest. The trial court based its refusal on its opinion

> that the case of IN RE WATTS, 38 N.C. App. 90, 247 S.E. 2d 427 (1978) is controlling and is authority for the proposition that the only evidence which may be considered . . . is that evidence which factually supports or rebuts the four findings of fact required by G.S. 45-21.16 and . . . evidence relating to other issues which may constitute a legal or equitable defense to foreclosure [is] inadmissible.

In *Watts* this court held only that, in a hearing pursuant to G.S. 45-21.16, the *equitable* jurisdiction of the court could not be invoked to enjoin a foreclosure sale. *In re Watts*, 38 N.C. App. 90, 94-95, 247 S.E. 2d 427, 429-430 (1978). It did not, however, hold that the alleged defaulting party is precluded from presenting *legal* defenses.

The statute provides for a hearing at which the clerk, and the superior court upon appeal, shall authorize the trustee to "proceed under the instrument, and . . . give notice of and conduct a sale" upon finding the existence of (1) a valid debt of which the party seeking to foreclose is the holder, (2) default, (3) right to foreclose under the instrument, and (4) notice to those entitled. G.S. 45-21.16(a), (d). Legal defenses which negate any of these requisite findings are properly considered at this hearing. For example, the alleged defaulting party could negate the existence of default, which is "[t]he omission or failure to perform a legal duty," Black's Law Dictionary 505 (rev. 4th ed. 1968), by establishing absence of legal obligation to perform an allegedly omitted duty, or by establishing full performance of the duty. While "G.S. 45-21.16 was intended by the legislature to meet minimum due process requirements, not to engraft upon the procedure for foreclosure under a power of sale all of the re-

quirements of a formal civil action," *In re Foreclosure of Sutton Investments*, 46 N.C. App. 654, 663, 266 S.E. 2d 686, 691, *disc. review denied*, 301 N.C. 90 (1980), to preclude presentation of legal defenses to the four requisites to authorization of sale would render the hearing provided by this statute a largely purposeless formality.

The court nevertheless correctly excluded and refused to consider respondents' proffered evidence. Our Supreme Court has construed a convenant requiring written consent to sale of security property under a deed of trust, when coupled with a clause permitting acceleration of maturity of the secured indebtedness upon non-compliance with the covenant, as a "due-on-sale" clause, which the lender may use to extract enhanced interest upon transfer of the security property. *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 224 S.E. 2d 580 (1976). While in *Crockett* the security property was commercial, and here it is residential, we nevertheless find the *Crockett* rationale controlling. The language of the deed of trust here, like that in *Crockett*, is unambiguous. "Where the terms of the contract are not ambiguous, the express language of the contract controls in determining its meaning [,] and not what either party thought the agreement to be." *Crockett*, 289 N.C. at 631, 224 S.E. 2d at 588. The deed of trust here, like that in *Crockett*, in no way purports to restrict the lender's right to withhold consent to transfer to situations in which it deems itself insecure. The court thus properly excluded and refused to consider the proffered evidence purporting to show that the consent to transfer provision was for the purpose of insuring the "credit worthiness" of those assuming the obligation, and was not intended to allow extraction of enhanced interest.

The order allowing the trustee to proceed with foreclosure is affirmed.

Affirmed.

Judges VAUGHN and HILL concur.

Stanley v. Walker

DONALD L. STANLEY AND WIFE, KATHLEEN S. STANLEY v. LENEIR P. WALKER AND WIFE, CAROLYN W. WALKER

No. 8118SC418

(Filed 5 January 1982)

Rules of Civil Procedure § 56.4— summary judgment—sufficiency of supporting material—opposing party

In an action upon a promissory note whereby plaintiffs sought to exercise their right to accelerate the note upon default and declare the remaining amount due, summary judgment was properly entered for plaintiffs where: (1) through their complaint and supporting affidavit, plaintiffs made out a prima facie case entitling them to judgment as a matter of law, (2) defendants raised the affirmative defense of payment in their answer, but did not verify it, (3) in their answer, defendants merely *alleged* they had a meritorious defense and would raise one issue of material fact, and (4) plaintiffs' evidence was not inherently incredible, self-contradictory, nor susceptible to conflicting inferences. G.S. 1A-1, Rule 56(e).

APPEAL by defendants from *Collier, Judge.* Order and judgment entered 27 January 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 9 December 1981.

On 2 May 1980 the defendants executed and delivered to the plaintiffs a promissory note for the principal sum of $11,417.65, with payment to be made in 184 monthly installments of principal and interest to be due on the first of each month. As part of the terms, the promissory note contained the following provision:

> In the event of default in payment of any installment of principal or interest hereof or default under the terms of any instrument securing this note, and if the default is not made good within fifteen (15) days, the holder may, without notice, declare the remainder of the debt at once due and payable.

Plaintiffs alleged in their complaint that the payment for November 1980 was not made by the first of the month, thereby placing defendants in default; that subsequently the plaintiffs did not receive any monies from the defendants within the fifteen-day period allowed for; that on 17 November 1980, plaintiffs exercised their right to accelerate the note and declared the remaining amount of $11,198.20 due and payable at once; and that defendants refused to pay the amount then due. Plaintiff Donald Lynn Stanley signed an affidavit to this effect.

In their answer to plaintiffs' motion for summary judgment, defendants stated that they "well and truly believe that they have a meritorious defense to the Complaint of the plaintiffs, and that there is or will be at least one (1) controverted genuine issue as to a material fact in this lawsuit." Defendants further filed an affidavit in which they stated that they were "personally aware of each and all of the things said in their Answer to Motion for Summary Judgment attached hereto."

From an order of summary judgment granted in favor of plaintiffs, defendants appeal.

J. Bruce Morton for plaintiff appellees.

Hollowell, Silverstein & Brady, by Robert A. Brady, Everett E. Dodd, Jr. and William P. Harper, Jr., for defendant appellants.

MARTIN (Harry C.), Judge.

We are afforded numerous cases interpreting and applying Rule 56 of the North Carolina Rules of Civil Procedure, which clearly established that on a motion for summary judgment, the question before the Court is whether the pleadings, discovery documents, and affidavits support a finding 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. *See, e.g., Hotel Corp. v. Taylor* and *Fletcher v. Foremans, Inc.*, 301 N.C. 200, 271 S.E. 2d 54 (1980); *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976); *Kidd v. Earley*, 289 N.C. 343, 222 S.E. 2d 392 (1976); *Tucker v. Telephone Co.*, 50 N.C. App. 112, 272 S.E. 2d 911 (1980). The burden is upon the movant to establish the absence of any issue of fact, and once satisfied, the opposing party must come forward with facts, rather than mere allegations, which controvert the moving party's case. *Hotel Corp., supra; Moore, supra; Nasco, supra; Kidd, supra.* To avoid the possibility of any party's manufacturing facts to meet a motion for summary judgment, Rule 56(e) requires that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Turning now to the record before us, we find that in their complaint and supporting affidavit, plaintiffs have made out a

prima facie case entitling them to judgment as a matter of law. Plaintiffs' forecast of the evidence includes possession of a validly executed note delivered to them, nonpayment of the November 1980 installment, and the exercise of their right to accelerate. Although defendants raise the affirmative defense of payment in their answer to plaintiffs' complaint, this answer is not verified. The mere allegation in their answer to the motion for summary judgment that they have a meritorious defense and will raise one issue of material fact is not sufficient to withstand a motion for summary judgment. Defendants fail to support their contentions by the factual showing required to oppose plaintiffs' affidavit under Rule 56. Moreover, defendants' affidavit falls short of the Rule 56(e) requirement in that it fails to verify these allegations, but merely states they are "aware" of them.

Defendants strongly urge us to adopt the reasoning in *Kidd v. Earley, supra,* at 367, 222 S.E. 2d at 408, which considered the question of "whether a party with the burden of proving a material fact is entitled to summary judgment when (1) he relies upon his own testimony, which is not inherently incredible and is neither self-contradictory nor susceptible to conflicting inferences, to establish that fact; and (2) the opposing party does not support the general denial of that fact in his pleadings by affidavits under Rule 56(e) or (f)." In *Kidd* the Court established the following rule:

> We hold that summary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate.

289 N.C. at 370, 222 S.E. 2d at 410.

Applying these principles to the facts of this case, we hold that the summary judgment for plaintiffs was proper. Plaintiffs' evidence is not inherently incredible, self-contradictory, nor susceptible to conflicting inferences. There are no gaps in the proof, and there is no standard that must be applied to the facts by a jury. There are only latent doubts as to the credibility of plaintiffs' affidavit stemming from the fact that they are

interested parties. Defendants have produced no contradictory affidavits, have pointed to no specific areas of impeachment or contradiction, and have offered no facts to support their allegations. *See Kidd, supra.* We find no "lurking issue" of credibility of sufficient import to justify affording defendants an opportunity to cross-examine witnesses and to require jury determination.

Affirmed.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. REGGIE BENFIELD

No. 8127SC454

(Filed 5 January 1982)

1. **Criminal Law § 22— arraignment—sufficiency of showing in record—waiver**

The record sufficiently showed that defendant was properly arraigned where it stated that defendant appeared with his counsel in open court and was duly arraigned by the assistant district attorney reading the charges to him, whereupon he pled not guilty, it not being necessary for the charges read to defendant to appear in the record. Furthermore, defendant effectively waived further arraignment by an oral waiver on the day of trial since no written waiver was required by G.S. 15A-945 when the waiver occurred at such time.

2. **Criminal Law § 15— venue transferred—trial in county of indictment—absence of prejudice—waiver of objection to venue**

Where defendant was indicted in Cleveland County for a breaking and entering and larceny which occurred in that county, and a superior court judge ordered the matter transferred to Iredell County, defendant was not prejudiced when he was thereafter tried on the indictment in Cleveland County without an order transferring the case back to Cleveland County. Moreover, venue in Cleveland County became conclusive when defendant failed to move to dismiss for improper venue pursuant to G.S. 15A-952, and the transfer of venue was not required by G.S. 15A-133(a) to be in writing and signed by defendant and the prosecutor. G.S. 15A-135.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 12 December 1979 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 19 October 1981.

The evidence shows that a Cleveland County grand jury on 29 December 1978 returned an indictment against defendant for

breaking and entering and larceny. On 31 January 1979, Superior Court Judge J. W. Jackson entered an order transferring the matter from Cleveland County to Iredell County, where defendant faced a burglary charge. Venue was transferred so that the matters pending against defendant in both counties could be consolidated and disposed of upon a plea of guilty, and so that defendant could be a witness for the state in other cases in Iredell County. Defendant did not appear for trial in Iredell County. He was tried on the breaking and entering and larceny charges in Cleveland County, was found guilty, and judgment was entered on 12 December 1979. Defendant appeals from an order of imprisonment.

Attorney General Edmisten, by Special Deputy Attorney General and Special Assistant to the Attorney General David S. Crump, for the State.

Kennedy, Church, Young and Paksoy, by William C. Young, for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant alleges that the trial court committed error by failing to arraign him in accordance with G.S. 15A-941. We find, however, that defendant was properly arraigned. The record reflects:

> . . . the defendant appeared with his counsel in open court and was duly arraigned by the Assistant District Attorney reading the charges against him, whereupon, he pleaded not guilty.

Defendant argues that charges read to a defendant must appear in the record. We disagree.

> Defendant, as appellant, has the burden on appeal to show that error was made. We will not presume that G.S. 15A-941 was not complied with when the record shows that an arraignment took place and defendant, duly represented by counsel, entered a plea of not guilty. If defendant was not properly informed of the charges against him at arraignment, it was his duty to object at that time and to have appropriate entries made in the record to show the basis for the objection.

State v. Small, 301 N.C. 407, 430-31, 272 S.E. 2d 128, 142-43 (1980). Defendant's counsel indicated that defendant had been previously arraigned in Cleveland County and entered a plea of not guilty. Further, there is no evidence that defendant either objected or made appropriate entries in the record at the original arraignment or at the proceedings upon remand to Cleveland County, where arraignment was waived. Defendant contends that the waiver, which was oral, did not comply with G.S. 15A-945. That statute provides:

> A defendant who is represented by counsel and who wishes to plead not guilty may waive arraignment prior to the day for which arraignment is calendared by filing a written plea, signed by the defendant and his counsel.

Defendant waived arraignment on the day of trial. Hence there was no need to submit a written waiver and G.S. 15A-945 is inapplicable.

Even were we to find that no arraignment had been conducted, failure of the record to show a formal arraignment does not entitle defendant to a new trial where the record indicates that defendant was tried as if he had been arraigned and had entered a plea of not guilty, as is the situation here. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980); *State v. McCotter*, 288 N.C. 227, 217 S.E. 2d 525 (1975). "In this case there can be no doubt either that defendant was fully aware of the charge against him or that he was in nowise prejudiced by the omission of a formal arraignment—if indeed it was omitted." *Id.*, p. 234.

[2] Defendant further contends that his trial was erroneously conducted, to his prejudice, in Cleveland County. He points out that Judge Jackson entered an order directing that the trial take place in Iredell County, but that there was no order transferring the case back to Cleveland County. Defendant alleges that the record does not reveal a waiver of venue as set forth in G.S. 15A-133. We find no error in either regard and deem that venue was proper.

Venue for trial proceedings in cases within the original jurisdiction of the superior court lies in the county where the offense occurred. G.S. 15A-131(c). The breaking and entering and larceny charges were brought in Cleveland County based upon a

criminal occurrence in that county. Thus, we are not persuaded that defendant suffered prejudice by having been tried in Cleveland County. Venue "does not affect the question of a defendant's guilt or the power of the court to try him." *State v. Batdorf*, 293 N.C. 486, 496, 238 S.E. 2d 497, 504 (1977). Moreover, defendant failed to move to dismiss for improper venue as per G.S. 15A-952, hence, venue in Cleveland County became conclusive. G.S. 15A-135.

Defendant is mistaken in espousing that a transfer of venue must be in writing and signed by the defendant and the prosecutor. G.S. 15A-133(a) applies when there is a voluntary change of venue with the consent of all parties, according to the official commentary, and applies only to "a particular proceeding or stage of the proceedings rather than the more unusual change of venue for all subsequent stages of a proceeding."

In the defendant's trial, particularly the matters of arraignment and venue, we find

No error.

Judges ARNOLD and BECTON concur.

DENNIS ELMER JOLLEY v. GENERAL MOTORS CORPORATION

No. 8127SC378

(Filed 5 January 1982)

Automobiles § 6.2— alleged negligence or breach of warranty for car defect—directed verdict for manufacturer proper

Directed verdict for the manufacturer of an automobile in which plaintiff was driving when he was involved in a single car accident was proper as the evidence only presented an inference that the right front tire either blew or came off the automobile. This fact alone was not sufficient to show the vehicle, or tire, was defective when it left defendant's plant, or that defendant was negligent in its design of the automobile, its selection of materials, its assembly process or its inspection.

APPEAL by plaintiff from *Gaines, Judge*. Judgment entered 12 January 1981 in Superior Court, CLEVELAND County. Heard in the Court of Appeals on 18 November 1981.

This case arises out of plaintiff's action to recover, in either negligence or breach of warranty, for damages he allegedly incurred in an automobile accident on 29 October 1976.

At trial, plaintiff presented evidence tending to show the following:

On 19 October 1976, plaintiff's father purchased a new 1977 model Oldsmobile from Bryson Chevrolet and Olds in Gaffney, South Carolina. Plaintiff drove the automobile away from the dealership and was the only person to drive the automobile until the time of his accident on 29 October 1976. The automobile was never involved in an accident until the one on 29 October. Plaintiff did not drive the automobile at excessive speeds and never started and stopped it quickly. On 29 October, plaintiff was operating the car on Highway 107, at a speed of 40 miles per hour. He was not under the influence of alcohol. Plaintiff testified:

> I was going on a straight. I felt a sudden drop off to the right and then there was a left curve in front of me. I couldn't make the left-hand curve and went straight into the embankment and around the curve and dropped off in between two trees on the left-hand side of the road. . . . I was driving along and . . . [t]he right side of my car pulled toward the right side of the highway. It did not stay on the same level at all times. It seemed to have a drop—a sudden drop down. When the right side of the car dropped down and pulled toward the right, I tried to apply my brakes. I was not able to do that. . . . [T]he car left the road . . . and went down in between two trees. . . .

Plaintiff did not turn his car off the road. Immediately after his accident, plaintiff was hospitalized for injuries he received in the accident. He returned to the scene of the accident the next day and observed a "rim mark," which was a "cut mark." The "cut mark" began on the surface of the road at the point where the automobile initially left the road and went from the road up to the bank and back across the road to where the automobile had stopped. The mark was as wide as the car's rim. Also on the day after the accident, plaintiff observed the vehicle at a service station in Sylva; the right front tire was missing and the rim remained on the car.

From an order granting defendant's motion for directed verdict, plaintiff appealed.

Hamrick & Hamrick, by J. Nat Hamrick, for plaintiff appellant.

Helms, Mulliss & Johnston, by E. Osborne Ayscue and W. Donald Carroll, Jr., for defendant appellee.

HEDRICK, Judge.

Plaintiff assigns as error the court's granting of defendant's motion for directed verdict. In determining whether a motion for directed verdict should be granted, the non-movant's evidence must be taken as true and considered in the light most favorable to him; a directed verdict is properly granted if and only if the evidence is insufficient to justify a verdict for the nonmovant. *Hawks v. Brindle*, 51 N.C. App. 19, 275 S.E. 2d 277 (1981). In the present case, the plaintiff's evidence must be examined to determine if it would be sufficient to support a verdict for either negligence or breach of warranty.

The plaintiff, to overcome a motion for a directed verdict, is required to offer evidence to establish, beyond mere speculation or conjecture, every essential element of negligence. Upon his failure to do so, a motion for a directed verdict is properly granted." *Oliver v. Royall*, 36 N.C. App. 239, 242, 243 S.E. 2d 436, 439 (1978). Evidence which raises only a conjecture of negligence is not sufficient to withstand a motion for directed verdict. *Cox v. Dick*, 31 N.C. App. 565, 229 S.E. 2d 843 (1976), *disc. rev. denied*, 291 N.C. 710, 232 S.E. 2d 203 (1977). Ordinarily, no inference of negligence arises from the mere fact of accident or injury. *O'Quinn v. Southard*, 269 N.C. 385, 152 S.E. 2d 538 (1967). In an action to recover for injuries resulting from the negligence of a manufacturer, plaintiff must present evidence which tends to show that the product manufactured by defendant was defective at the time it left defendant's plant, and that defendant was negligent in its design of the product, in its selection of materials, in its assembly process, or in its inspection of the product. *Cockerham v. Ward*, 44 N.C. App. 615, 262 S.E. 2d 651, *disc. rev. denied*, 300 N.C. 195, 269 S.E. 2d 622 (1980). To make out a case of breach of implied warranty, the plaintiff must prove that the goods bought and sold were subject to an implied warranty of

merchantability, that the goods did not comply with the warranty in that the goods were defective at the time of sale, that his injury was caused by the defective nature of the goods, and that damages were suffered as a result; the burden is upon the purchaser to establish a breach by the seller of the implied warranty by showing that a defect existed at the time of sale. *Cockerham v. Ward, supra.*

No construction of the evidence in the present case yields an inference that the automobile in question was defective in any way when it left defendant's plant, or that there was any negligence on the part of defendant in its design of the automobile, its selection of materials, its assembly process, or in its inspection. An inference which may reasonably be drawn from the evidence is that the right front tire either blew out or came off the rim of the automobile. Assuming arguendo that the tire did blow out or come off the rim, this fact standing alone is not sufficient to show that the vehicle, or in particular, the tire, was defective when it left defendant's plant, that defendant was negligent in its design of the automobile, its selection of materials, its assembly process, or its inspection. *Plouffe v. Goodyear Tire & Rubber Co.*, 118 R.I. 288, 373 A. 2d 492 (1977); *Springer Corp. v. Dallas & Mavis Forwarding Co.*, 90 N.M. 58, 559 P. 2d 846 (1976), *cert. denied*, 90 N.M. 254, 561 P. 2d 1347 (1977). When the evidence in the present case is considered in the light most favorable to plaintiff, it tends to show that an accident occurred and that plaintiff was injured, and, as pointed out earlier, negligence cannot be inferred from the mere happening of an accident or injury. What we have said with respect to a lack of evidence of negligence on the part of defendant applies equally to a lack of evidence of breach of implied warranty. Directed verdict against plaintiff, therefore, was proper.

Affirmed.

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

FRED C. BROWN v. S. W. VANCE, M.D.

No. 8124SC410

(Filed 5 January 1982)

Judgments § 36.6; Master and Servant § 32; State § 9— action against negligent employee—recovery in tort claim action as res judicata

Plaintiff's claim against defendant physician for negligent treatment of plaintiff while he was an inmate of the Department of Corrections was barred by an award of $15,000 made to plaintiff by the Industrial Commission in an action under the Tort Claims Act against defendant's employer, the Department of Corrections, based solely on the negligence of defendant.

APPEAL by plaintiff from *Griffin, Judge*. Judgment entered 9 February 1981 in Superior Court, AVERY County. Heard in the Court of Appeals 8 December 1981.

Plaintiff initiated this action against defendant to recover for defendant's medical malpractice. In his complaint plaintiff alleged that he was an inmate at the Avery County Unit of the Department of Corrections and that defendant was the physician who treated the inmates. The complaint further alleged that defendant was negligent in the treatment of plaintiff's diabetes and the ulcer on plaintiff's leg; that plaintiff's lower left leg was amputated as a result of defendant's negligence; and that plaintiff experienced pain and suffering and suffered damages as a result of this negligence. Plaintiff prayed for recovery of damages in excess of $10,000.

In his answer defendant denied negligence. By amended answer defendant alleged that plaintiff's action was barred by the decision and order of the North Carolina Industrial Commission awarding plaintiff $15,000 for the same claim in a proceeding by plaintiff against the Department of Corrections. Defendant alternatively alleged that the award by the Industrial Commission placed a ceiling of $15,000 on the amount of damages plaintiff could recover from defendant.

Defendant moved for summary judgment. The court found that plaintiff's recovery under the Tort Claims Act barred his claim and allowed summary judgment and dismissed the claim.

Robert H. West for plaintiff appellant.

Mitchell, Teele, Blackwell & Mitchell by Hugh A. Blackwell for defendant appellee.

CLARK, Judge.

Plaintiff argues strenuously that the court erred in granting defendant's motion for summary judgment in that the recovery under the Tort Claims Act was not *res judicata* in this action. However, we agree with the trial court that plaintiff's claim was barred by the recovery awarded him by the Industrial Commission and hold, therefore, that the granting of summary judgment was proper.

We find this case is controlled by *Brotherton v. Paramore*, 5 N.C. App. 657, 169 S.E. 2d 36 (1969). In that case plaintiff had filed a claim under the Tort Claims Act seeking an award of damages for personal injuries against the State Highway Commission for the negligent act of its employee Paramore. Plaintiff was awarded $6,000 in damages from the Highway Commission. A pending civil action against Paramore individually was subsequently dismissed on the ground that the award under the Tort Claims Act was *res judicata*. This Court affirmed the order dismissing plaintiff's complaint, holding that:

> "The defendant, Paramore, and the State Highway Commission are not alleged to be joint tort-feasors; the recovery against the Highway Commission was upon the principle of *respondeat superior*. There is no negligent conduct alleged against anyone but Paramore and the ultimate liability was his; liability of the Highway Commission is predicated solely upon the principle of *respondeat superior*. Recovery against it was bottomed upon negligence of Paramore while acting as its employee within the course of his employment.
>
> We think the rationale of the opinion in *Bowen v. Insurance Co.*, 270 N.C. 486, 155 S.E. 2d 238, is clearly applicable here. The plaintiff has recovered damages from and has been paid by Paramore's employer for the negligence of Paramore at the time and place in question in this lawsuit; plaintiff cannot now, in an independent action against Paramore, seek to enhance his original recovery."

Id. at 658, 169 S.E. 2d at 37-38.

Plaintiff in the case *sub judice* recovered the sum of $15,000 in his claim against defendant's employer, the Department of Corrections, under the Tort Claims Act. No appeal was taken from this award, and plaintiff has been paid and has accepted the $15,000. Under the Tort Claims Act, in 1976 when plaintiff's injuries occurred, G.S. 143-291 provided for a maximum recovery against the State in the amount of $30,000. Clearly, the Industrial Commission determined the total amount of plaintiff's damages for his injuries in light of the $30,000 ceiling on recoveries under the Act. As stated in *Brotherton, supra,* plaintiff cannot now seek in this action to enhance his original recovery. It is well-settled law in this State that even though separate judgments against employer and employee may be obtained by the injured party under the doctrine of *respondeat superior,* there may be only one satisfaction, and payment of one judgment extinguishes the other. An injured party cannot recover twice for the same wrong. *Real Estate Trust v. Debnam,* 299 N.C. 510, 263 S.E. 2d 595 (1980); *Bowen v. Ins. Co.,* 270 N.C. 486, 155 S.E. 2d 238 (1967). Plaintiff cannot now be heard to complain that the act of defendant inflicted greater damage than that recovered at his first trial.

We think that plaintiff's reliance on the case of *Wirth v. Bracey,* 258 N.C. 505, 128 S.E. 2d 810 (1963), is misplaced. *Wirth* is clearly distinguishable, for in that case the issue was whether a pending claim under the Tort Claims Act abated an action by the injured party against the individual employee for injuries resulting from the same act of negligence. No final judgment or payment of award had been made; and, therefore, there had been no satisfaction of plaintiff's claim.

We hold that plaintiff's claim against the defendant was properly dismissed on the ground that his previous recovery under the Tort Claims Act was *res judicata.*

Affirmed.

Judges WHICHARD and BECTON concur.

WILLIAM A. McCALL v. JACK R. HARRIS AND EDWIN A. PRESSLY, DOING BUSINESS AS HARRIS & PRESSLY, ATTORNEYS AT LAW; AND ORA J. McCALL

No. 8122SC239

(Filed 5 January 1982)

Divorce and Alimony § 20.1— absolute divorce prior to sale of property securing judgment lien—lump sum alimony unaffected

Defendant McCall did not forfeit her right to receive alimony, awarded as a result of a 29 December 1978 action which resulted in a lump sum of alimony without divorce in her favor, when she obtained a divorce based on separation prior to the sale of foreclosed property she owned by the entirety with plaintiff which secured a judgment lien she had obtained with the other defendants. The lump sum award accrued when it was granted and was unaffected by the subsequent divorce decree. G.S. 50-6, 50-11 and 50-16(1).

APPEAL by plaintiff from *Davis, Judge*. Judgment entered 30 December 1980 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 14 October 1981.

Plaintiff initiated this special proceeding to recover the excess funds ($24,298.53) remaining after the foreclosure of property he owned with defendant McCall as tenants by the entirety. The complaint states that on 29 December 1978 the defendant McCall filed a civil action against plaintiff in district court which resulted in a judgment for a lump sum of alimony without divorce in the sum of $20,000 in favor of defendant McCall, and $3,000 in attorney's fees to the other two defendants. Plaintiff alleged that since he and defendant McCall were still married at the time of the complaint, the $24,298 belonged to him, and he requested that the Clerk of Superior Court turn those funds over to him.

In response the defendants denied the essential allegations of plaintiff's claim. They further averred that a 24 September 1979 judgment, under which they obtained a lien upon the foreclosed real property, entitled them to the sums held by the Clerk of Superior Court.

On 24 September 1980 the Clerk of Superior Court entered an order in which she found that the trustee in the foreclosure sale had turned over the $24,000 to the Clerk, and that the Clerk had paid half of that sum to the defendant McCall. The Clerk noted that she was holding the balance for distribution to the par-

ty entitled thereto. The Clerk further found that defendant McCall had filed a civil action against plaintiff, and that judgment in the sum of $20,000 was granted to defendant McCall, and $3,000 to the defendant attorneys. It was ordered that this judgment be secured by real and personal property owned by plaintiff individually or jointly with defendant McCall. The Clerk concluded that neither the defendant McCall, nor the attorneys, acquired any right or interest in the funds being held by the Clerk. She ordered that the plaintiff recover the funds remaining with the Clerk.

The defendants appealed to superior court and thereafter moved for summary judgment. Defendants noted that since the sale of the property on 13 August 1980, the plaintiff and defendant McCall had obtained an absolute divorce. Plaintiff also moved for a summary judgment.

The court entered summary judgment awarding the excess proceeds from the sale of the house to defendants. Plaintiff appeals.

Bondurant and Lassiter, by T. Michael Lassiter, for plaintiff appellant.

Harris and Pressly, by Edwin A. Pressly, for defendant appellees.

ARNOLD, Judge.

Plaintiff argues that the defendant forfeited her right to receive the alimony awarded in the prior judgment when she obtained a divorce based on separation, and that the court erred in entering summary judgment in her favor.

Defendants respond that, although prior to 1967 (when permanent alimony became available) the courts in this State had held that divorce terminated all rights of the dependent spouse to receive alimony arising out of the marriage, a divorce did not annul or destroy the dependent spouse's right to receive alimony that had accrued. *Blankenship v. Blankenship*, 256 N.C. 638, 124 S.E. 2d 857 (1962); *Smith v. Smith*, 12 N.C. App. 378, 183 S.E. 2d 283 (1971). Defendants contend that the situation here is analogous to cases prior to 1967 where final divorce was granted following a judgment for alimony *pendente lite*, and urge that the

G.S. 50-11 reference to "arising out of the marriage" be read as referring only to future payments of alimony becoming due after such absolute divorce.

This appeal presents a close question. We suggest that the wife here would have been well-advised to have postponed her divorce action until after sale of the property securing the judgment lien and distribution of the proceeds therefrom.

A careful review of the wording of G.S. 50-16.1(1), which sets forth the statutory definition of alimony, leads us to the conclusion that the legislature clearly intended to include lump sum awards such as that involved here, as well as periodic support. However, defendants' argument that a lump sum award of alimony "accrues" when it is granted is well taken. According to prior case law accrued support payments are exempt from the effects of a divorce. *Yow v. Yow*, 243 N.C. 79, 89 S.E. 2d 867 (1955); *Smith v. Smith, supra.*

We note also that the failure of the divorce judgment to make any reference to support or property disposition suggests that the trial judge considered all claims between the parties to have been settled by the prior judgment. Indeed, the legislature stipulated in a 1979 amendment to G.S. 50-6 that "no final judgment of divorce shall be rendered under this section [on the basis of separation of one year] until the court determines that there are no claims for support or alimony between the parties or that all such claims have been fully and finally adjudicated." *Hamilton v. Hamilton*, 296 N.C. 574, 251 S.E. 2d 441 (1979).

In view of this amendment, and the rule established by prior North Carolina cases, we are persuaded that the defendants' interpretation of G.S. 50-11 is that which was intended by the legislature. Accordingly, we find that the alimony award here had accrued upon judgment and was unaffected by the subsequent divorce decree.

Affirmed.

Chief Judge MORRIS and Judge BECTON concur.

STATE OF NORTH CAROLINA v. HARRY SHAW McDONALD

No. 8110SC683

(Filed 5 January 1982)

Criminal Law § 149.1— granting of motion to suppress evidence—appeal by State

The State had no right to appeal an order granting defendant's motion to suppress evidence where the record failed to show that the prosecutor certified to the judge who granted the motion that the appeal was not being taken for the purpose of delay and that the suppressed evidence was essential to the case as required by G.S. 15A-979(c).

APPEAL by the State from *Godwin, Judge.* Order entered 4 June 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 8 December 1981.

The defendant was charged with failure to stop for a school bus in violation of G.S. 20-217. The school bus driver recorded the license number of the car which had stopped briefly and then driven past the bus as it was stopped to pick up children. By using the license number, officers traced the car to defendant. A police officer contacted defendant by telephone and in person at defendant's home. During these conversations, defendant made several incriminating statements. The officer gave no *Miranda* warnings to defendant prior to questioning. After these discussions, defendant was issued a citation for passing a stopped school bus.

Defendant moved to suppress the statements made to the police officer on the ground that they violated his Fifth Amendment right against self-incrimination and his *Miranda* rights. After a hearing on the motion, the trial court entered an order granting defendant's motion to suppress. The State appeals from that order.

Attorney General Edmisten by Associate Attorney James W. Lea, III, for the State, appellant.

Dimmock & Reagan by Thomas J. Dimmock for defendant appellee.

CLARK, Judge.

The general rule is that the State cannot appeal from a judgment in favor of the defendant in a criminal proceeding in the

absence of a statute clearly conferring that right. *State v. Harrell*, 279 N.C. 464, 183 S.E. 2d 638 (1971).

G.S. 15A-979(c) provides that orders of the superior court granting motions to suppress evidence are appealable to the appellate division prior to trial "upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case." As this court stated in *State v. Dobson*, 51 N.C. App. 445, 276 S.E. 2d 480 (1981), the above-quoted language "constitutes a statutory prerequisite which must be met in order for the State to have the right to appeal, prior to trial, an order granting a motion to suppress. Statutes authorizing an appeal by the prosecution must be strictly construed." (Citations omitted.) *Id.* at 446-447, 276 S.E. 2d at 482.

In the present case, there is no indication in the record that the prosecutor certified to Judge Godwin that the appeal was not being taken for the purpose of delay and that the suppressed evidence was essential to the case. The burden is on the State to demonstrate that it has the right to appeal and that it has followed the statutory mandate. *State v. Dobson, supra.* The State has failed to fulfill the statutory requirements in this case.

Therefore, the appeal by the State is not authorized by statute, and this court has no jurisdiction over the appeal.

Dismissed.

Judges WHICHARD and BECTON concur.

IN THE MATTER OF: MARGUERITE B. BIDSTRUP

No. 8130SC342

(Filed 5 January 1982)

1. Insane Persons § 2.2— no trial de novo on issue of appointment of guardian

The right of a trial de novo on appeal from the orders of the clerk relates only to the adjudication of incompetency and not to the appointment of a guardian for an incompetent's estate. G.S. 35-1.6 *et seq.*

2. Insane Persons § 2.2— no abuse of discretion in appointment of guardian

Respondent failed to show (1) that the appointment of an individual as guardian by the clerk was "manifestly unsupported by reason" or (2) that the clerk abused her discretion in appointing the individual as the evidence only revealed another person may have also been a suitable candidate for guardian.

APPEAL by respondent from *Lewis, Judge.* Judgment entered 7 November 1980 in Superior Court, CHEROKEE County. Heard in the Court of Appeals on 12 November 1981.

This is an appeal from an order appointing W. Arthur Hays, Jr., guardian of the estate of Marguerite B. Bidstrup. On 12 September 1980, J. Edward Davis, who had been acting as attorney in fact for the respondent, Marguerite Bidstrup, filed a petition for adjudication of incompetency and for appointment of a guardian for the respondent. The clerk of superior court conducted a hearing on 24 September 1980 and issued orders adjudicating respondent an incompetent adult and appointing Blanche Smith as guardian for the person of respondent and W. Arthur Hays, Jr., as guardian of the estate of the respondent. From the order appointing Hays guardian of the estate, L. L. Mason, Jr., attorney for the incompetent, gave notice of appeal "for trial de novo before a Superior Court Judge." The superior court judge "ruled that the matter would not be heard de novo, but that his consideration of the case would be limited to whether the clerk of Superior Court had abused her discretion" in appointing Hays to be guardian of the estate. After a hearing, the judge found that the clerk of court had not abused her discretion and entered an order affirming her appointment of Hays as guardian of the estate. L. L. Mason, Jr., attorney for the incompetent, gave notice of appeal to the Court of Appeals.

McKeever, Edwards, Davis & Hays, by George P. Davis, Jr., for guardian appellee.

Jones, Key, Melvin & Patton, by R. S. Jones, Jr. and Joseph D. Johnson, for respondent appellant.

HEDRICK, Judge.

[1] Respondent first argues the judge of the superior court erred in not affording him a trial de novo on the issue of who would be appointed the guardian of the incompetent's estate. He argues that the enactment of G.S. § 35-1.6, *et seq.*, providing for

"Guardianship of Incompetent Adults" abrogated the well-settled principle that the appointment of guardians is within the sound discretion and exclusive original jurisdiction of the clerk of the superior court. We disagree. While G.S. § 35-1.20 does provide that appeals to the superior court from orders of the clerk shall be de novo and thence to the Court of Appeals, this statute must be read in *pari materia* with the remaining sections of the article and when so read, we hold that the right of a trial de novo on appeal from the orders of the clerk relates only to the adjudication of incompetency. G.S. §§ 35-1.28, -.29, which provide qualification guidelines for the appointment of guardians, essentially require only that the guardian be a resident of North Carolina and be, in the following order of priority, either an individual, a corporation, or a disinterested public agent. The clerk's appointment of a guardian for an incompetent's estate therefore involves a determination too routine to justify saddling a superior court judge with a review any more extensive than a review of the record. This assignment has no merit. *See* 39 Am. Jur. 2d Guardian and Ward § 27 (1968); 5 Am. Jur. 2d Appeal and Error § 772 (1962); *In re Estate of Lowther*, 271 N.C. 345, 156 S.E. 2d 693 (1967); *Beck v. Beck*, 36 N.C. App. 774, 245 S.E. 2d 199 (1978); *In re Simmons*, 266 N.C. 702, 147 S.E. 2d 231 (1966); *In re Michal*, 273 N.C. 504, 160 S.E. 2d 495 (1968). *See also Battle v. Vick*, 15 N.C. 294 (1833) and *Long v. Rhymes*, 6 N.C. 122 (1812).

[2] Respondent next assigns as error the superior "court's refusal to find that the Clerk of Superior Court had abused her discretion in appointing W. Arthur Hays as Guardian of the Estate of Respondent."

For a litigant to succeed in having a judgment reversed on the grounds that the issuance of such judgment constituted an abuse of discretion, the litigant must show that the challenged action is "manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E. 2d 58, 63 (1980). In the present case, the evidence presented by respondent before the superior court judge tends to show only how Blanche Smith might have been a suitable candidate for guardian of respondent's estate; nowhere in the record, however, is there evidence tending to show that the clerk's appointment of W. Arthur Hays, Jr., was "manifestly unsupported by reason" or in any other way tainted by an error of law. In fact, respondent states in her own brief that she "does not

argue that W. Arthur Hays, Jr., is unfit or otherwise disqualified to serve as guardian. . . ." Respondent having failed to show an abuse of discretion or any error of law in the clerk's appointment, this assignment of error has no merit.

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

JUDITH T. ROKES v. DAVID K. ROKES

No. 8125DC356

(Filed 5 January 1982)

Appeal and Error § 6.6— denial of motion to dismiss—no immediate appeal

Defendant had no right of immediate appeal from the denial of his Rule 12(b)(6) motion to dismiss plaintiff's claim for permanent alimony.

APPEAL by defendant from *Crotty, Judge.* Order entered 24 April 1980 in District Court, CATAWBA County. Heard in the Court of Appeals on 16 November 1981.

This is a civil action wherein plaintiff seeks permanent alimony, attorney's fees, and custody and support of the minor children. On 5 September 1979 the defendant filed answer denying the material allegations of plaintiff's claim for permanent alimony, child support, and attorney's fees, and filed a counterclaim for absolute divorce. Plaintiff filed a motion and notice of hearing for "Temporary Alimony and Child Support." On 24 April 1980, after a hearing on plaintiff's motion, the trial court entered a "Temporary Order" denying plaintiff's motion for alimony pendente lite; denying defendant's motion to dismiss plaintiff's claim for permanent alimony; awarding plaintiff custody of the children, with visitation privileges for the defendant; ordering defendant to contribute to the support of the children; and ordering defendant to pay "partial attorney's fees."

Defendant gave notice of appeal on 6 October 1980.

Rudisill & Brackett, by J. Richardson Rudisill, Jr., for plaintiff appellee.

Sigmon & Sigmon, by W. Gene Sigmon, for defendant appellant.

HEDRICK, Judge.

Defendant has no right of immediate appeal from the denial of his Rule 12(b)(6) motion to dismiss plaintiff's claim for permanent alimony. This is another attempt to appeal from a "Temporary Order." Insofar as the record discloses, plaintiff's claims for permanent alimony and counsel fees, and defendant's claim for absolute divorce, are still pending in the district court. Thus, defendant's appeal from the "Temporary Order" is subject to dismissal as being premature. *See Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E. 2d 281 (1981).

We note defendant's notice of appeal was not given within ten days of the entry of the order appealed from. Thus this Court has no jurisdiction to hear the appeal. G.S. § 1-279.

The appeal is

Dismissed.

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

ALICE MOORE v. JOHN C. CRUMPTON, CAROL CRUMPTON AND JOHN C. CRUMPTON, JR.

No. 8115SC369

(Filed 19 January 1982)

1. Parent and Child § 8— liability of parents for wrongful acts of child

Parents cannot be held liable in negligence for the wrongful acts of their unemancipated children unless (1) there is an agency relationship; (2) the parent has directly aided, abetted, solicited, or encouraged the wrongful act; or (3) the parent has entrusted the child with a dangerous instrumentality which was used to cause the injury.

2. Parent and Child § 8— child's rape of plaintiff—use of alcohol and drugs—no liability of parents to plaintiff

Defendants, the parents of a minor who raped the plaintiff after he had used alcohol and drugs, were not under a duty to control and supervise the minor so as to foreclose his use of drugs or alcohol or to foreclose any risk of his harming others, and defendants were not liable in damages to plaintiff for their son's rape of plaintiff where defendants did not participate in any respect in the son's injury to plaintiff, he was not their agent, they did not aid, abet, encourage or solicit his rape of plaintiff, and they did not provide him with the means by which he accomplished it.

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

APPEAL by plaintiff from *Bailey, Judge.* Summary judgment entered 18 November 1980 in Superior Court, ORANGE County. Heard in the Court of Appeals 18 November 1981.

Plaintiff initiated these personal injury actions alleging that defendant John C. Crumpton, Jr. intentionally assaulted and raped her at knifepoint, and that defendants John C. Crumpton and Carol Crumpton, parents of defendant John C. Crumpton, Jr., were negligent in failing to use reasonable care to control and supervise their son. After reviewing the pleadings, supporting affadavits, depositions, and various exhibits, the trial court granted summary judgment in favor of defendants John C. Crumpton and Carol Crumpton. Plaintiff appeals.

Epting, Hackney & Long, by Lunsford Long, for plaintiff-appellant.

Newsom, Graham, Hedrick, Murray, Bryson and Kennon, by Robert B. Glenn, Jr., and James L. Newsom, for defendant-appellees.

WELLS, Judge.

The essential allegations as to the negligence of John and Carol Crumpton are as follows:

> III. [D]efendant, John C. Crumpton, Jr. was the unemancipated minor child of defendants John C. Crumpton and Carol Crumpton, and John C. Crumpton and Carol Crumpton had the ability to exercise reasonable care in the supervision and control of their minor child John C. Crumpton, Jr.
>
> IV. [F]or some time prior to June 28, 1978 by reason of acts and statements of defendant John C. Crumpton, Jr. involving

illegal drug usage and deadly weapons, of which defendants John C. Crumpton and Carol Crumpton were aware, defendants John C. Crumpton and Carol Crumpton knew or had reason to know that defendant John C. Crumpton, Jr. was possessed of a dangerous disposition, mental state and personality so as to make it foreseeable that he would intentionally injure others unless reasonable care in his control and supervision were exercised by John C. Crumpton and Carol Crumpton.

V. By reason of the matters and things hereinabove alleged, defendants John C. Crumpton and Carol Crumpton, on June 28, 1978, had a legal duty to exercise reasonable care to control and supervise their minor child, defendant John C. Crumpton, Jr. so as to prevent him from intentionally injuring others.

VI. [I]n breach of such duty as hereinabove alleged, on the night of June 27 and in the early morning of June 28, 1978 defendants John C. Crumpton and Carol Crumpton negligently failed to exercise reasonable care in the control and supervision of their minor son defendant John C. Crumpton, Jr. in that they failed to prevent his having access to and using illegal drugs and deadly weapons, and failed to prevent him from going abroad alone and unsupervised in the nighttime after having used such alleged drugs and after having gained possession of such a deadly weapon.

. . .

The materials before the trial court tell the story of a modern American family tragedy. John Crumpton, Jr., one of five children born to the marriage of John and Carol Crumpton, was born with a club foot and in early childhood experienced other health problems: hypoglycemia, diabetes, and ulcerative colitis. His family life was apparently comfortable and secure, and it appears that during his childhood and early adolescence, John Jr.'s relationship with his parents and grandparents involved regular hunting, fishing and golfing outings and frequent trips to the beach. Despite his supportive environment, John, Jr. began using marijuana at an early age, and was a regular user of various illegal drugs by the time he was thirteen years old. Although John, Jr.'s parents were aware of his use of drugs and attempted by

various means to discourage such habits, he persisted in his drug habit, earning money to purchase drugs from various part-time jobs. John, Jr. frequently skipped school, got into arguments with his parents, once struck his mother, was hospitalized once for a drug overdose, was arrested once for carrying a concealed weapon (a knife), and impregnated a young girl. This tragic history of drug addiction and rebellious behavior culminated in his rape of the plaintiff and his conviction of and imprisonment for that crime.

Prior to the rape, John, Jr. possessed a number of hunting knives and guns given to him by his parents. His parents did not know that he possessed the thirteen-inch stiletto that he used in the rape. His parents kept alcoholic beverages at home, to which John, Jr. had access. The pint of bourbon whiskey he drank on the night of the rape was obtained at a friend's house. In May, 1978, Carol Crumpton separated from her husband and moved to a separate address. By agreement, Mrs. Crumpton took the couple's three youngest children to live with her, while her husband continued to have custody of John, Jr. and his twin sister. Carol Crumpton was on vacation at the beach on 28 June 1978. Prior to 28 June 1978, John Crumpton finalized plans for a vacation in Hawaii. Before leaving home, he made arrangements for John, Jr. to visit with his grandparents, and delivered John, Jr. to their home near Roxboro. After his father left him in Roxboro, John, Jr. returned to Chapel Hill, and on the night of 28 June 1978, he drank a large amount of whiskey, took drugs, got "high" and carried out his rape of plaintiff.

The history of John, Jr.'s problems reflects the response of concerned parents. When John, Jr. was nine, problems associated with his physical infirmities led his parents to consult a child psychologist. As John, Jr.'s drug and school problems emerged in junior high school, his parents sought the help of school guidance counselors and various mental health professionals. They frequently remonstrated with John, Jr. and attempted to discipline him. In an effort to remove him from his harmful home-town environment, they sent him away to a private high school for the tenth grade, where he performed well. He was sent back for the eleventh grade, but he refused to stay and returned home early in that school year. In addition to other mental health professionals who counseled John, Jr. and his parents, he was treated

by John A. Gorman, Ph.D., a clinical psychologist, and Landrum S. Tucker, Jr., M.D., a psychiatrist. Dr. Gorman saw John, Jr. on six occasions during the period May through October, 1975. Dr. Tucker saw John, Jr. on five occasions in January and February, 1978, during which time he also reviewed John, Jr.'s psychological testing. Both Dr. Gorman and Dr. Tucker indicated that although John, Jr. required continued treatment, he was not disposed toward violent or dangerous behavior and that he was not a person who should or could be involuntarily committed. John, Jr. broke off his counseling with both Dr. Gorman and Dr. Tucker. His parents either could not or did not require him to continue treatment.

To answer the principal issue in this appeal, we must review the law of North Carolina as it relates to the liability of parents for the torts of their unemancipated children. We first note that there is no statute bearing upon the issue of liability in this case, and it is therefore to the common law which we must look for answers.

We begin our analysis with *Brittingham v. Stadiem*, 151 N.C. 299, 66 S.E. 128 (1909). Plaintiff's injury resulted from a pistol wound inflicted by defendants' son, who was employed in defendants' store. In allowing recovery for plaintiff on the basis of the agency of defendants' son, Justice Manning, speaking for the Court, stated the general rule as follows:

> Relationship does not alone make a father answerable for the wrongful acts of his minor child. There must be something besides relationship to connect him with such acts before he becomes liable. It must be shown that he approved such acts, or that the child was his servant or agent. (Citations omitted) Wherever the principles of the common law prevail, this is the well-established doctrine.

See also Linville v. Nissen, 162 N.C. 95, 77 S.E. 1096 (1913), (where Chief Justice Clark restates the above quoted rule in *Brittingham*). *See also Robertson v. Aldridge*, 185 N.C. 292, 116 S.E. 742 (1923) and *Hawes v. Haynes*, 219 N.C. 535, 14 S.E. 2d 503 (1941), (early automobile family purpose doctrine cases, in which the restatement in *Linville*, supra, of the *Brittingham*, supra, rule is approved by the Court.)

In *Taylor v. Stewart*, 172 N.C. 203, 90 S.E. 134 (1916) the defendant-father regularly allowed his thirteen year old son to operate the father's automobile. While driving his father's automobile, the boy struck and killed plaintiff's son. In allowing recovery against the father, the Court affirmed the *Linville*, supra, restatement of the *Brittingham*, supra, rule and held that the father himself was negligent in allowing the thirteen-year-old to operate the car.

In *Lane v. Chatham*, 251 N.C. 400, 111 S.E. 2d 598 (1959), plaintiff was injured when defendants' minor son shot plaintiff in the eye with an air rifle. The defendant-mother knew that the boy had previously shot three people with the air rifle. The Court allowed recovery against the mother, stating the rule in that case as follows:

> The applicable rule is this: Where parents entrust their nine-year old son with the possession and use of an air rifle and injury to another is inflicted by a shot intentionally or negligently discharged therefrom by their son, the parents are liable, *based on their own negligence*, if under the circumstances they could and should, by the exercise of due care, have reasonably foreseen that the boy was likely to use the air rifle in such manner as to cause injury, and failed to exercise reasonable care to prohibit, restrict or supervise his further use thereof.

Earlier in its opinion, the Court cited and relied upon both *Brittingham*, supra, and *Taylor*, supra, but in its discussion, also included the following statements:

> In the Restatement of the Law of Torts, § 316, the general rule is stated as follows: "A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control."
>
> To impose liability upon the parent for the wrongful act of his child (absent evidence of agency or of the parent's par-

ticipation in the child's wrongful act), for which the child, if *sui juris*, would be liable, it must be shown that the parent was guilty of a breach of legal duty, which concurred with the wrongful act of the child in causing the injury. "A parent is liable if his negligence combines with the negligence of the child and the two contribute to injury by the child." 67 C.J.S., Parent and Child § 68.

In *Grindstaff v. Watts*, 254 N.C. 568, 119 S.E. 2d 784 (1961) the plaintiff sought to extend the family purpose doctrine to the operation of motorboats. A verdict was returned against the minor son, who was the operator, but the father-owner's motion for nonsuit was allowed. In affirming the nonsuit as to the father and declining to extend the family purpose doctrine to the operation of boats,[1] the Court stated and applied the general rule of parental liablity as follows:

"At common law it is well established that the mere relation of parent and child imposes on the parent no liability for the torts of the child. . . ." 67 C.J.S., Parent and Child, s. 66, p. 795. "Relationship does not alone make a father answerable for the wrongful acts of his minor child. There must be something besides relationship to connect him with such acts before he becomes liable. It must be shown that he approved such acts, or that the child was his servant or agent." *Brittingham v. Stadiem*, 151 N.C. 299, 300, 66 S.E. 128. "To impose liability upon the parent for the wrongful act of his child (absent evidence of agency or of the parent's participation in the child's wrongful act), for which the child, if *sui juris*, would be liable, it must be shown that the parent was guilty of a breach of legal duty, which concurred with the wrongful act of the child in causing the injury. 'A parent is liable if his negligence combines with the negligence of the child and the two contribute to injury by the child.' 67 C.J.S., Parent and Child, s. 68." *Lane v. Chatham*, 251 N.C. 400, 402, 111 S.E. 2d 598.

In the case at bar there is no showing that the boat was structurally or mechanically defective, that the son was inex-

1. We note that the 1959 enactment of G.S. 75A-10.1 has made the family purpose doctrine applicable to the operation of motorboats.

perienced in the operation of the craft or was on any prior occasion reckless or irresponsible in its operation, or that the son was on any mission or engaged in any business for his father at the time of the accident. Therefore, the evidence is insufficient to impose liability on the father under the common law rule.

In *Langford v. Shu*, 258 N.C. 135, 128 S.E. 2d 210 (1962), plaintiff was injured as a result of a practical joke carried out by defendant's minor children. In holding defendant liable because she set the stage for her children's prank and therefore aided and abetted them, the Court stated the rule of parental liability as follows:

> North Carolina is in full accord with the common law rule that the mere relation of parent and child imposes on the parent no liability for the torts of the child. The parent is not liable merely because the child lives at home with him and is under his care and control. Apart from the parent's own negligence, liability exists only where the tortious act is done by the child as the servant or agent of the parent, or where the act is consented to or ratified by the parent. A parent is liable for the act of his child if the parent's conduct was such as to render his own negligence a proximate cause of the injury complained of. In such a case the parent's liability is based on the ordinary rules of negligence and not upon the relation of parent and child. 39 Am. Jur., Parent and Child, Sec. 55. Furthermore, "a parent may be liable for the consequences of failure to exercise the power of control which he has over his children, where he knows, or in the exercise of due care should have known, that injury to another is a probable consequence. . . . Failure to restrain the child, it is said, amounts to a sanction of or consent to his acts by the parent. . . . (A)s in all negligence cases, the issue in the last analysis is whether the parent exercised reasonable care under all the circumstances. . . ." 39 Am. Jur., Parent and Child, Sec. 58; See also 67 C.J.S., Parent and Child, Sec. 68.

Insurance Co. v. Faulkner, 259 N.C. 317, 130 S.E. 2d 645 (1963) was an action for damages under G.S. 1-538.1 for malicious or wilful destruction of property by minors. Justice (later Chief Justice) Parker, speaking for the Court, stated the general rule of parental liability as follows:

> At common law, with which our decisions are in accord, the mere relationship of parent and child was not considered a proper basis for imposing vicarious liability upon the parent for the torts of the child. *Lane v. Chatham*, 251 N.C. 400, 111 S.E. 2d 598. Parental liability for a child's tort at common law was imposed generally in two situations, i.e., where there was an agency relationship, or where the parent was himself guilty in the commission of the tort in some way. *Lane v. Chatham*, supra; *Hawes v. Haynes*, 219 N.C. 535, 14 S.E. 2d 503; Strong's N.C. Index, Vol. 3, Parent and Child, sec. 7; 67 C.J.S., Parent and Child, secs. 67 and 68.

In *Smith v. Simpson*, 260 N.C. 601, 133 S.E. 2d 474 (1963), the Court, declining to extend the family purpose doctrine to include an automobile titled to the father but beneficially owned and controlled by the son, stated the rule of parental liability as follows:

> "The mere fact of the relationship does not render a parent liable for the torts of his child. Liability of the parent must be predicated upon evidence that the child was in some way acting in a representative capacity such as would make the master responsible for the servant's tort, or on the ground that the parent procured, commanded, advised, instigated or encouraged the commission of the tort by his child, or that the parent was independently negligent, as in permitting the child to have access to some dangerous instrumentality." 3 Strong: N.C. Index, Parent and Child, s. 7, p. 529; *Insurance Co. v. Faulkner*, 259 N.C. 317, 130 S.E. 2d 645; *Langford v. Shu*, 258 N.C. 135, 128 S.E. 2d 210; *Griffin v. Pancoast*, supra; *Lane v. Chatham*, 251 N.C. 400, 111 S.E. 2d 598; *Hawes v. Haynes*, 219 N.C. 535, 14 S.E. 2d 503; *Bowen v. Mewborn*, 218 N.C. 423, 11 S.E. 2d 372. . . .

See also Pleasant v. Insurance Co., 280 N.C. 100, 185 S.E. 2d 164 (1971).

In *Patterson v. Weatherspoon*, 17 N.C. App. 236, 193 S.E. 2d 585 (1972), plaintiff was injured when struck by a golf club swung by defendant's eight year old son. The trial court allowed defendant's motion to dismiss under G.S. 1A-1, Rule 12(b)(6). In reversing the trial court, this Court stated the rule as follows:

> [W]hile the relationship alone does not make a father answerable for the wrongful acts of his minor child, a father

> who is aware, or by the exercise of due care should be aware of the dangerous propensities of his child in the use of the instrumentality and who fails to prohibit, restrict or supervise the child in the use thereof, may be liable based on his own negligence for injury to another caused by the child's misuse of the instrumentality. *Lane v. Chatham*, 251 N.C. 400, 111 S.E. 2d 598 (1959).

In *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974), plaintiff's minor son was injured when struck by a forklift being operated by defendant's eleven year old son. The evidence showed that defendant had previously allowed his son to operate the lift and that on the occasion of the injury it was being operated by the son with the father's knowledge, permission, and direction. In allowing recovery against the father, the Court found that a forklift is a dangerous instrumentality in the hands of a person who lacks the ability to operate it safely; hence, the father was independently negligent in entrusting its operation to his son.

[1] Our review of the decisional law of North Carolina convinces us that parents cannot be held liable in negligence for the wrongful acts of their unemancipated children unless (1) there is an agency relationship; (2) the parent has directly aided, abetted, solicited, or encouraged the wrongful act; or (3) the parent has entrusted the child with a dangerous instrumentality, the use of which caused the injury. Despite the "control" *dicta* in *Langford* and *Lane*, supra, in every case in which parental liability has attached, some additional act of parental negligence has formed the basis of liability.

[2] Tragic as these events were for all concerned, we cannot say that John, Jr.'s parents were under a duty to control and supervise him so as to foreclose his use of drugs or alcohol or to foreclose any risk of his harming others. Plaintiff's forecast of evidence does not show that defendants participated in any respect in John, Jr.'s injury to plaintiff. He was not their agent; they did not aid, abet, encourage, or solicit his rape of plaintiff; and they did not provide him with the means by which he accomplished it.

Although we recognize and re-emphasize the general rule that summary judgment should rarely be applied in negligence cases, *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d

419 (1978); *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975); *Durham v. Vine*, 40 N.C. App. 564, 253 S.E. 2d 316 (1979), the forecast of evidence in this case shows no basis upon which plaintiff may maintain an action in negligence against defendants Carol Crumpton and John Crumpton, and they were therefore entitled to judgment as a matter of law.

The judgment of the trial court is

Affirmed.

Judge ARNOLD concurs.

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

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

I agree with the result reached by Judge Wells in holding that the summary judgment in favor of defendants John C. Crumpton and Carol Crumpton should be affirmed. Carol Crumpton separated from John Crumpton in May 1978 and moved out of the house. John Crumpton, Jr. and his sister, Kimberly, continued to live at home with their father. The three other children were with Carol. From May 1978 until the rape on 28 June 1978, Carol Crumpton did not have day-to-day custody and control of John, Jr. She had neither the power nor the duty during this time period to exercise control over him. On the night in question, she was at the beach, far removed from Chapel Hill. The materials presented at the summary judgment hearing fail to disclose any evidence of negligence by Carol Crumpton. *Langford v. Shu*, 258 N.C. 135, 128 S.E. 2d 210 (1962); *Lane v. Chatham*, 251 N.C. 400, 111 S.E. 2d 598 (1959).

As to the claim against John Crumpton, the materials before the court on the motion for summary judgment fail to support a finding that he was actionably negligent. There was no evidence that a sexual assault by John, Jr. was foreseeable. Although John, Jr.'s propensities toward aberrant behavior were all too well known to his father, there is no indication from the record that the child had exhibited any propensity for acts similar to that now under consideration. In *Bowen v. Mewborn*, 218 N.C. 423, 11 S.E. 2d 372 (1940), on facts more compelling than in the present

case, the Court held upon demurrer that the allegations failed to establish the foreseeability of the son's actions. In that case the defendant father had actually encouraged his son to engage in illicit intercourse, and the son thereafter committed a sexual assault on the plaintiff. There was no evidence that the "unnatural and vicious advice" was given close enough in time to the act to establish a cause and effect relationship. Although foreseeability is an element of proximate cause, it does not import that the particular injury should have been foreseeable, but does require that consequences of a generally injurious nature might have been expected. *White v. Dickerson, Inc.*, 248 N.C. 723, 105 S.E. 2d 51 (1958). In order to survive the motion for summary judgment, plaintiff must present a forecast of evidence to support a finding that the result in question was reasonably foreseeable as a proximate result of negligent conduct. *Bowen, supra.* This she failed to do.

The majority opinion would eliminate the negligent failure of a parent to exercise reasonable control over a child as a basis for recovery against such parent. In this I cannot concur. The law is well settled in North Carolina that a parent may be liable in damages for failure to exercise the power of control which he has over his children where he knows, or in the exercise of due care should know, that injury to another is a probable consequence. In the last analysis, the test is whether the parent exercised reasonable care under all the circumstances. *Langford, supra; Lane, supra.* This is also the general rule in the United States. *See* Restatement of Torts 2d § 316 (1965); 67A C.J.S. Parent & Child § 125 (1978); 59 Am. Jur. 2d Parent and Child § 133 (1971); 155 A.L.R. 85 (1945).

In short, the law may impose liability upon a parent for harm proximately caused by negligence of the parent in failing to exercise proper control over his child, but in the present case, plaintiff has failed to carry the burden in response to the summary judgment motion.

STATE OF NORTH CAROLINA v. SHARON JOHNSTON BRACKETT

No. 8126SC486

(Filed 19 January 1982)

1. **Criminal Law § 91— speedy trial—continuance by State**

The trial court did not err in continuing defendant's case for one month and in excluding that period for speedy trial purposes under G.S. 15A-701(a1)(b)(7) where (1) defendant's case and two other cases were set for trial one week apart in the same courtroom, (2) the same assistant district attorney was to handle defendant's and one other case, (3) defendant's case would involve a protracted trial, and (4) the defendant was not in custody while the defendants in the other cases were in jail.

2. **Arson and Other Burnings § 3; Constitutional Law § 30— discovery—reports of fire investigators**

In a prosecution where defendant was charged with willfully and wantonly setting fire to and burning her own dwelling house, the trial court did not abuse its discretion under G.S. 15A-910(4) by allowing two fire investigators to testify when one investigator's report was furnished defendant approximately one month prior to trial and the other investigator's report was not furnished until the time of trial. The record was not clear as to the purposes for which the two reports were prepared, and if the statements were made for the prosecutor in preparation for the case, they were not discoverable under G.S. 15A-903(d), and G.S. 15A-903(e) had no application to the case as contended by defendant.

3. **Arson and Other Burnings § 3— testimony of fire insurance—admissible to show motive**

In a prosecution concerning the burning of defendant's own dwelling house, testimony of the fire insurance that was on the house was admissible to show motive on the part of defendant.

4. **Criminal Law § 88.2— cross-examination—use of prior recording**

The trial court did not err in failing to allow the defendant to play a recording of a witness's prior testimony while the witness was being cross-examined.

5. **Arson and Other Burnings § 3; Criminal Law § 50— qualification of expert in origin of fire**

The evidence was sufficient to qualify two fire investigators as experts in the origin and cause of fires where each witness testified that he had several years experience investigating fires and had attended several schools as to the origin of fires.

6. **Arson and Other Burnings § 3; Criminal Law §§ 50.1, 51— experts in origin of fires—testimony of cause—expert in electricity unnecessary**

The trial court did not err in allowing two witnesses who were qualified as experts in the cause and origin of fires to testify that in their opinions the

fire in question was not caused by electricity, and it was not necessary for either witness to be an expert in electricity to form an opinion.

7. Arson and Other Burnings § 3; Criminal Law § 50.1— expert testimony concerning burn pattern on rug

It was not error to allow two experts in the cause and origin of fires to testify that each had observed a burn pattern on a rug and in each expert's opinion it had been caused by gasoline on the rug.

8. Criminal Law § 50.1— unlawful burning—testimony as to appraised value of property

The trial court did not err in allowing an employee of the Mecklenburg County Tax Supervisor's Office to testify in a case involving an unlawful burning that he appraised the property that burned in 1974 and in his opinion the building on the property was worth $4,520. The fact that it had been several years prior to the trial that he made the appraisal would go to the weight of his opinion.

9. Criminal Law § 164— motion to dismiss—presentation of evidence after denial

Where the defendant put on evidence after the denial of his motion to dismiss at the close of the State's evidence, he waived his right to except on appeal. G.S. 15-173.

10. Arson and Other Burnings § 3— testimony of witness's bad character—not relevant to prove motive

In an action concerning an unlawful burning, the trial court did not err in excluding testimony that a neighbor had made threats to defendant and her family and had fired a gun at her property. The testimony was elicited to prove the witness also had a motive and opportunity to commit the offense, and such evidence is not relevant to prove he did so rather than the defendant.

11. Arson and Other Burnings § 3— evidence of attitude toward house—exclusion not prejudicial

In a prosecution for willfully and wantonly setting fire and burning her own dwelling house, the defendant, by her own testimony and by the testimony of other witnesses, offered sufficient evidence of her attitude toward her house and her neighbors and the status of her marriage that she was not prejudiced by the exclusion of testimony by her that she liked her home, children and neighborhood.

12. Arson and Other Burnings § 3— testimony concerning cost of repair to building—exclusion not prejudicial

In a prosecution for the burning of her own dwelling house, defendant was not prejudiced by the exclusion of testimony by her husband concerning cost of repairs to the home as he had already testified without objection that in his opinion the building was worth $35,000.

13. Arson and Other Burnings § 3— evidence of neighborhood fires—exclusion proper

In a prosecution for unlawful burning of a dwelling house, the court did not err in excluding evidence that there had been other fires recently in the neighborhood.

14. Criminal Law § 89.3— prior written statement—corroboration of testimony

The trial court did not err in admitting a prior written statement given to an officer by a witness for the State as the statement was introduced in corroboration of the witness's testimony.

15. Criminal Law § 87.1— failure to declare witness hostile

The trial court did not abuse its discretion by refusing to hold a State's witness as hostile where there was no indication from the witness's testimony that he was hostile to the defendant.

16. Arson and Other Burnings § 4.1— unlawful burning of own dwelling house—sufficiency of evidence

The evidence was sufficient to be submitted to the jury on the charge of willfully and wantonly setting fire to and burning her own dwelling house where the evidence tended to show that the defendant left her house, got in an automobile, drove "fast up the street," shortly thereafter the house was observed as burning, there was testimony that the fire started by gasoline being ignited inside the house, and there was evidence that the defendant and her clothes had been burned.

17. Arson and Other Burnings § 5— unlawful burning—motive—instructions

In a prosecution for willfully and wantonly setting fire to and burning a dwelling house, the trial court did not err in instructing the jury that it was not necessary to prove motive in order to prove a willful and wanton burning but that motive or lack of motive is a circumstance to be considered.

18. Arson and Other Burnings § 5— unlawful burning—instruction on willful and wanton

In a prosecution for willfully and wantonly setting fire to and burning a dwelling house, the trial court did not err in instructing the jury that in order to convict the defendant they would have to be satisfied beyond a reasonable doubt that she burned the house willfully and wantonly "that is, intentionally and without justification or excuse, without regard for the consequences or the rights of others."

Judge WELLS dissenting.

APPEAL by defendant from *Sitton, Judge*. Judgment entered 30 October 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 21 October 1981.

The defendant appeals from a conviction of willfully and wantonly setting fire to and burning her own dwelling house.

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

Paul L. Pawlowski for defendant appellant.

WEBB, Judge.

[1] The defendant has brought forward and argues 24 assignments of error. In her first assignment of error, the defendant challenges the overruling of her motion to dismiss because she was not tried within 120 days of the day on which she was indicted. G.S. 15A-701(a1) provides in part:

> (a1) . . . the trial of a defendant charged with a criminal offense who is . . . indicted, on or after October 1, 1978, and before October 1, 1983, shall begin within the time limits specified below:
>
> (1) Within 120 days from the date the defendant is . . . indicted . . .
>
> * * *
>
> (b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:
>
> * * *
>
> (7) Any period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding.

The defendant was indicted on 9 June 1980. On 18 September 1980 the State made a written motion to have the case continued until 8 October 1980 and to exclude this period of time pursuant to G.S. 15A-701(a1)(b)(7). The State showed in support of this motion that the court had peremptorily set two cases for trial, one to commence on 29 September 1980 and one on 6 October 1980, that the same assistant district attorney who was to handle the instant case was to handle the case set for 29 September 1980, and

the case set for 6 October 1980 was scheduled for trial in the same courtroom as the instant case. The State further showed that the instant case would involve a protracted trial, there being the testimony of three expert witnesses and approximately five other persons. The court found that the defendant was not in custody while the defendants in the two cases which had been peremptorily set were in jail, and that the ends of justice served by granting the continuance outweighed the best interests of the public and the defendant in a speedy trial. The court ordered the case continued from 29 September 1980 until 27 October 1980 and excluded that period of time in computing the time in which the defendant's trial must begin.

We hold the court's findings of fact were supported by the evidence and there was no error in excluding the time between 29 September 1980 and 27 October 1980 from the time in which defendant's trial was required to begin. The defendant's first assignment of error is overruled.

[2] In her second assignment of error the defendant argues the court should have excluded the findings of two fire investigators who testified for the State. Burt Christopher, III was employed by the Charlotte Fire Department as a fire investigator. Allen Lee Blackwelder was employed by a private company that investigated fires for insurance companies. Mr. Christopher and Mr. Blackwelder investigated the fire in the instant case. On 6 June 1980 the defendant made a request for voluntary discovery. The State did not furnish the written report of either investigator to the defendant pursuant to the request for voluntary discovery. On 25 September 1980 the defendant made a motion for the production of these documents. Approximately one month prior to the trial of the case, Judge C. E. Johnson ordered the State to furnish a copy of Mr. Christopher's report to the defendant but refused to require the State to furnish the defendant with a copy of Mr. Blackwelder's report. The State furnished the defendant with a copy of Mr. Blackwelder's report during the trial. The defendant argues that it was error requiring a new trial for the State not to furnish her with the Christopher report until approximately one month prior to the trial and not to furnish the Blackwelder report until the time of trial.

The defendant contends she was entitled to have the reports pursuant to G.S. 15A-903(d) and (e) which provide:

(d) Documents and Tangible Objects.—Upon motion of the defendant, the court must order the solicitor to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the State and which are material to the preparation of his defense, are intended for use by the State as evidence at the trial, or were obtained from or belong to the defendant.

(e) Reports of Examinations and Tests.—Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor. In addition, upon motion of a defendant, the court must order the prosecutor to permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physical evidence, or a sample of it, available to the prosecutor if the State intends to offer the evidence, or tests or experiments made in connection with the evidence, as an exhibit or evidence in the case.

G.S. 15A-904(a) provides:

(a) Except as provided in G.S. 15A-903(a), (b), (c) and (e), this Article does not require the production of reports, memoranda, or other internal documents made by the prosecutor, law-enforcement officers, or other persons acting on behalf of the State in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State.

G.S. 15A-903(e) has no application to this case. It deals with reports of tests, examinations, or experiments and with physical evidence which the State intends to offer into evidence. No such evidence was offered by Mr. Christopher or Mr. Blackwelder. In her brief the defendant contends Mr. Christopher's report was

made in conjunction with the police and prosecution. If the statements were made for the prosecutor in preparation for the case they were not discoverable under G.S. 15A-903(d). *See State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981) and *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977). The record is not clear as to the purposes for which the two reports were prepared. We hold the court did not abuse its discretion under G.S. 15A-910(4) in allowing the defendant to have the Blackwelder report at the trial and allowing both witnesses to testify.

[3] The defendant argues in her third assignment of error that the court erred in allowing testimony of the fire insurance that was on the house. Although the defendant was not tried for fraudulently burning the house, we hold this evidence was admissible to show motive on the part of the defendant. If evidence is relevant to prove the commission of a crime it is not made incompetent because it proves the commission of another crime so long as its only relevancy is not to prove the character of the defendant or her disposition to commit the crime with which she was charged. *See* 1 Stansbury's N.C. Evidence § 91 (Brandis rev. 1973). The defendant also contends the court erred by not giving a limiting instruction at the time the testimony was elicited. No request for a limiting instruction was made. The defendant's third assignment of error is overruled.

[4] The defendant next assigns error to a ruling of the court during the cross-examination of a witness. The witness had previously testified at a probable cause hearing and his testimony had been recorded. The court would not allow the defendant to play this recording while the witness was on the witness stand. We find no error in this. We believe the court was correct in limiting counsel to questions to the witness while the witness was being cross-examined. The defendant did not offer this recording to impeach the witness when the defendant was putting on her evidence. This assignment of error is overruled.

[5] In her fifth assignment of error the defendant contends there was insufficient evidence to qualify either Mr. Christopher or Mr. Blackwelder as an expert in the cause and origin of fires. An expert witness is a person who is better qualified than the jury to form an opinion from facts in evidence. *See* 1 Stansbury's N.C. Evidence § 132 (Brandis rev. 1973). In the instant case each

witness testified that he had several years' experience investigating fires and had attended several schools as to the origin of fires. We believe this was evidence from which the court could conclude each of the two witnesses was better able than the jury to form an opinion as to the cause of the fire. The defendant's fifth assignment of error is overruled.

[6] In her sixth assignment of error the defendant contends the two expert witnesses should not have been allowed to testify that in their opinions the fire was not caused by electricity. She argues that neither witness had been qualified as an expert in electricity. It was not necessary for either witness to be an expert in electricity to form an opinion that the fire was not electrically caused. This assignment of error is overruled.

[7] In her seventh assignment of error the defendant contends that it was error to allow each expert to testify that he had observed a burn pattern on the rug and in his opinion it had been caused by gasoline on the rug. We believe that the training and experience of each witness qualified him to testify as to his opinion on this subject. The defendant's seventh assignment of error is overruled.

In her eighth assignment of error the defendant challenges the two experts being allowed to give their opinions as to the origin of the fire. This assignment of error is overruled.

[8] In her ninth assignment of error the defendant challenges the testimony of an employee of the Mecklenburg County Tax Supervisor's office who testified that he appraised the property in 1974 and in his opinion the building on the property was worth $4,520.00. The evidence showed the witness was familiar with the property upon which he put a value and had such knowledge and experience as to enable him to intelligently put a value on it. He did not have to qualify as an expert. *See* 1 Stansbury's N.C. Evidence § 128 (Brandis rev. 1973). The defendant relies on *Manufacturing Company v. R.R.*, 222 N.C. 330, 23 S.E. 2d 32 (1942); *Hamilton v. R.R.*, 150 N.C. 193, 63 S.E. 730 (1909); and *Ridley v. R.R.*, 124 N.C. 37, 32 S.E. 379 (1899). We believe these cases are distinguishable from the instant case. In each of those cases it was the tax listing which was offered in evidence. In this case the person who did the appraisal testified and was subject to cross-examination. The fact that it had been several years

prior to the trial that he made the appraisal would go to its weight.

[9] The defendant next assigns error to the failure of the court to dismiss at the close of the State's evidence. The defendant put on evidence and thus waived the exception brought forward by this assignment of error. *See* G.S. 15-173.

[10] In her eleventh assignment of error the defendant argues the court erred in its evidentiary rulings. When the defendant was testifying, the court excluded testimony by her that a neighbor, Robert G. Massey, had made threats to her and her family and had fired a gun at her property. Testimony of her husband as to threats by Mr. Massey to their family was also excluded. Mr. Massey was called as a witness by the defendant and the court sustained objections to testimony of Mr. Massey that he had been convicted of communicating threats to the defendant and her family. The defendant then called a witness who would have testified as to Robert Massey's bad character and reputation. The court excluded this testimony. The defendant contends it was error to exclude this testimony. She argues, relying on *State v. Britt*, 42 N.C. App. 637, 257 S.E. 2d 468 (1979), that this testimony should have been allowed to prove someone else burned her dwelling. We believe this evidence was properly excluded. Evidence that someone else had a motive and opportunity to commit the offense is not relevant to prove he did so rather than the defendant. *See State v. Jenkins*, 292 N.C. 179, 232 S.E. 2d 648 (1977). The defendant's eleventh assignment of error is overruled.

[11] In her twelfth assignment of error the defendant argues it was error to exclude testimony by her that she liked her home, children, and neighborhood; by her husband that he and his wife had a loving marriage, that his wife had a good relationship with their neighbors, that his wife had no intention of leaving their house; and by her brother as to whether the defendant and her husband had a good marriage. She argues that this evidence should have been admitted to show her feeling for her home and to rebut the State's evidence that she had a motive for burning the house. We hold that the defendant, by her own testimony and by the testimony of other witnesses, offered sufficient evidence of her attitude toward her house and her neighbors and the status of her marriage so that she was not prejudiced by the exclusion

of this testimony. The defendant's twelfth assignment of error is overruled.

[12] In her thirteenth assignment of error the defendant argues that the court should not have excluded testimony by her husband as to the cost of repairs to the building. She contends this testimony should have been allowed to corroborate his testimony that in his opinion the building was worth $35,000.00. The defendant's husband testified without objection that in his opinion the building was worth $35,000.00. We hold that exclusion of evidence in corroboration of uncontradicted testimony was harmless. *See* G.S. 15A-1443.

[13] In her fourteenth assignment of error the defendant contends the court erred in excluding evidence that there had been other fires recently in the neighborhood. We hold evidence of other fires was too conjectural to have probative value in the instant case.

[14] In her fifteenth assignment of error the defendant argues the court should have excluded a prior written statement given to an officer by George Wheeler, Jr., a witness for the State. This written statement was introduced in corroboration of Mr. Wheeler's testimony. The written statement was consistent with his testimony and we hold there was no error in its being received in evidence.

[15] In her sixteenth assignment of error the defendant contends it was error for the court not to declare Robert S. Massey a hostile witness. The defendant called Mr. Massey as a witness. He testified that he lived across the street from the defendant's house and as to his relationship with George Wheeler, Jr. A question was then asked him as to crimes of which he had been convicted, to which an objection was sustained. At that point the defendant's attorney requested that Mr. Massey be declared a hostile witness. There was no indication from Mr. Massey's testimony that he was hostile to the defendant, and we hold the court did not abuse its discretion by refusing to hold he was a hostile witness.

[16] In her seventeenth assignment of error the defendant argues that it was error not to dismiss the case at the conclusion of all the evidence. She contends that there was not sufficient

evidence that she burned the house to be submitted to the jury and there was no evidence that she burned it willfully and wantonly. Mr. George Wheeler, Jr. testified for the State that he lived across the street from the defendant and was in his front yard on 6 May 1980. On that day he saw the defendant come from the house, get in her automobile, and "drive fast up the street." A short while later a neighbor told him the house was burning, and he called the fire department. There was testimony that the fire was started by gasoline being ignited inside the house. There was also evidence that the defendant and her clothes had been burned. We believe this is evidence from which the jury could conclude the defendant set the fire. *See State v. Moses*, 207 N.C. 139, 176 S.E. 267 (1934). This is also evidence from which the jury could conclude the defendant acted willfully and wantonly. The defendant acted willfully if she set fire to the building purposely and deliberately. *See State v. Morgan*, 136 N.C. 628, 48 S.E. 670 (1904). The evidence allows the conclusion that she acted purposely and deliberately. The act was done wantonly if it was done needlessly, manifesting a reckless indifference to the rights of others. *See Brewer v. Harris*, 279 N.C. 288, 182 S.E. 2d 345 (1971). The jury could have concluded that the burning of the building was needless and in reckless indifference of the right of the public not to have the building burned. The defendant's seventeenth assignment of error is overruled.

[17] In her eighteenth assignment of error the defendant contends the court erred in the charge by instructing the jury that it was not necessary to prove motive in order to prove a willful and wanton burning but motive or lack of motive is a circumstance to be considered. We believe this is a correct statement. The defendant contends it was error because the court did not apply the law to the evidence in this portion of the charge. The court charged the jury as to the insurance coverage on the house. We believe from this the jury could apply the law as it related to motive.

In her nineteenth assignment of error the defendant contends the court committed error in recapitulating the State's evidence. The court charged the jury that there was a burn pattern on the rug leading to the front door while the evidence showed the burn pattern stopped two feet from the door. The court also stated that the State's evidence showed the defendant was the last one to leave the house. The State's witness said he

saw the defendant coming from the house and a short while later he saw the house afire. We believe the court fairly recapitulated the State's evidence.

In her twentieth assignment of error the defendant contends the court, in recapitulating the evidence, should not have told the jury there was evidence that the house was insured for $35,000.00. We have held that this evidence was properly admitted and it was not error for the court to recapitulate this part of the evidence.

In her twenty-first assignment of error the defendant contends the court did not fairly summarize all her evidence. We hold the court fairly summarized the defendant's evidence. This assignment of error is overruled.

[18] In her twenty-second assignment of error the defendant challenges the court's instruction to the jury as to the definition of willfulness and wantoness. The court instructed the jury that in order to convict the defendant they would have to be satisfied beyond a reasonable doubt that she burned the house willfully and wantonly "that is, intentionally and without justification or excuse, without regard for the consequences or the rights of others." The defendant requested a charge on this feature of the case as follows:

> "AND THIRD, that she did this wantonly and willfully, that is intentionally and without justification and authority, and needlessly manifesting a reckless indifference to the rights and safety of others."

We hold this portion of the court's charge is correct and in substantial compliance with the request by the defendant. The defendant's twenty-second assignment of error is overruled.

In her twenty-third assignment of error the defendant challenges the charge as regards the testimony of the expert witnesses. The defendant requested the court to instruct the jury that the testimony of the expert witnesses should not be given any greater weight than any other witness. We do not believe it was necessary for the court to charge as requested on this feature of the case. The court charged as to how the jury would consider the testimony of each witness without differentiating

between the experts and the other witnesses. In this we find no error.

In her twenty-fourth assignment of error the defendant contends the court erred by not charging, as requested by the defendant, as to how to consider the evidence that George Wheeler, Jr. had been "convicted of fighting and public drunk." There was no showing that Mr. Wheeler had any interest in the case or animosity toward the defendant. We hold the defendant was not prejudiced by the court's failure to give this requested instruction. The defendant's twenty-fourth assignment of error is overruled.

No error.

Judge MARTIN (Robert M.) concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

The indictment did not charge, in the alternative, a fraudulent purpose. *See* G.S. 14-65. I believe the admission of the State's evidence, over defendant's objection, as to insurance on the dwelling and its contents, was prejudicial error which requires a new trial.

IN RE: THE HOUSING AUTHORITY OF THE CITY OF RALEIGH, N.C., LOW-RENT PUBLIC HOUSING PROJECT NC 2-14 v. BEULAH C. MONTGOMERY, PAULINE J. HOLT AND ALL PERSONS HAVING ANY INTEREST IN OR LIEN UPON THE PROPERTY DESCRIBED HEREIN

No. 8110SC879

(Filed 19 January 1982)

1. **Eminent Domain § 7; Municipal Corporations § 4.6— condemnation by Housing Authority for access street—authority—summary judgment proper**

Where a Housing Authority sought to purchase respondent's land as part of a series of purchases concerning the building of a low-rent housing project, whether the site petitioner sought to condemn was to be used for the construction of a street or for the construction of drainage and water and sewer lines

was not a material fact in dispute. Unlike respondent contended, under Article 1 of Chapter 157 of the General Statutes of North Carolina, respondent possessed statutory authority to condemn petitioner's property for either purpose.

2. Eminent Domain § 7.3; Municipal Corporations § 4.6— condemnation proceeding by Housing Authority—good faith negotiations

There was no failure of good faith negotiations by the Housing Authority under N.C.G.S. § 40-12 where the offer to acquire respondent's property equaled the highest appraisal; respondent never tendered a counter offer; and petitioner encouraged respondent to obtain her own appraisal.

APPEAL by respondent from *Preston, Judge.* Judgment entered 14 April 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 20 November 1981.

In July 1978 the Housing Authority of the City of Raleigh, N.C. (hereinafter referred to as the Housing Authority) purchased approximately seventeen acres of land, in Wake County just north of the northeastern limits of the city of Raleigh. The site was to serve as the location of Project N.C. 2-14, a low-rent housing project of the Housing Authority. It adjoined Sue Ellen Drive on the east, Baugh Street and Oates Drive on the south, and was approximately 300 feet east of U.S. Highway 1.

Prior to its approval of the Project N.C. 2-14 plan, which had to be submitted to the City of Raleigh for subdivision approval, the Housing Authority Board of Commissioners was informed by architects for the project that it would be necessary to secure a right-of-way for a waterline, a sanitary sewer drain, and a storm water drain between the seventeen-acre site and U.S. Highway 1, and that a street between the site and U.S. Highway 1 was necessary to conform to the comprehensive thoroughfare plan of the City of Raleigh. The subdivision plan subsequently approved by the Housing Authority and by the Raleigh City Council included a provision that the right-of-way for the street, which was located on the property of respondents Montgomery and Holt,[1] would be acquired by the Housing Authority.

On 14 April 1980, after completion of the necessary preliminary reports, the Housing Authority sent to Mrs. Montgomery a letter offering to acquire a 0.579-acre parcel of her land

1. Pauline J. Holt did not appeal from the judgment of the clerk of superior court, filed 27 February 1981, and is not, therefore, a party to this appeal.

for the sum of $50,600. Included in that letter was a Statement of the Basis for the Determination of Just Compensation. On 29 April, Mrs. Montgomery, through her attorney, responded with a letter seeking additional information concerning the Housing Authority's offer. On 14 August 1980, after additional correspondence between the Housing Authority and Mrs. Montgomery, the Housing Authority sent its final offer to purchase the parcel of land. Receiving no firm response to its offer, the Housing Authority initiated condemnation proceedings by filing a petition for condemnation on 17 October 1980 (amended 20 October 1980), alleging both the authority to exercise the power of eminent domain and the necessity for the land for construction of a low-rent public housing project. The petitioner sought, *inter alia*, a declaration that petitioner could take title to and possession of the property and the appointment of a special master to determine just compensation. Respondent Montgomery answered, denying that the property was being acquired for the housing project and asserting that the true purpose for which the land was being acquired was construction of a public street, an activity beyond the scope of petitioner's authority. Respondent also contended that petitioner had failed to make a reasonable good faith effort to acquire the property by negotiation. Petitioner had denied respondent's request for copies of the reports of the appraisers, thereby denying a basis on which respondent could determine whether petitioner's offer was reasonable. Because of the pendency of an action that respondent, as one of several plaintiffs, had initiated in federal court,[2] respondent sought dismissal of the condemnation proceedings until the issues of the federal case could be determined.

After somewhat extensive discovery and a motion for leave to amend the amended petition for condemnation,[3] the matter was heard before the Clerk of Superior Court of Wake County. The clerk made findings of fact which included the following:

2. Respondent and others, in 79-453-CIV-5, United States District Court for the Eastern District of North Carolina, sued the United States Department of Housing and Urban Development, the Housing Authority, and others, seeking discontinuation of N.C. Project 2-14 because the defendants in that case had failed to comply with the provisions of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347.

3. The purpose of the motion for leave to amend was to set forth the legal descriptions of the two separate tracts of respondents Montgomery and Holt.

14. According to the most recent plan for Project N.C. 2-14 prepared by Owen Smith (hereinafter "current plan"), on the property that is described in Paragraph 2 of the Amended Petition there will be installed water lines, sewer drainage, storm water drainage, and a paved street, all of which will be complete between Highway U.S. 1 North and the 17-acre tract described above.

15. According to the current plan the water line across the property that is the subject of this condemnation action would run to a water main located in the right of way of Highway U.S. 1 North.

16. Although water for Project N.C. 2-14 could be obtained by alternative means, the alternative means would provide water at a lower pressure than the current plan and would therefore provide less protection against fire to the housing to be constructed.

17. There is no acceptable alternative to sewer drainage for the sixty (60) units of low-rent housing other than a connection between the 17-acre tract and a main drain for sewage and storm water located in the right of way of Highway U.S. 1 North. The property that is the subject of this condemnation action provides the best means of access for such a sewer connection.

18. There is no alternative means of storm water drainage from the 17-acre tract other than a drain between that tract and a main drain for sewage and storm water located in the right of way of Highway U.S. 1 North. The property that is the subject of this action for condemnation is the best location for such a connecting drain.

19. The City of Raleigh has approved a subdivision plan which includes a requirement that the petitioner acquire the property that is the subject of this condemnation action, construct a paved street connecting Highway U.S. 1 North and the 17-acre tract, and dedicate that street to the public domain.

20. Petitioner employed three expert appraisers to establish the fair market value of the portion of the property that is described in Paragraph 2 of the Amended Petition and

is owned by Beulah C. Montgomery. Petitioner offered to purchase that portion of the property from respondent Montgomery for the greatest estimated fair market value set by any of those appraisers. Petitioner made a good faith attempt over the four-month period following the initial offer to purchase respondent Montgomery's property to determine whether she accepted or refused that offer and to determine whether she was prepared to tender a counter offer. Respondent Montgomery at no time accepted the offer or tendered any counter offer.

After concluding that petitioner could exercise the power of eminent domain and that the acquisition of the subject property was for a public use and was necessary for N.C. Project 2-14, the clerk decreed that petitioner could take title to and possession of the property. The clerk also appointed a special master to hear the question of compensation and to make a report to the court.

Respondent Montgomery appealed the clerk's order to the Superior Court of Wake County. Petitioner and respondent both filed motions for summary judgment. Petitioner's motion was allowed, and the case was remanded for proceedings in accordance with the clerk's order. Respondent has appealed from that ruling.

Allen, Steed and Allen, by Thomas W. Steed, Jr., William D. Dannelly, and Ann Hogue Pappas, for petitioner appellee.

Weaver & Montgomery, by John R. Montgomery and G. Earl Weaver, for respondent appellant.

MARTIN (Harry C.), Judge.

[1] The respondent presents two questions for our determination. First, she contends that the trial court erred in determining, for summary judgment purposes, that no genuine issue of any material fact existed.

Under Rule 56 of the North Carolina Rules of Civil Procedure, summary judgment is proper when "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 judgment as a matter of law." The purpose of summary judgment under this

rule is not to decide an issue of material fact, but to determine whether a genuine issue of material fact exists. *Hotel Corp. v. Taylor* and *Fletcher v. Foremans, Inc.*, 301 N.C. 200, 271 S.E. 2d 54 (1980). Properly granted, summary judgment eliminates the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim or the defense of the respective parties is exposed. *Id.*

According to respondent in the present case, the material fact in dispute was whether the site petitioner sought to condemn was to be used for the construction of a street or for construction of drainage and water and sewer lines. Respondent contends that the determination of this material fact was crucial because the Housing Authority had no power to condemn land for the former purpose and that if this was the proposed use, petitioner's action would be illegal. After reviewing the statutes granting housing authorities the power to condemn property, this Court rejects respondent's premise that the Housing Authority lacked authority to condemn land for the purpose of constucting an access street to Project N.C. 2-14 and concludes that the fact respondent seeks to put in issue was not material to a resolution of the case.

Under the statutory scheme, a housing "authority shall constitute a public body and a body corporate and politic, exercising public powers, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions" of the Housing Authorities Law, article 1 of chapter 157 of the General Statutes of North Carolina. N.C. Gen. Stat. § 157-9 (1981). These powers include the power "to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise, or otherwise any property real or personal or any interest therein . . . [and] to acquire by eminent domain any real property, including improvements and fixtures thereon." *Id.* The statutory grant of the power of eminent domain is reinforced by N.C.G.S. 157-11 which reads in pertinent part:

> The authority shall have the right to acquire by eminent domain any real property, including fixtures and improvements, which it may deem necessary to carry out the purposes of this Article after the adoption by it of a resolution declaring that the acquisition of the property described therein is in the public interest and necessary for public use.

The legislature declared that "the clearance, replanning and reconstruction . . . and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired . . .." N.C. Gen. Stat. § 157-2 (1976).

Respondent's argument that petitioner lacked statutory authority to condemn property for purposes of constructing a street defies a sensible interpretation of the clear language of the enabling statute. A housing complex as contemplated here cannot be constructed without providing means of ingress and egress for the people who reside therein. The power to condemn property for a street to connect the housing project with a major thoroughfare, as required by a municipality's thoroughfare plan, is a power necessary to carry out the purposes of the Housing Authorities Law.

Assuming, therefore, that the issue of how the property was to be used was a genuine one, we cannot find that it affected a material fact that would alter the outcome of the court's ruling. Respondent's assignment of error is overruled.

[2] Respondent next contends that the trial court erred in granting petitioner's motion for summary judgment when petitioner had failed prior to the condemnation proceedings to make a good faith effort to acquire the property by private negotiations. Respondent's argument is twofold. First, she contends that petitioner did not abide by the statutory requirement of good faith negotiation. Secondly, respondent contends that petitioner's failure to abide by North Carolina's Public Records act, N.C.G.S. 132-1 to -9, by disclosing its three appraisals amounted to a failure of good faith negotiations by petitioner.

Under N.C.G.S. 40-11, condemnation proceedings can be initiated by the appropriate body politic if the condemnor "is unable to agree for the purchase of any real estate required" for its purposes. A petition instigating such proceedings must allege that the condemnor "has not been able to acquire title [to the real property], and the reason of such inability." N.C. Gen. Stat. § 40-12 (1976). The above-quoted statutes have been interpreted to require a condemnor to "make a bona fide effort to purchase by private negotiation" prior to instituting condemnation proceedings. *Power Co. v. King*, 259 N.C. 219, 220-21, 130 S.E. 2d 318,

320 (1963). *Accord, Airport Authority v. Irvin*, 36 N.C. App. 662, 245 S.E. 2d 390, *appeal dismissed*, 295 N.C. 548 (1978), *cert. denied*, 440 U.S. 912, 59 L.Ed. 2d 460 (1979). In the *Irvin* case, this Court quoted with approval the following language from *Murray v. City of Richmond*, 257 Ind. 548, 276 N.E. 2d 519 (1971):

> We do not construe the language [of the statute pertaining to negotiations] to mean that the condemning authorities must first make an offer of a figure below that which they believe to be the maximum they could justify paying for the property, then through a series of negotiations bargain with the property owner until some figure within what the Commission might consider to be reasonable was agreed upon. In fact, it appears to be much more honest and forthright on the part of the condemning authority to come forth in their initial offer with the highest price they feel they could reasonably justify paying for the property.

36 N.C. App. at 671, 245 S.E. 2d at 395-96.

Applying these principles to the facts of this case, we can find no failure of good faith negotiation by the Housing Authority. The fact that the offer to acquire respondent's property equaled the highest appraisal of the fair market value of that property was undisputed. As far as we can determine from the record, respondent never tendered a counteroffer to petitioner's offer made in at least two letters to respondent. Furthermore, we do not consider petitioner's refusal to reveal the three appraisals of the property as a lack of good faith. Petitioner encouraged respondent to obtain her own appraisals and even went so far as to offer to reveal the total amount of each of its appraisals. We, therefore, reject this portion of respondent's contention that the petitioner failed to negotiate in good faith.

Finally, respondent argues that the Public Records act required the Housing Authority to reveal to her its three appraisals of the property. Under the facts of this proceeding, we are not required to determine whether petitioner violated the terms of the Public Records act. We note the record does not disclose that respondent requested the appraisals after the appeal to superior court. Nor did she request a continuance of the summary judgment hearing in order to pursue further discovery relative to the appraisals, pursuant to N.C.R. Civ. P. 56(f). Assuming, *arguendo*,

that petitioner violated the Public Records act by refusing to disclose the appraisals of respondent's property, that violation may not be used as an affirmative defense in a condemnation proceeding. The proper procedure for compelling petitioner to turn over documents allegedly covered by the Public Records act would have been by proceedings pursuant to N.C.G.S. 132-9.

The summary judgment from which respondent brought this appeal is

Affirmed.

Judges ARNOLD and WELLS concur.

RONALD MARC ROBERTS v. WAKE FOREST UNIVERSITY, EUGENE GAYLOR HOOKS AND JESSE HADDOCK

No. 8121SC270

(Filed 19 January 1982)

1. **Master and Servant § 10— discharge of college golf coach—no breach of contract**

Plaintiff's discharge as golf coach at Wake Forest University, with or without cause, 16 months after he was orally hired for that position did not constitute a breach of contract, even though plaintiff had become a "permanent" employee under regulations of the University, where the duration of the contract was not specifically fixed; the circumstances did not reveal an intention of the parties that the contract of employment be for a long time or for a reasonable time of not less than six years as contended by plaintiff; and the evidence did not show a custom or usage known to both parties at the time of employment so as to indicate or imply a specific term of employment.

2. **Judgments § 37.4; Master and Servant §§ 10.2, 100— unemployment compensation ruling—no res judicata in action for breach of employment contract**

The ruling of the Employment Security Commission that plaintiff was entitled to unemployment compensation benefits upon his discharge as golf coach at Wake Forest University was not *res judicata* in plaintiff's action for breach of his contract of employment since (1) the issues before the Commission and the court in the breach of contract action were not the same, and (2) the doctrine of *res judicata* was inapplicable to an adjudication by an unemployment compensation agency.

Roberts v. Wake Forest University

APPEAL by plaintiff from *Collier, Judge.* Order entered 29 September 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 20 October 1981.

Plaintiff sought to recover damages for breach of an oral employment contract as Golf Coach and Associate Athletic Director made in July 1976 with Wake Forest University by its agents Eugene Hooks, Athletic Director, and James R. Scales, President. Plaintiff alleged that although the duration of the contract was not fixed, the parties intended the employment to be for a reasonable time, at least six years, but that his contract as golf coach was terminated and the University hired Jesse Haddock as golf coach on 2 December 1977 without notice to plaintiff.

Plaintiff also alleged a claim against Haddock and Hooks for interference and inducement to breach his contract.

Defendants Hooks and the University in their answers admitted plaintiff's employment as Associate Athletic Director and Golf Coach but denied that there was any agreement as to the term of employment. They also admitted defendant was offered, but refused to accept, new duties, unrelated to coaching golf, as Associate Athletic Director. They further alleged that plaintiff failed to adequately perform the duties of golf coach, that he demanded the members of the golf team sign written pledges of support to him personally, that he created ill feelings between himself and members of the team, that he failed to attend tournaments in which the golf team participated, that he wrongfully accused the defendants of misconduct, and that he had not worked out as an acceptable coach.

Defendant Haddock by his answer made a general denial. Plaintiff later took a voluntary dismissal of his claim against Haddock.

Plaintiff moved for partial summary judgment on the issue of liability. Defendants moved for summary judgment. The trial court in ruling on these motions had before it for consideration the University's answer to interrogatories, depositions of plaintiff, President Scales and Athletic Director Hooks, letters and telegrams exchanged between plaintiff and Director Hooks, the University's "Personnel Policies and Regulations," Hooks' Evaluation of Plaintiff, and Minutes of Athletic Council. We summarize

briefly the materials offered by plaintiff and by defendant University and defendant Hooks.

PLAINTIFF'S MATERIALS

Jesse Haddock, after 17 years as golf coach at the University, left for Oral Roberts University in July 1976. His leaving the University caused somewhat of an uproar, the members of the golf team were upset and resentful, and there was criticism of the move by alumni, particularly the golf team alumni.

Plaintiff had been golf coach at Georgia Southern University. In July 1976, he read that Haddock had resigned and then made a written application to Athletic Director Hooks. Hooks requested plaintiff come for an interview in early August 1976. Plaintiff told Hooks golf coaching was not a full-time endeavor. Hooks said he wanted someone to coach golf and to help with the public relations activities. Plaintiff also talked with President Scales. He told Scales that he hoped to win 13 national championships. Scales replied that was a worthy ambition and he hoped plaintiff achieved it. Hooks said he did not want somebody who would "run in and out." Plaintiff listed his requirements as follows: salary of $20,800, payment of his country club dues, a courtesy car, moving expenses, and the title of Associate Athletic Director. No precise time period was specified.

Golf coaches traditionally have a very long tenure. Plaintiff understood from all the circumstances surrounding his visit that he would be given a reasonable amount of time to demonstrate he could coach the golf team.

In July 1977 Hooks wrote a letter to plaintiff in which he complained that the team was not making a good effort and showed a complete lack of respect for plaintiff and the school, that there would be mounting pressure from the team and from alumni to rehire Haddock, and that it would be best for all concerned if plaintiff resigned. He refused.

On 21 July 1977 the Athletic Council voted to retain plaintiff as golf coach.

The golf team did not do well in the Fall of 1977. By letter of 2 December 1977 President Scales requested plaintiff to relinquish his duties as golf coach and accept other duties in the

athletic program. He refused and his employment was terminated. Haddock was rehired as golf coach in December 1977.

Plaintiff filed a claim for unemployment compensation. The Commission ruled that he was entitled to benefits.

DEFENDANTS' MATERIALS

Coach Haddock was offered a lucrative salary at another school, a salary which Wake Forest University could not match, and he resigned to accept that job.

Plaintiff was the only applicant interviewed by Hooks and President Scales. The golf program at the University was discussed. There was an oral agreement on salary and that plaintiff would have the title of Golf Coach and Associate Athletic Director. He did not request a definite term of employment.

Coach Roberts inherited a very talented golf team, some All-Americans and two of the top recruits in the country. Some of the team members did not like him and did not respect him.

In the Fall of 1976 plaintiff placed on the bulletin board a request that all members of the team sign a pledge of loyalty to plaintiff and the University. When informed that newspaper reporters were coming to photograph the pledge sheet, Hooks requested plaintiff to remove it.

In the Spring of 1977 the team placed third in the ACC and third in the Big Four Tournaments. Several golfers on the team left school; others on the team were critical of plaintiff. Lanny Wadkins told Hooks he would no longer support the program. The alumni were critical of the golf program.

The golf program deteriorated. The team members became undisciplined and were criticized for their sloppy attire. There were many instances of misconduct during tournament play. After one tournament plaintiff threw a trophy at Scott Hoch and cursed him. Five players quit the team.

In a letter to plaintiff dated 7 July 1977 Hooks suggested that plaintiff resign.

In the last tournament of Fall 1977 the team finished eleventh out of sixteen teams.

On 2 December 1977 President Scales announced that Jesse Haddock was rehired as golf coach and notified plaintiff that he was relieved of his duties as golf coach and would be reassigned to new duties in the athletic program. Plaintiff refused the reassignment. His employment was terminated by President Scales on 7 December 1977.

The trial court denied plaintiff's motion for partial summary judgment and allowed the motions for summary judgment by defendant Hooks and defendant University. Plaintiff appeals from the summary judgment for defendant University.

Roy G. Hall, Jr., for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by Jimmy H. Barnhill and Joseph T. Carruthers for defendant appellee.

CLARK, Judge.

It is a settled rule of law in North Carolina and other jurisdictions that employment for an indefinite term is regarded as an employment at will which may be terminated at any time by either party. *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971); *Tuttle v. Lumber Co.*, 263 N.C. 216, 139 S.E. 2d 249 (1964); *Freeman v. Hardee's Food Systems*, 3 N.C. App. 435, 165 S.E. 2d 39 (1969); 9 Williston on Contracts § 1017 (3d ed. 1967); 3A Corbin Contracts § 684 (1960); Annot., 62 A.L.R. 3d 271 (1975); and see cases collected in Annot., 161 A.L.R. 706 (1946); Annot., 100 A.L.R. 834 (1936), and, Annot., 11 A.L.R. 469 (1921).

[1] In our opinion the questions on appeal are determined by whether this rule of law controls the case *sub judice*. First, though the materials offered by the defendant University to support its motion for summary judgment tend to show his performance as Golf Coach was not satisfactory, the materials offered by plaintiff are conflicting. Whether there was cause for termination as Golf Coach would be a material issue of fact, and we eliminate this issue in determining whether the trial court erred in allowing summary judgment. Second, though plaintiff was employed as Golf Coach and Associate Athletic Director, the record on appeal contains little or nothing relative to any duties expected or performed as Associate Athletic Director. It is unquestioned that defendant offered to retain plaintiff in the position of Associate

Athletic Director and assign him to perform other duties in the athletic program, but plaintiff took the position that he was employed as Golf Coach and rejected the offer. In determining the question before us, we make the assumption that plaintiff was employed as Golf Coach and defendant discharged him from this position.

Perhaps because of the sometimes harsh results, the courts have occasionally relaxed the general rule permitting either party to an employment contract for an indefinite term to terminate it at will, with or without cause. See Annot., 62 A.L.R. 3d 271 (1975); 53 Am. Jur. 2d *Master & Servant* § 27 (1970). In *Still v. Lance, supra*, although the court upheld the school board's termination of a teacher without cause, we find the following dicta: "Where, however, there is a business usage, or other circumstance, appearing on the record, or of which the court may take judicial notice, which shows that, at the time the parties contracted, they intended the employment to continue through a fixed term, the contract cannot be terminated at an earlier period except for cause or by mutual consent." *Id.* at 259, 182 S.E. 2d at 406-407.

Plaintiff, relying on this dicta, makes the argument that the attendant circumstances reveal the intention of the parties that the contract of employment be for a long time, or for a reasonable term, not less than six years. He relies on statements made by Athletic Director Hooks and President Scales when he was hired which indicated that they expected him to be with the University and develop the golf program for a substantial period. Plaintiff also claims it was the custom and usage for golf coaches to serve for long terms, that Jesse Haddock was the golf coach at the University for 17 years, and that according to records kept by the Golf Coaches Association, other coaches held their jobs for long terms. We find, however, that this evidence at best reveals the hope by the parties that plaintiff would perform his duties satisfactorily and maintain a good golf program but falls far short of showing the intention of the parties for a fixed term of employment. Nor does the statement of Dr. Scales that "employees are not customarily dismissed at random without reason," show a custom or usage known to both parties at the time of employment so as to infer or indicate a specific term.

Plaintiff relies on a manual entitled "Wake Forest University Personnel Policies and Regulations" to support his argument that

he was a "permanent" employee and could not be dismissed without cause. The manual included the following provision: "As a new employee, you serve a probationary period of three months to allow for job adjustment. At the end of this time if your performance has been satisfactory, you become a permanent employee. You then become eligible to participate in the University insurance program and you receive an employee identification card."

We assume that the manual applies to all employees of the University, including the Golf Coach and Associate Athletic Director, and that plaintiff, having served in that position for 16 months, was a "permanent" employee at the time of his termination. Dr. Scales testified that the distinction between probationary and permanent employees under the manual was that permanent employees become eligible for insurance and receive an identification card. But assuming that plaintiff was a "permanent" employee in a general sense, it is settled in North Carolina that "permanent" employment means a position of some permanence as contrasted with a temporary employment, and ordinarily, where there is no additional expression as to duration, a contract for permanent employment implies an indefinite general hiring terminable at will. *Howell v. Credit Corp.*, 238 N.C. 442, 78 S.E. 2d 146 (1953); *Malever v. Jewelry Co.*, 223 N.C. 148, 25 S.E. 2d 436 (1943); *Freeman v. Hardee's Food Systems, supra.*

[2] Plaintiff also makes the argument that the ruling of the Employment Security Commission that plaintiff was entitled to unemployment benefits is *res judicata* in this action, because an employee is disqualified for benefits if he (1) left work voluntarily without good cause attributable to the employer, or if he (2) was discharged for misconduct connected with his work. G.S. 96-14(1) and 96-14(2).

We find no merit in this argument because the issue before the Commission and the issue before the court in this action for breach of contract are not the same. Too, the doctrine of *res judicata* is inapplicable to adjudication by unemployment compensation agencies. 76 Am. Jur. 2d Unemployment Compensation § 93 (1975).

In conclusion, we find that plaintiff's discharge as Golf Coach, with or without cause, did not constitute a breach of contract, and summary judgment for the defendant is

Affirmed.

Judges HEDRICK and MARTIN (Harry C.) concur.

BOBBY H. TEAGUE v. SPRINGFIELD LIFE INSURANCE COMPANY, INC.

No. 8127SC453

(Filed 19 January 1982)

Insurance § 44— disability benefits—order to pay future benefits proper

In an action by plaintiff to recover disability benefits which had been discontinued by defendant insurance company, where the jury returned a verdict finding defendant to be eligible for the disability benefits, it was not error for the court to order that "[p]laintiff shall be paid in the future at the rate of $900.00 per month so long as his total disability continues and he survives, but not beyond plaintiff insured's 65th birthday . . .." Once the jury established the fact of plaintiff's disability by its verdict, a presumption arose that his condition would continue. When the court directed the insurance company to pay the future installments for disability as they accrue, he was exercising sound discretion.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 17 December 1980 in Superior Court, GASTON County. Heard in the Court of Appeals 11 December 1981.

Plaintiff sustained personal injuries on 28 May 1976 while working on the premises of his employer, Tuscarora Cotton Mill, and, under a group contract issued by the defendant to Tuscarora, was entitled to disability benefits. Plaintiff received disability benefits for the period from 18 September 1976 through 18 October 1978, at which time defendant ceased making payments and has made no further payment. In August of 1979, plaintiff filed a complaint alleging that he was and would be a totally disabled person for the remainder of his life; that defendant had denied his claim for continuing benefits; and that he was entitled to receive benefits in the future so long as he lived.

At trial the following issue was submitted to the jury and answered affirmatively on 22 October 1980: "Has the Plaintiff been continuously and completely unable to engage in any gainful occupation in which he might reasonably be expected to engage with due regard to his education, training and experience since

October 1978?" By stipulation the parties agreed "that the second proposed issue regarding what amount the plaintiff would be entitled to recover may be resolved by the Court at a separate evidentiary hearing, if necessary . . .." In its judgment, filed 17 December 1980, the court ordered "[t]hat the plaintiff have and recover of the defendant the sum of $900.00 per month for each month since October 18, 1978, with interest thereon for each monthly payment." The court also ordered that "[p]laintiff shall be paid in the future at the rate of $900.00 per month so long as his total disability continues and he survives, but not beyond plaintiff insured's 65th birthday . . .."

Basil L. Whitener and Anne M. Lamm for plaintiff appellee.

Cansler, Lockhart, Parker & Young, by Sarah Elizabeth Parker and Thomas Drake Garlitz, for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant contends that those portions of the judgment entitling plaintiff to disability benefits from 22 October 1980 through 17 December 1980 and into the future are not supported by the jury verdict finding that plaintiff was disabled on or prior to 22 October 1980, and are conditional and therefore void. We disagree. Defendant relies heavily upon *Green v. Casualty Co.*, 203 N.C. 767, 167 S.E. 38 (1932). In *Green* the contract of insurance provided for payments as long as plaintiff was alive and disabled. The jury found plaintiff to be disabled, and the trial court entered judgment that defendant pay the arrearages due under the policy and the sum of $7.50 per month "so long as he shall live." The court failed to limit the future payments to the period that plaintiff continued to be disabled. On appeal, the Supreme Court modified the trial court's judgment to eliminate the future payments. *Green* is distinguishable from the present case. Here, the trial court did not fall into the error in *Green*, but limited future payments for the period of plaintiff's continuing disability within the terms of the policy.

We note initially that it would have been error to submit the issue of plaintiff's continuing disability for jury determination. However, under the terms of the contract there is a presumption of continuing total disability as long as the insured person "is completely unable to engage in any gainful occupation in which he

might reasonably be expected to engage with due regard to his education, training and experience." The jury determined that as of 22 October 1980, plaintiff was entitled to disability benefits under the policy. In addition, a presumption of continuance arises when a particular state of things is once proved to exist. *Sloan v. Light Co.*, 248 N.C. 125, 102 S.E. 2d 822 (1958). This is true as to insanity, *Tomlins v. Cranford*, 227 N.C. 323, 42 S.E. 2d 100 (1947); *Ballew v. Clark*, 24 N.C. 23 (1841); malice, *State v. Johnson*, 23 N.C. 354 (1840); the legal relations created by contract, *Robinet v. Hamby*, 132 N.C. 353, 43 S.E. 907 (1903); knowledge, *State v. Davis* and *State v. Fish*, 284 N.C. 701, 202 S.E. 2d 770, *cert. denied*, 419 U.S. 857 (1974); and other conditions, *see generally* 2 Stansbury's N.C. Evidence § 237 (Brandis rev. 1973). Once the jury established the fact of plaintiff's disability by its verdict, a presumption arose that this condition would continue.

Defendant has a contractual obligation to continue payments until any one of the three events triggers its contractual right to discontinue payments. These events are the death of the insured, his attainment of age sixty-five, or his return to health. With respect to the last event, the defendant retains "the right and opportunity to examine the insured person or dependent when and as often as it may reasonably require during the pendency of a claim . . .." Moreover, the defendant may at any future time have an evidentiary hearing on the issue of the continuing disability of the plaintiff within the terms of the insurance contract. Under the terms of the contract in this case, plaintiff would have the burden of proof at such hearing. Thus, those portions of the judgment to which defendant takes exception merely reiterate defendant's rights and obligations under the contract. Essentially the trial court has exercised its equity jurisdiction in ordering specific performance of the contract. *See Caporali v. Washington Nat. Ins. Co.*, 102 Wis. 2d 669, 307 N.W. 2d 218 (1981); *Moore v. Moore*, 297 N.C. 14, 252 S.E. 2d 735 (1979); *National Old Line Ins. Co. v. Brownlee*, 349 So. 2d 513 (Miss. 1977).

Under the facts of this case, plaintiff's remedy at law is inadequate. Defendant's persistent refusal to pay disability benefits under the contract contemplates "successive lawsuits to recover in a piecemeal fashion the sums due," at great hardship to the plaintiff whose livelihood now depends on the performance of the contract. *Moore, supra*, at 18, 252 S.E. 2d at 738. The Court's

reasoning in *Moore* is persuasive when applied to the present case:

> Equity "seeks to reach and do complete justice where courts of law, through the inflexibility of their rules and want of power to adapt their judgments to the special circumstances of the case, are incompetent so to do." *Zebulon v. Dawson*, 216 N.C. 520, 522, 5 S.E. 2d 535, 537 (1939). In *Sumner v. Staton*, 151 N.C. 198, 201, 65 S.E. 902, 904 (1909), Justice Brown discussed the nature of a court's inquiry into the adequacy of a plaintiff's remedy at law thusly:
>
> > "An adequate remedy is not a partial remedy. It is a full and complete remedy, and one that is accommodated to the wrong which is to be redressed by it. *It is not enough that there is some remedy at law; it must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.*" . . .
>
> Thus in *McClintock on Equity*, § 46, p. 110 (2d ed. 1948) it is observed that "[t]he fact that the remedy which the courts of law would ultimately give if the plaintiff were successful would be an adequate one does not prevent the intervention of equity if the procedures which must be followed at law would make the remedy less efficient and practical to meet the plaintiff's needs." . . .
>
> . . . .
>
> The adequacy of the remedy at law must be evaluated in a relative sense, treating the contract in a particular case "as one of a class, and the inquiry is whether, in agreements generally of that kind, the terms or relations of the parties are such that the legal remedy of damages is adequate or inadequate." *Pomeroy's Specific Performance of Contracts*, § 27, pp. 89-90 (3d ed. 1926). The *Restatement of the Law of Contracts*, § 361, p. 646 sets forth the factors involved in the determination of the adequacy of remedies at law when specific performance of a contract is sought. Subsections (c) and (e) are pertinent to our consideration. Subsection (c)

> focuses on "the difficulty, inconvenience, or impossibility of obtaining a duplicate or substantial equivalent of the promised performance by means of money awarded as damages." . . . Subsection (e) focuses on "the probability that full compensation cannot be had without multiple litigation." This factor goes to the heart of the inadequacy of plaintiff's remedy at law as discussed *supra* and, in an appropriate situation, is a sound basis for the granting of equitable relief.

297 N.C. at 16-18, 252 S.E. 2d at 737-38. When applied to the facts of this case, the logic in *Moore* supports a holding that plaintiff is entitled to specific performance of the contract so long as he is disabled within the terms of the contract. This the trial court sought to do in its judgment. The factor of judicial economy, while not controlling, is certainly worthy of consideration in determining the issue in question.

Plaintiff's situation is succinctly summed up in *Caporali, supra*, at 680-81, 307 N.W. 2d at 224:

> ". . . all courts are inclined to find disability to exist where an insured cannot perform his usual duties in the customary manner, irrespective of technical definitions placed in the policy drafted by the insurer. When it comes time to collect the benefits promised, a disabled insured is in a deplorable condition to do battle with a powerful insurer which can hire expert defense counsel and do battle up through the reviewing courts, as has been seen from the decisions cited. The sudden cessation of the promised income, when earnings have ceased, the accumulation of bills, the anxiety and stress of pending litigation—these work a hardship upon an insured and place him in a markedly disadvantageous bargaining position."

Rejecting the plaintiff's request for a lump sum payment based on a theory of anticipatory breach, the Wisconsin court agreed that:

> "The only other remedy would be to award benefits to date, . . . and for the court in its order to dictate that the insurer pay monthly benefits as they fall due, retaining jurisdiction so that—in the event of default—the insured may return into court to ask for sanctions against a delinquent company. In that respect, such judgment would be

similar to a decree for specific performance. It is time for the courts to cast aside the niceties of past legal syllogisms and look to the realities of the situations presented, with a view to accomplishing practical justice."

Id. at 683, 307 N.W. 2d at 225.

We thus adopt the reasoning of *Caporali, supra, Moore, supra,* and *National Old Line Ins. Co., supra,* and hold that:

> When the [court] directed the insurance company to pay the future installments for disability as they accrue, he was exercising sound discretion. With an increase in the number of decisions favorably viewing specific performance in lieu of damages for breach of contract as a viable alternative to protect the rights and interests of policyholders as to future unaccrued installments without increasing the risk or liability of insurance companies it cannot be said that the [court] committed manifest error.
>
> . . . .
>
> We are all aware that many insurance contracts are in force which provide for disability payments over a period of time. Such contracts are of fairly recent origin and the time has come for the equity courts to enforce such contracts by way of specific performance so as to obviate the necessity of an insured being required to file a separate suit on each disability payment as it accrues. By statute, decrees involving child custody, payment of alimony, child support and separate maintenance are subject to modification under changed conditions and circumstances. This is a statutory remedy, but the history of the development of equity jurisdiction convinces me that we should continue the development of equitable principles and fashion a rule whereby cases such as this could be disposed of at one hearing. If, in this particular case, the insured should regain his health or die before collecting all of the payments to which he is entitled we should permit modification on petition of the insurer when such changed circumstances or conditions arise. The time is now ripe for such a forward step because contracts of insurance for disability payments are common and equity demands that a swift and simple remedy be fashioned to determine controversies of such contracts.

National Old Line Ins. Co., supra, at 518.

No error.

Judges VAUGHN and WELLS concur.

STATE OF NORTH CAROLINA v. GROVER CLEVELAND BURGESS, JR.

No. 8117SC730

(Filed 19 January 1982)

1. **Criminal Law §§ 89.2, 162— waiver of objection to hearsay testimony—admissibility of corroborating testimony**

In a prosecution for feloniously receiving stolen tractors, defendant waived objection to a witness's hearsay testimony that a friend of defendant had told the witness that defendant did not care if the tractors were stolen by failing to make a timely objection to the question or a timely motion to strike the answer. Therefore, an S.B.I. agent's testimony that the witness told him that defendant's friend had stated that defendant did not care if the tractors were stolen was properly admitted to corroborate the witness's testimony.

2. **Criminal Law § 128.2— testimony struck by court—mistrial denied**

In a prosecution for feloniously receiving stolen tractors, the trial court did not err in the denial of defendant's motion for a mistrial when an S.B.I. agent testified that the person who sold the tractors to defendant told him that it cost him $1500 for the people to steal the tractors where the court struck such testimony and instructed the jury to disregard it.

3. **Receiving Stolen Goods § 5.1— feloniously receiving stolen tractors—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for receiving stolen tractors where it tended to show that the tractors were first shown to defendant between 12:00 a.m. and 3:00 a.m. and that defendant purchased the tractors on another date at 10:00 p.m.; most of the people involved in the transaction were strangers to defendant and were eager to sell the tractors; the name of the corporate owner of the tractors was printed on the side of the truck which transported the tractors when defendant first saw them; the tractors were left on defendant's land after he first saw them rather than being taken to a place of business; defendant purchased the tractors for much less than the fair market value; and defendant paid in cash but did not request a bill of sale.

4. **Criminal Law § 114.3— instruction concerning indictment—no expression of opinion**

The trial court's instruction that the indictment against defendant should not be considered as evidence of guilt "in and of itself" did not constitute an improper expression of opinion. G.S. 15A-1222.

State v. Burgess

APPEAL by defendant from *Washington, Judge.* Judgment entered 19 February 1981 in Superior Court, CASWELL County. Heard in the Court of Appeals 5 January 1982.

Defendant was convicted of feloniously receiving stolen property. Judgment imposing a prison sentence was entered.

The State's evidence tends to show the following. In March of 1976, Gerald Inman discussed with Richard Johnson a plan to steal some tractors from L. H. Vernon Company, Inc., located about 2 miles from Yanceyville, North Carolina. They asked Pell Liles if he would be able to place farm tractors should they obtain some. There was no discussion concerning ownership of the tractors. Liles replied that he thought he had a buyer for them. In a later conversation, Inman, informed Liles that he had two Ford tractors for which he wanted $5,000.00. He told Liles that the tractors were "hot."

Subsequent to this conversation with Inman, Liles contacted Gerald Stevenson. Stevenson was not interested in the tractors but said he had a friend in Siler City who might be. Liles testified that he told Stevenson the tractors were "hot" but that Stevenson replied his friend did not care, if the price was right. The friend Stevenson had in mind was the defendant. Stevenson testified that Liles told him the price was cheap but never informed him the tractors were stolen. According to Stevenson, he relayed that information to defendant: "I told him that I did not know that much about the man that had offered them to me . . . and I could not swear either way where the tractors were from. . . ."

Meanwhile, Johnson was locating people to help in the theft. On or about the night of 28 March 1976, he introduced Inman to Johnny Boykins, Sammy Atkins, and Benny Bowden. The five men drove by L. H. Vernon Co., Inc., to see the tractors. Inman told Boykins, Atkins, and Bowden he would pay them each $500.00 to steal the tractors. They agreed. Johnson lent Inman $1,500.00 and then left the men.

Inman and the others returned to L. H. Vernon Co., Inc. and stole a truck loaded with two tractors. The 1975 Ford 5000 tractor was valued at $14,000.00; the 1969 Ford 5000 was valued at $10,000.00. Both tractors were equipped with accessories.

Inman and Boykins then drove to Siler City where they met Stevenson and Liles. An hour later the other men drove up in the stolen truck with the tractors. Sometime between 12:00 and 3:00 a.m. Stevenson and Liles went to the house trailer of defendant.

Defendant answered their knock, talked to Stevenson inside his trailer and then followed the two men to where the truck was parked, about a mile from defendant's trailer. Defendant looked at the tractors but said they were not what he wanted. He refused to pay the asking price of $5,000.00. Inman testified that at this meeting, he never told defendant the tractors were stolen and defendant never asked. The name of L. H. Vernon Co., Inc., was written on the side of the truck.

Defendant returned to his trailer where Stevenson discussed the matter with him further. Defendant stated that he "did not want them at no price." Defendant did, however, allow the men to unload the tractors near his home.

One or two days later Inman called defendant on the telephone and again inquired as to his interest in buying the tractors. Inman stated he had no place for them and needed to get rid of them. There was no mention that the tractors were stolen. That night around 10:00 p.m., defendant met Inman at an exit off the highway. This was the second time the two men had seen each other. Defendant paid Inman $1,600.00 in cash for the tractors.

The tractors were later recovered. One was in the possession of defendant's brother. The other was found at an auction house in Pennsylvania. The safety equipment on the tractors had been removed.

At the close of the State's evidence, defendant moved for a mistrial. He also moved for a nonsuit. Both motions were denied.

Defendant's evidence is that Stevenson knew defendant was interested in purchasing a Ford 5000 tractor because they had attended auctions together. After receiving a call from Stevenson asking if he would be interested in two tractors, defendant received a call from a man in Danville, Virginia. The man said he was moving tractors from South Carolina to Virginia and en route would bring them by for defendant to view.

On a weekend night, defendant was awakened by a knock. Outside stood Inman who said he had the tractors there for defendant to examine. Defendant went with him to the truck. Defendant testified that the tractors did not look like farming tractors. Rather, they had cages on them and seemed designed for clearing roadways. Inman wanted $10,000.00 for the two tractors but defendant replied he did not want the tractors at any price: "I said this because I wanted the 5000 tractor, but I did not want to spend the time taking all of that cage off. . . ." Before returning home, defendant gave permission to Inman to unload the tractors anywhere but in his yard. Defendant understood Inman to be the owner of the tractors.

Two days later, Inman called defendant and identified himself as the owner of the tractors. He said he still needed to sell the tractors and was now willing to sell them for $2,500.00. Defendant asked him if the tractors were stolen, and he assured defendant that they were not.

Defendant borrowed $2,000.00 from his brother and met Inman around 7:00 or 8:00 p.m. at a place off of Highway 421 near Liberty, North Carolina. Defendant paid Inman $2,500.00 in one hundred dollar bills for the tractors. He did not ask for nor receive a bill of sale.

Defendant removed the cages from the tractors to make them suitable for farming. He also repainted them and replaced certain parts. He used the 1969 tractor for two seasons before selling it to an auction company for $3,800.00. He sold the 1975 tractor to his brother for $2,000.00.

At the close of all the evidence, defendant again moved for a nonsuit. The court denied his motion.

Attorney General Edmisten, by Assistant Attorney General Guy A. Hamlin, for the State.

Vernon, Vernon, Wooten, Brown and Andrews, by Wiley P. Wooten, for defendant appellant.

VAUGHN, Judge.

Defendant makes several assignments of error. We hold that none of them disclose prejudicial error.

[1] Defendant first excepts to the admission of testimony of two State witnesses. On direct examination, Liles testified without objection to a phone conversation he had had with Stevenson concerning the tractors: "I told Mr. Stevenson that they were hot and he stated that his friend in Siler City did not care if the price was right."

Later, an S.B.I. agent testified to statements given to him by accomplices to the theft of the tractors. He repeated Liles' statement which contained the following: "I also told Gerald Stevenson that the tractors were stolen. He told me that he would call his friend up in the county and see if he wanted them. . . . After a few minutes Gerald Stevenson called me back and said. . . ." At that point, defendant objected.

The jury was excused while the judge heard arguments on the objection. The judge excluded testimony of the agent which included statements to which Liles had not previously testified. He overruled, however, defendant's objection to the above-quoted testimony. The court ruled the agent's testimony was admissible for corroboration. Defendant then moved to strike Liles' previous testimony. The court denied the motion. When the jury returned, the agent testified that Liles had told him, "After a few minutes Gerald Stevenson called me back and said that his friend wanted the tractors and didn't care if they were hot or stolen at that price."

To review the court's rulings, we must first determine whether Liles' testimony on direct examination was admissible. His testimony as to what Stevenson told him concerning defendant was clearly hearsay. As such, defendant had the right to object to its admission. Failure to object in apt time to inadmissible evidence, however, constitutes a waiver. *State v. Neal*, 19 N.C. App. 426, 430, 199 S.E. 2d 143, 145 (1973). Usually, "apt time" to object is when the question calling for inadmissible evidence is asked. *State v. Bost*, 33 N.C. App. 673, 236 S.E. 2d 296, *cert. denied*, 293 N.C. 254, 237 S.E. 2d 537 (1977). Where the admissibility of evidence becomes apparent only upon the answer, the proper objection is a motion to strike. *State v. Neal, supra.* The present defendant failed to object immediately to the question or to move to have Liles' answer struck.

Defendant did not move to strike Liles' testimony until the S.B.I. agent testified. A motion to strike is addressed to the discretion of the trial court. *Stein v. Levins*, 205 N.C. 302, 171 S.E. 96 (1933); *State v. Bost, supra.* In *State v. Beam*, 45 N.C. App. 82, 262 S.E. 2d 350 (1980), we held that a motion to strike, made after other questions were asked, would not relate back to earlier answers. It was, therefore, clearly proper for the present court to deny defendant's motion to strike made after several other witnesses had testified.

Concluding that defendant waived any objection he may have had to Liles' testimony by his failure to act timely, we next address defendant's objection to testimony by the S.B.I. agent. The State prefaced its questioning by stating the agent's testimony was admitted solely for the purpose of corroboration. The court, therefore, properly sustained objections to that part of the agent's testimony which introduced new evidence. Defendant, however, had earlier allowed Liles to testify that Stevenson had told him defendant did not care if the tractors were stolen. Since we have held that previous testimony admissible, testimony by the agent to a similar statement by Liles was properly admitted for corroborative purposes. As such, it came in not to prove the truth of the matter asserted but to prove the statement was in fact made. There was no hearsay violation. 1 Stansbury, N.C. Evidence § 141 (Brandis rev. 1973). *See also State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977); *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975).

[2] Defendant next argues the court erred in denying his motion for a mistrial. The S.B.I. agent testified concerning statements Inman had given him. He sated that Inman had said he became upset when defendant originally refused to purchase the tractors. The agent continued:

> "I believe it was the next day that he said that there was a contact made and Mr. Burgess stated that he would give, I think that it was fifteen hundred dollars for the tractors. And that Mr. Inman stated that when he went down and met Mr. Burgess on the pull-off, off 421, I believe that he told him that you know that it cost him fifteen hundred dollars for, just for the people to steal the tractors and he gave him sixteen hundred. . . ."

Defendant made a motion to strike. The court overruled the motion as to testimony that Inman said he was given $1,600.00 by defendant. It sustained defendant's objection to the testimony concerning Inman's explanation to defendant of the cost.

After the ruling on his motion, defendant moved for a mistrial. Defense attorney argued outside the presence of the jury that the stricken statement was so prejudicial to defendant that a fair trial was no longer possible. The court denied defendant's motion. We conclude the court's ruling was proper.

A motion for mistrial in a case not involving a capital offense is within the court's discretion. The ruling is not reviewable without a showing of gross abuse of discretion. *State v. Yancey*, 291 N.C. 656, 664, 231 S.E. 2d 637, 642 (1977). Here, the court struck the hearsay portions of the witness' testimony and gave the jury a limiting instruction. After ruling on defendant's motion for a mistrial, the court again instructed the jury. It explained what part of the agent's testimony the jury could consider, solely for corroborative purposes, and what part the jury should disregard. We must assume the jurors were capable of following the court's instructions. In light of the other evidence, we do not find the stricken testimony so prejudicial that its effect on the jury could not be erased. *Compare with State v. Hunt*, 287 N.C. 360, 215 S.E. 2d 40 (1975); *State v. Aycoth*, 270 N.C. 270, 154 S.E. 2d 59 (1967).

[3] Defendant also argues the court erred in denying his motion to dismiss made at the close of the State's evidence and renewed at the close of all the evidence. We disagree.

In ruling on a motion to dismiss, the court must consider evidence in the light most favorable to the State. *State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977). In this action, there was ample evidence from which a jury could infer that defendant knew, or must have known, that the tractors were stolen. *Compare with State v. Oxendine*, 223 N.C. 659, 27 S.E. 2d 814 (1943). Besides the unusual hours of the transactions, there was testimony that most of the people involved were strangers to defendant; they were anxious to sell the tractors; the name of L. H. Vernon Co., Inc. was printed on the side of the truck yet no one ever mentioned ownership of the truck and tractors; the tractors were left on defendant's land rather than taken to any place

of business; defendant purchased the tractors for much less than their fair market value; defendant paid in cash yet did not request a bill of sale. We hold the court properly denied defendant's motion to dismiss.

[4] Finally, defendant objects to the court's instructions that the indictment against him should not be considered as evidence of guilt "in and of itself." Defendant argues that the comment implies the indictment could become incriminating if there were other evidences of defendant's guilt and is thus an improper expression of opinion. G.S. 15A-1222. Upon examining the instruction in its entirety, we conclude the jury was properly charged.

No error.

Judges WEBB and HILL concur.

HARVEY RHODES WHITE, JR. v. RICHARD L. GREER

No. 8120SC441

(Filed 19 January 1982)

1. Automobiles § 88— contributory negligence—sufficiency of evidence

In an automobile accident case where plaintiff's motorcycle hit the rear of defendant's car as defendant's car was turning into a driveway, the evidence was sufficient to require submission of the issue of contributory negligence to the jury as the jury could find the plaintiff contributorily negligent in that he (1) drove at a speed greater than reasonable in violation of G.S. 20-141(a), (2) failed to keep a reasonable lookout, and (3) failed to maintain proper control.

2. Automobiles § 72.1— sudden emergency—failure to instruct proper

There was no error in the court's failure to charge on the doctrine of sudden emergency where the evidence tended to show that plaintiff, if negligent, was negligent in creating the emergency in that he failed to keep a reasonable lookout, to maintain proper control, or drove at an excessive speed. The doctrine of sudden emergency applies in situations where defendant's negligence creates the sudden emergency and plaintiff's acts have not brought about or contributed to the emergency.

3. Trial § 33.3— instructions—summarizing contentions of parties

In an automobile accident case, plaintiff's argument that the court erred in failing to summarize the investigating officer's testimony was without merit as the trial judge is not required to name and summarize the testimony of

each witness. G.S. 1A-1, Rule 51(a) requires the judge to state the evidence necessary to explain the application of the law and to give equal stress to the contentions of the various parties.

APPEAL by plaintiff from *Rousseau, Judge.* Judgment entered 28 October 1980 in Superior Court, MOORE County. Heard in the Court of Appeals 10 December 1981.

Plaintiff filed this action against defendant for injuries suffered as a result of the collision of defendant's car with plaintiff's motorcycle. Plaintiff alleged that defendant was negligent in that he turned left in front of plaintiff's motorcycle, causing the two vehicles to collide. Plaintiff prayed for $75,000 in damages.

Defendant's answer denied negligence, alleged contributory negligence by plaintiff, and counterclaimed for $1,000 in property damage resulting from the collision.

Plaintiff's reply denied contributory negligence and alleged in the alternative that defendant had the last clear chance to avoid the collision.

At the trial plaintiff's evidence tended to show the following: On the morning of 1 May 1977, plaintiff was driving his motorcycle west on Bethesda Avenue in Aberdeen, North Carolina, at a speed of 30 to 35 miles per hour. There is a crest in the road where Bethesda Avenue intersects Cypress Street, about 275 to 300 feet from the driveway where the collision occurred. As plaintiff came over the crest, he saw defendant's car in the eastbound lane with the left turn signal blinking, either stopped or moving very slowly. Defendant's car suddenly turned in front of plaintiff. Plaintiff locked the rear brakes and skidded, and the two vehicles collided. Plaintiff presented evidence about his injuries and medical treatment.

Officer Arthur Frye investigated the accident. He testified that the distance from the intersection to the driveway where the accident occurred is about 278 feet and that the skid marks from plaintiff's motorcycle were 62 feet long. Defendant told Frye he did not see the motorcycle. Plaintiff told Frye that defendant did not give a turn signal.

Defendant testified that he signaled a left turn as he approached the driveway and started a slow turn into the driveway

when he saw the road was clear. He had started into the driveway when he saw the motorcycle. The front of plaintiff's motorcycle hit the right rear fender of the car. About seven or eight feet of defendant's car was still on the pavement when the accident occurred. Defendant testified that the skid marks were 88 feet long.

The jury found that defendant was negligent and that plaintiff was contributorily negligent. Plaintiff appeals.

Van Camp, Gill & Crumpler by James R. Van Camp, Douglas R. Gill and H. Morris Caddell, Jr., for plaintiff appellant.

McLeod & Senter by Joe McLeod and William L. Senter for defendant appellee.

CLARK, Judge.

[1] Plaintiff contends that the issue of contributory negligence should not have been submitted to the jury and that the court erred in its instructions on contributory negligence. A defendant who asserts contributory negligence as a defense has the burden of proving it. The issue of contributory negligence should not be submitted to a jury unless there is evidence from which such conduct might reasonably be inferred. *Atkins v. Moye*, 277 N.C. 179, 176 S.E. 2d 789 (1970); *Harris v. Freeman*, 18 N.C. App. 85, 196 S.E. 2d 48 (1973). "A defendant, however, is entitled to have any evidence tending to establish contributory negligence considered in the light most favorable to him and, if diverse inferences can reasonably be drawn from it, the evidence must be submitted to the jury with appropriate instructions as to its bearing upon the issue." *Atkins v. Moye, supra*, at 184, 176 S.E. 2d at 793.

There was evidence that plaintiff drove his motorcycle on a municipal street over the crest of a hill at the maximum speed limit of 35 miles per hour, that defendant's car proceeded at a slow speed from the eastbound lane to the left and almost entirely across the westbound lane to a private driveway before being struck at the rear fender, that plaintiff's motorcycle left skid marks on the street for a distance of 88 feet, that the crest of the hill was some 275 feet from the point of impact, and that defendant looked but did not see the motorcycle approaching when he began his turn. This evidence was sufficient, when considered in

the light most favorable to the defendant, to require the submission of the contributory negligence issue to the jury, and to support the charge to the jury that it could find the plaintiff contributorily negligent in that he (1) drove at a speed greater than reasonable in violation of G.S. 20-141(a), (2) failed to keep a reasonable lookout, and (3) failed to maintain proper control.

The trial judge correctly stated the principles of law concerning a driver's duty to drive at a reasonable speed, to keep a proper lookout, and to maintain control of his vehicle. He correctly defined the burden of proof, negligence, and proximate cause, including foreseeability. The court related to the jury the specific acts or omissions which, under the pleadings and evidence, could constitute contributory negligence. We think the instructions on contributory negligence were sufficient, and no prejudicial error appears. *See Clay v. Garner,* 16 N.C. App. 510, 192 S.E. 2d 672 (1972).

[2] The plaintiff next argues that the court committed prejudicial error by failing to instruct the jury on the doctrine of sudden emergency. The court is required to state the law and apply the evidence thereto in regard to each substantial and essential feature of the case, even in the absence of a properly submitted request for special instructions. *Johnson v. Simmons,* 10 N.C. App. 113, 177 S.E. 2d 721 (1970), *cert. denied,* 277 N.C. 726, 178 S.E. 2d 832 (1971). The doctrine of sudden emergency applies in situations where defendant's negligence creates the sudden emergency and plaintiff's acts have not brought about or contributed to the emergency. The plaintiff, while under a duty to exercise ordinary care for his own safety, is not held to the standard of care of selecting the wisest course of conduct when faced with the sudden emergency, but only to act as a reasonably prudent man under similar circumstances. *Rodgers v. Thompson,* 256 N.C. 265, 123 S.E. 2d 785 (1962); Annot., 80 A.L.R. 2d 5 (1961). The doctrine is not available to one who by his own negligence brought about or contributed to the emergency. *Johnson v. Simmons, supra.*

Probably a sudden emergency arises in most, if not all, motor vehicle collisions, but the doctrine of sudden emergency is applicable only when there arises from the evidence in the case an issue of negligence by an operator after being confronted by the

emergency. In *Rodgers v. Carter*, 266 N.C. 564, 568, 146 S.E. 2d 806, 810 (1966), Justice Lake commented:

> "The doctrine of sudden emergency is simply that one confronted with an emergency is not liable for an injury resulting from his acting as a reasonable man might act in such an emergency. If he does so, he is not liable for failure to follow a course which calm, detached reflection at a later date would recognize to have been a wiser choice. . . ."

In the case *sub judice*, the defendant does not allege and offer evidence tending to show that the plaintiff after being confronted by the emergency was negligent in the operation of his motorcycle. Defendant does not allege and contend that plaintiff was confronted with the emergency and was thereafter negligent in that he applied his brakes and continued to drive in the westbound lane rather than avoiding the collision by driving to the left in the eastbound lane. The evidence tends to show that plaintiff, if negligent, was negligent in creating the emergency in that he failed to keep a reasonable lookout, to maintain proper control, or drove at an excessive speed. In *Brunson v. Gainey*, 245 N.C. 152, 156, 158, 95 S.E. 2d 514, 517, 519 (1956), the Court said:

> "One cannot, by his negligent conduct, permit an emergency to arise and then excuse himself on the ground that he was called upon to act in an emergency. . . .
>
> * * * *
>
> If the peril suddenly confronting the defendant was due to excessive speed or to his failure to maintain a proper lookout, the fact that care was exercised after the discovery of the peril would not excuse the negligent conduct which was the proximate cause of the injury and damage. The court should so have instructed the jury."

We find no error in the failure of the trial court to charge on the doctrine of sudden emergency.

[3] We find plaintiff's argument that the court erred in failing to summarize the investigating officer's testimony without merit. The omission of Officer Frye's testimony concerning defendant's admission that he did not see plaintiff was not prejudicial to plaintiff since the jury found defendant negligent. Plaintiff benefited

by the court's omission of Frye's testimony that plaintiff told him he saw no turn signal since this contradicted plaintiff's testimony at trial.

In summarizing the evidence for the jury, the trial judge did not name and summarize the testimony of each witness. G.S. 1A-1, Rule 51(a) provides, in part, as follows: "The judge shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided, the judge shall give equal stress to the contentions of the various parties." We find no prejudice to plaintiff in the court's failure to recapitulate the officer's testimony, and overrule this assignment of error.

We have examined and considered all plaintiff's assignments of error and arguments and find that plaintiff had a fair trial free from prejudicial error.

No error.

Judges WHICHARD and BECTON concur.

DOROTHY G. MEBANE, M.D. v. BOARD OF MEDICAL EXAMINERS OF THE STATE OF NORTH CAROLINA

No. 818SC366

(Filed 19 January 1982)

Physicians, Surgeons, and Allied Professions § 1— temporary license to practice medicine—denial of permanent license—notice and hearing not required

The State Board of Medical Examiners had authority under G.S. 90-13 to issue a temporary license with limited duration to practice medicine in North Carolina without examination to a physician who had been licensed to practice medicine in Florida and to condition the issuance of a permanent license on her passage of the Federal Licensing Examination. Furthermore, since plaintiff was never issued a permanent license, she was not entitled to the written notice and opportunity to be heard required by G.S. 90-14.2 before a license to practice medicine may be revoked.

APPEAL by plaintiff from *Peel, Judge.* Order entered 22 December 1980 in Superior Court, WAYNE County. Heard in the Court of Appeals 17 November 1981.

Mebane v. Board of Medical Examiners

This is an action to restrain the Board of Medical Examiners from revoking plaintiff's license to practice medicine pending a hearing under G.S. 90-14.2.

In her complaint plaintiff alleged the following: She had been licensed to practice medicine in Florida in 1979 and in this State that same year without further examination by the North Carolina Board. Defendant conditioned plaintiff's further practice in North Carolina upon passing the Federal Licensing Examination (FLEX). This condition was arbitrary and meaningless since defendant had already attested to plaintiff's qualifications by issuing a license. Defendant notified her that her license to practice would terminate on 31 March 1980. Plaintiff had established a practice of 2,000 patients and to halt this practice by 31 March 1980 would have caused personal injury and distress to her patients. The proper procedure to terminate her license was by a hearing pursuant to G.S. 90-14.2, but defendant refused to grant such a hearing. Plaintiff prayed for a temporary restraining order to prevent revocation of her license until a hearing was held.

Attached to and made a part of plaintiff's complaint were the following exhibits: "Exhibit A" is plaintiff's license to practice medicine in the State of Florida, dated 5 March 1979; "Exhibit B1" is plaintiff's temporary license to practice medicine in the State of North Carolina, showing an expiration date of 29 June 1979; "Exhibit B2" is the second North Carolina temporary license, with an expiration date of 7 February 1980; "Exhibit B3" is the third temporary license, with an expiration date of 31 March 1980.

A temporary restraining order was issued on 28 March 1980 restraining defendant from terminating plaintiff's license. The order was served on defendant on 1 April 1980.

Defendant filed a motion to dismiss pursuant to Rule 12(b)(6), which was granted. Plaintiff appeals from this order dismissing her complaint. The temporary restraining order was continued pending appeal.

Hulse & Hulse by Herbert B. Hulse for plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan by John H. Anderson and Michael E. Weddington for defendant appellee.

CLARK, Judge.

In its motion to dismiss, defendant asserted that the complaint failed to state a claim upon which relief could be granted in that the action was against an official agency of the State of North Carolina and, therefore, under the doctrine of sovereign immunity, it could not be maintained. In effect the defendant's motion to dismiss sets out two separate defenses: (1) failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6), and (2) the affirmative defense of sovereign immunity which is required to be asserted in the responsive pleading under Rule 12(b). *Thompson v. Railroad*, 248 N.C. 577, 104 S.E. 2d 181 (1958). The issue on appeal is whether the complaint on its face fails to state a claim upon which relief could be granted.

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, the allegations of the complaint must be presumed true. A claim should not be dismissed under Rule 12(b)(6) unless it appears that plaintiff is entitled to no relief under any statement of facts which could be proved in support of the claim. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

In 1859 the General Assembly created the Board of Medical Examiners of the State of North Carolina "to properly regulate the practice of medicine and surgery . . . ." G.S. 90-2. Under Chapter 90 of the General Statutes the Board was given certain powers to enable it to carry out its regulatory duties. G.S. 90-13 provides that in its discretion the Board may issue a license to practice medicine without examination to an applicant who has a diploma from a medical school, a license issued to him by another state, and who has successfully completed one year of training after graduation. The last sentence of that statute reads as follows: "Such a license may be granted for such a period of time and upon such conditions as the Board may deem advisable."

The Board issued plaintiff a series of three consecutive temporary licenses to practice medicine. Although G.S. 90-13 does not specifically refer to the issuance of temporary licenses, we find that the language of the statute is broad enough to grant authority to the Board to issue temporary licenses with limited duration "upon such conditions as it deems advisable." It is clear from the face of the licenses issued to plaintiff that each one was temporary and expired on the dates shown on the documents. Plain-

tiff was fully aware that the licenses were temporary and that the issuance of a permanent license to practice medicine was conditioned upon a finding of competency based upon her passage of FLEX. When she failed to pass FLEX, the last temporary license expired and the Board refused to issue another one. We find nothing to support plaintiff's claim that she is entitled to a permanent license to practice medicine in this State.

Under G.S. 90-14.2, a licensee is entitled to written notice and opportunity to be heard before the revocation or suspension of a license to practice medicine. Plaintiff argues that she was entitled to such a hearing. However, we find no statutory authority which would give plaintiff this right. She was never issued a permanent license and, therefore, she was not threatened with revocation or suspension of her license. The action taken by the Board was the denial of issuance of a permanent license to practice medicine to plaintiff. We, therefore, find that plaintiff has no statutory right to a hearing to contest the denial of a permanent license by the Board.

Based upon the foregoing, we hold that the plaintiff's complaint fails to state a claim upon which relief could be granted in that the Board of Medical Examiners acted within the scope of its authority under Chapter 90 of the North Carolina General Statutes, and that plaintiff has no statutory right to a hearing to contest the Board's decision.

The order dismissing the complaint is

Affirmed.

Judges WHICHARD and BECTON concur.

JOHN HENRY MITCHEM v. LINDA HICKS SIMS AND ARTHUR THOMAS SIMS

No. 8129SC456

(Filed 19 January 1982)

1. **Evidence § 50.1— medical opinion—form of question proper**

Where a proper foundation had been laid, asking a chiropractor's opinion of a plaintiff's disability based upon his personal examination and treatment of plaintiff, even though not phrased in the traditional form, called for an opinion based upon reasonable medical certainty and was proper.

2. **Evidence § 50.2— hypothetical question—cause of injury**

A hypothetical question which allowed a medical expert to base his opinion in part on the medical history obtained from the patient himself was proper.

3. **Damages § 13.6—use of mortuary table**

Where there was testimony indicating that injuries received by plaintiff in an automobile accident were permanent in nature, it was not error to admit into evidence mortuary tables found in G.S. 8-46.

4. **Damages §§ 16.4, 17.1— instructions on damages for permanent injury and future pain and suffering proper**

The trial court did not err in instructing the jury that it could assess damages for permanent injury to and future pain and suffering of plaintiff in a personal injury action, where the evidence tended to establish a permanent injury with reasonable certainty and where the evidence was sufficient to permit a jury to find a causal connection between the automobile accident and plaintiff's present disability.

APPEAL by defendants from *Lamm, Judge.* Judgment entered 2 February 1981 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 5 January 1982.

The appeal is from a judgment awarding plaintiff damages for personal injuries sustained in a motor vehicle collision.

Hamrick, Bowen, Nanney and Dalton, by Louis W. Nanney, Jr., for plaintiff appellee.

John B. Whitley and George C. Collie, for defendant appellants.

VAUGHN, Judge.

Defendants' assignments of error arise from testimony by Dr. James L. Byers, a chiropractor who treated plaintiff for pain he was experiencing after a motor vehicle collision with defendant

Linda Sims. Defendants contend that the court erred in allowing Dr. Byers to testify as to his opinion of plaintiff's alleged disability and its causation. Defendants further argue that Dr. Byers' testimony was insufficient evidence of permanent injury to warrant the admission into evidence of mortuary tables and the court's instruction on damages for permanent injury. We find no merit in defendants' contentions.

[1] Defendants first except to the court permitting the following testimony:

> "Q. Based upon your examination and treatment, what disability, if any, would you say John Mitchem will suffer from the injuries he related to you?
>
> A. In my opinion he will have twenty to twenty-five percent disability in his shoulder and neck region."

Defendants object to the form of the question, arguing it is not stated in terms of reasonable chiropractic certainty. They also argue that no evidence of disability had been presented which could serve as a foundation for the question.

Chiropractors are recognized as experts in their field and, when properly qualified, allowed to testify as to diagnosis, prognosis, and disability. G.S. 90-157.2; *Currence v. Hardin*, 36 N.C. App. 130, 243 S.E. 2d 172, *aff'd.*, 296 N.C. 95, 249 S.E. 2d 387 (1978). *See also* Annot., 52 A.L.R. 2d 1384 (1957). Both parties to the present action stipulated that Dr. Byers was an expert in the field of chiropractic medicine. The court, therefore, properly permitted plaintiff's question concerning Dr. Byers' opinion of disability. The traditional form of such a question is phrased in terms of an "opinion satisfactory to yourself based upon reasonable medical certainty." We conclude that the present question asking for a chiropractor's expert opinion based upon his personal examination and treatment necessarily called for an opinion based upon reasonable medical certainty. Defendant's argument raises only semantic technicalities.

Furthermore, plaintiff had laid a proper foundation prior to asking the question. Plaintiff testified that he continues to have headaches and ringing in his ears. He has trouble sleeping and must take medication. Plaintiff testified he did not have these health problems prior to the accident. Dr. Byers testified that he

examined plaintiff a month after the accident. He took x-rays showing misalignment of plaintiff's spine along his neck, rib cage section, and lower back. After one and a half months of treatment, the pain in plaintiff's lower back had subsided. At the end of 53 treatments, however, plaintiff still had limited motion and experienced pain in his shoulder and neck region. We conclude that the question of Dr. Byers was proper, and the assignment of error is overruled.

[2] Defendants next except to the admission of a hypothetical question addressed to Dr. Byers:

> "Q. Dr. Byers, if the jury should find from the evidence presented, and by its greater weight, that John Mitchem was involved in an automobile accident on November 15, 1978, that he was injured while in his truck when the truck was hit by the defendant — that the left side of his truck was hit by the left side of the defendant's car, and that his car traveled approximately twenty feet after the collision occurred and that he was knocked around in his car at the time of the collision, and that Mr. Mitchem had no problems with his neck and shoulder prior to November 15, 1978, do you have an opinion satisfactory to yourself as to whether all these ailments that he related to you could or might have been caused by this accident?"

Defendants argue that the question asks not for expert opinion but for mere speculation since it is premised on ailments as related by plaintiff to the doctor. There is no error, however, in allowing a medical expert to base his opinion in part on the medical history he obtains from the patient himself. "Statements made by a patient to his physician for the purposes of treatment . . . are 'inherently reliable'. . . ." *Booker v. Medical Center*, 297 N.C. 458, 479, 256 S.E. 2d 189, 202 (1979). This assignment of error is overruled. Defendants' arguments concerning Dr. Byers' response to the hypothetical question cannot be heard since defendants failed to make a timely motion to strike at trial or to note any exception in the record. *See Young v. Glenn*, 42 N.C. App. 15, 20, 255 S.E. 2d 596, 599 (1979).

[3] Defendant next argues that the court erred in admitting into evidence mortuary tables found in G.S. 8-46. We disagree.

It is well established that before evidence of life expectancy under G.S. 8-46 can be introduced, there must be evidence to a reasonable certainty of permanent injury. *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753 (1965); *Teachey v. Woolard*, 16 N.C. App. 249, 191 S.E. 2d 903, *cert. denied*, 282 N.C. 430, 192 S.E. 2d 840 (1972); *McCoy v. Dowdy*, 16 N.C. App. 242, 192 S.E. 2d 81 (1972).

Where plaintiff suffers from an objective injury, a jury is capable of determining whether or not the injury is permanent in nature. *Gillikin v. Burbage, supra.* Where the injury complained of is subjective, however, and of such nature that a layman cannot with reasonable certainty know whether the injury is permanent, it is necessary to have medical expert testimony. *Callicutt v. Hawkins*, 11 N.C. App. 546, 181 S.E. 2d 725 (1971).

In the present cause, plaintiff suffers from subjective pain. Evidence of his disability, however, is not limited to plaintiff's own credibility. Dr. Byers testified that from a chiropractic viewpoint, plaintiff has reached maximum recovery: "Although he has received all the treatment that I can give him that will benefit him, it is still my opinion that he has a twenty to twenty-five percent disability."

Dr. Byers never used the specific word "permanent" to describe plaintiff's injuries. His testimony, however, indicates that the lasting duration of plaintiff's disability is certain or probable. *Compare with Garland v. Shull*, 41 N.C. App. 143, 254 S.E. 2d 221 (1979). We hold there was sufficient evidence of permanent injury to sustain the introduction of mortuary tables. *See also Teachey v. Woolard, supra.*

[4] Finally, defendant argues that the court erred in instructing the jury that it could assess damages for permanent injury to and future pain and suffering of plaintiff. We disagree.

To warrant instructions permitting an award for permanent injury and future pain and suffering, there must be evidence that there is a reasonable certainty of permanent injury and future pain and suffering and that such disabilities proximately resulted from defendant's wrongful act. *Callicutt v. Hawkins, supra.*

We have already held that plaintiff presented evidence tending to establish a permanent injury with reasonable certainty. Because Dr. Byers testified that the disability in plaintiff's

shoulder and neck region was caused by limited motion and pain, we also find evidence of future pain and suffering. We next address the issue of causation. In answer to the hypothetical question set out earlier, Dr. Byers stated he did have an opinion: "In my opinion, this type of accident can cause this type of injury in the neck and shoulders." In *Smith v. Hospital*, 21 N.C. App. 380, 204 S.E. 2d 546 (1974), this Court held that "could or might have" refers to probability rather than mere possibility. By stating that a car collision such as that between plaintiff and defendant can cause injuries similar to plaintiff's, Dr. Byers presented evidence sufficient to permit a jury to find a causal connection between the 1978 accident and plaintiff's present disability. *Compare with Caison v. Cliff*, 38 N.C. App. 613, 248 S.E. 2d 362 (1978). We also note plaintiff's testimony that before the accident, he was not suffering from his current health problems. We conclude that the court properly instructed the jury on its right to assess damages for permanent injury and future pain and suffering and to consider plaintiff's life expectancy in so doing.

Affirmed.

Judges WEBB and HILL concur.

GEORGE K. SAMUEL, EMPLOYEE, PLAINTIFF v. CLAUDE PUCKETT/LINCOLN USED CARS AND/OR LEWIS JENKINS, NON-INSURER, EMPLOYER DEFENDANT

No. 8110IC292

(Filed 19 January 1982)

1. Master and Servant § 96.5— workers' compensation—defendant not employer—sufficiency of evidence to support findings

The evidence in a workers' compensation proceeding was sufficient to support findings by the Industrial Commission that defendant financed the purchase of the automobile plaintiff was driving at the time he was injured but that the automobile was owned by a third party; that the automobiles financed by defendant for the third party were usually titled in his name; and that plaintiff was employed by the third party and not by defendant on the date of the accident.

2. Master and Servant § 93— workers' compensation—notices of accident showing different employers—request for hearing as to one employer—determining claim against second employer

Where plaintiff filed with the Industrial Commission one notice of accident showing defendant as his employer and another notice showing a second individual as his employer, plaintiff filed a request for hearing only as to defendant, and the Industrial Commission did not schedule a hearing as to the claim against the second individual, the Industrial Commission erred in determining the claim against the second individual in the proceeding against defendant. G.S. 97-83.

APPEAL by plaintiff from order of North Carolina Industrial Commission entered 4 November 1980. Heard in the Court of Appeals 21 October 1981.

The plaintiff was injured in an automobile accident on 4 February 1976. He filed two notices of accidents with the Industrial Commission, one showing Claude Puckett as his employer and the other showing Lewis Jenkins as his employer. The plaintiff filed in March 1977 a request that the claim against Puckett be set for hearing. On 12 July 1977, Deputy Commissioner Ben Roney conducted a hearing in Dobson. At that hearing the plaintiff testified that on 3 February 1977 he was employed by the defendants Puckett and Jenkins who were engaged in the wholesale used automobile business. On that date he was instructed by Mr. Jenkins to drive an automobile from High Point to Fredericksburg, Virginia, to be sold at public auction. He drove the automobile from High Point to Greensboro where he spent the night and proceeded toward Fredericksburg the next morning. He was involved in an accident while driving the automobile through Stokes County.

Claude Puckett testified he had never been in partnership with Mr. Jenkins. He testified further that he financed the purchase of used automobiles for Mr. Jenkins who paid him $25.00 for each automobile that was financed. The titles to the automobiles he financed were put in Mr. Puckett's name as security for the loans. Mr. Puckett testified that he did not own the automobile which the plaintiff was driving at the time of the accident.

The hearing was resumed on 18 October 1978 at which time the defendant Puckett offered further evidence. It was then continued and further evidence as to the plaintiff's injuries was

taken on 9 January 1979 in Winston-Salem. On 23 February 1979 an order was entered continuing the case and allowing the plaintiff to take additional depositions. No depositions were filed with Industrial Commission and on 30 June 1980 Deputy Commissioner Roney filed an opinion and award. Deputy Commissioner Roney found among other facts that the defendant Puckett was not a partner with the defendant Jenkins; that Puckett financed the purchase of used automobiles for Jenkins and charged a fee for doing so, but did not participate in any profit or loss; that plaintiff was employed by Jenkins and not Puckett at the time of the accident; and that the record did not reveal that Jenkins regularly employed four or more employees on 4 February 1976. Deputy Commissioner Roney denied any recovery to plaintiff and the plaintiff appealed to the full Commission.

The Industrial Commission struck certain findings of fact made by the Deputy Commissioner as to the plaintiff's being under the influence of alcohol at the time of the accident and affirmed the decision. The plaintiff appealed.

Max D. Ballenger for plaintiff appellant.

Folger, Folger and Bowman, by Fred Folger, Jr., H. Lee Merrit, Jr. and Larry Bowman, for defendant appellee Claude Puckett.

No counsel for defendant appellee Lewis Jenkins.

WEBB, Judge.

[1] The plaintiff's first assignment of error deals with the findings of fact by Deputy Commissioner Roney. The plaintiff contends the evidence does not support the findings of fact that the automobile which the plaintiff was driving at the time he was injured was owned by Lewis Jenkins; that Claude Puckett had financed the purchase of the automobile; that the automobiles financed by Puckett were usually titled in his name; and that the plaintiff was employed by Jenkins and not Puckett on 4 February 1976. The plaintiff testified he was employed by Puckett and Jenkins and was instructed by Jenkins as to where to drive the automobile. Mr. Puckett testified he and Jenkins were not partners. We believe this is evidence from which Deputy Commissioner Roney could find the plaintiff was employed by Jenkins,

not Puckett. The testimony of Mr. Puckett supports the other findings of fact about which the plaintiff complains. The plaintiff's first assignment of error is overruled. *See Hollman v. City of Raleigh*, 273 N.C. 240, 159 S.E. 2d 874 (1968).

[2] In his second assignment of error the defendant contends the claim against Lewis Jenkins should not have been determined in this proceeding. We believe this assignment of error has merit. The plaintiff filed a request only as to Puckett that the claim should be set for hearing. The plaintiff and Puckett stipulated that the claim against Puckett only was to be heard. G.S. 97-83 provides in part:

> If the employer and the injured employee or his dependents fail to reach an agreement, in regard to compensation under this Article within 14 days after the employee has knowledge of the injury or death . . . either party may make application to the Industrial Commission for a hearing in regard to the matters at issue, and for a ruling thereon.

This statute provides that a hearing may be had when applied for by either party. Whether the Industrial Commission may schedule a hearing without an application from either party, we need not decide. In this case it is clear the Industrial Commission did not schedule a hearing as to the claim against the defendant Jenkins. We hold it was error to determine this claim.

In his third assignment of error the plaintiff contends the Industrial Commission should have struck a finding of fact by Deputy Commissioner Roney as to the consumption of alcoholic beverages by the plaintiff on 4 February 1976. The decision in this case does not depend on this finding of fact and the plaintiff was not prejudiced by it. This assignment of error is overruled.

We affirm as to the claim against the defendant Claude Puckett and reverse as to the claim against the defendant Lewis Jenkins.

Affirmed in part, reversed in part.

Judges MARTIN (Robert M.) and WELLS concur.

REECE KEY v. HOWARD W. FLOYD, JR., AND WIFE, RITA W. FLOYD

No. 8121SC417

(Filed 19 January 1982)

Contracts § 6.1— unlicensed contractor—summary judgment for property owners proper

In an action by plaintiff to recover the balance allegedly due on an oral construction contract, summary judgment for defendant property owners was proper where defendants' pleadings and affidavits indicated that plaintiff represented himself to be a general contractor and that the contract between the parties was for an amount in excess of the amount needed to trigger application of G.S. 87-1 and where plaintiff failed to set forth specific facts in support of his assertion that he had not acted as a general contractor.

APPEAL by plaintiff from *Seay, Judge.* Judgment entered 27 January 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 9 December 1981.

Plaintiff brought this action to recover the balance allegedly due on an oral construction contract. Plaintiff's complaint alleged that he entered into a contract with defendants to furnish all labor and building materials for construction of a residential dwelling on a cost plus 10% basis. He further alleged that he had fulfilled his obligations under the contract at a cost of $53,795.21, and that defendants had paid him only $32,512.19. Plaintiff sued for the difference between these amounts, plus his 10% commission, for a total of $26,662.54. He also sought interest and a lien and execution on defendants' property.

Defendants filed an answer and counterclaim, denying that they owed any amount to plaintiff in that plaintiff had represented that he was a general contractor when in fact he was not. Defendants also claimed that recovery was barred by the Statute of Frauds and by cases construing G.S. 87-1 which requires licensure of any general contractor who undertakes to build a structure for $30,000 or more. Defendants further alleged that plaintiff failed to complete the construction of their house in a good and workmanlike manner. Defendants sought damages for plaintiff's alleged breach and treble damages for plaintiff's alleged unfair and deceptive trade practices.

Plaintiff, in his reply, claimed he had not represented himself to defendants as a general contractor, but had only agreed to

assist defendants, as builder, in the construction of their house. He alleged that defendants had retained control in selecting materials and had thus controlled the ultimate cost of construction.

Defendants' motion for summary judgment was granted by the trial court on grounds that no issue of material fact had been raised by the pleadings and affidavits as to plaintiff's claim. Plaintiff appeals.

Hiatt and Hiatt, by V. Talmage Hiatt, for plaintiff appellant.

Badgett, Calaway, Phillips, Davis, Stephens, Peed and Brown, by B. Ervin Brown, II, for defendant appellees.

ARNOLD, Judge.

Plaintiff grounds his appeal on the trial court's alleged error in granting summary judgment for defendants in that a genuine issue of material fact exists as to whether plaintiff was a general contractor. Plaintiff's pleadings and affidavit indicate that he told defendants he was not a general contractor and that he undertook to build defendants' home under their supervision and control. Plaintiff cites *Helms v. Dawkins*, 32 N.C. App. 453, 232 S.E. 2d 710 (1977), for the rule that the degree of control to be exercised by the contractor over the construction determines whether he is, in fact, a general contractor subject to the requirements of G.S. 87-1.

Defendants' pleadings and affidavits indicate that plaintiff represented himself to be a general contractor, both to defendants and to their lending institution, and that the contract between the parties was for an estimated $45,000, well in excess of the amount needed to trigger application of G.S. 87-1. Defendants cite this Court's opinion in *Revis v. King*, 49 N.C. App. 168, 270 S.E. 2d 580 (1980), wherein it was held that violation of G.S. 87-1 precluded recovery by an unlicensed contractor on either the contract itself or *quantum meruit* grounds.

We agree with plaintiff that the burden of sustaining a summary judgment is a heavy one. We note, however, that in the present case defendant's motion found support in plaintiff's own complaint which included assertions of fact amounting to an admission that he had performed as a general contractor, *e.g.:*

3. . . .in accordance with the terms of their oral contract the plaintiff was to furnish all labor and building materials used in the construction of said dwelling for cost plus 10%. . . .

4. . . . plaintiff has contracted for and furnished all of the building materials and fixtures and has furnished all the hired and sub-contract labor for the completion of the defendant's single family dwelling. . . .

In determining that there exists no material issue of triable fact, the court must accept as true all facts asserted by the party opposing the motion for summary judgment. *Norfolk and Western Railway Co. v. Werner Industries*, 286 N.C. 89, 209 S.E. 2d 734 (1974). It is also the established rule that where a motion for summary judgment has been made and supported, the "adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth *specific facts* showing that there is a genuine issue for trial." N.C.R.C.P. 56(e) (Emphasis added.)

While plaintiff made an assertion in his reply to defendant's counterclaim that he had not acted as a general contractor, he failed to set forth specific facts in support of that assertion. Those facts specified in plaintiff's affidavit, relating to selection of materials, fixtures, wall and floor coverings, etc. by defendants, do not support plaintiff's claim that defendants were in control of the construction. Property owners' preferences as to such incidentals are undoubtedly respected by most residential building contractors.

We find that plaintiff has failed to set forth specific facts showing the existence of a genuine issue for trial. We conclude, therefore, that summary judgment for defendants should be

Affirmed.

Judges MARTIN (Harry C.) and WELLS concur.

ARDEN EQUIPMENT COMPANY, INCORPORATED v. LILLIE MAE RHODES AND BILLY RICHARD RHODES

No. 8128SC316

(Filed 19 January 1982)

1. **Uniform Commercial Code § 46— sale of collateral—inadequacy of price—commercial reasonableness—genuine issue of material fact**

In an action to recover a deficiency judgment, the evidence on a motion for summary judgment presented a genuine issue of material fact as to whether the sale of the secured chattel, a backhoe, was commercially reasonable where the only evidence as to the manner of sale showed that the backhoe was sold by the creditor bank to plaintiff for $4,500; plaintiff offered evidence that the backhoe was worth $4,500; and defendant offered evidence that the backhoe should have brought around $10,000 at the time of sale and that a sales representative for plaintiff said the backhoe "was worth what was owed on it."

2. **Uniform Commercial Code § 45— agreement not to seek deficiency judgment—absence of consideration**

An alleged agreement that no deficiency judgment would be sought if defendant debtor would not contest the repossession of the secured chattel, a backhoe, was not supported by consideration where all the evidence showed that the creditor bank was entitled to possession of the backhoe.

APPEAL by defendants from *Allen, Judge.* Judgment entered 31 October 1981 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 23 October 1981.

In this action the plaintiff seeks a judgment for $6,106.45 plus interest based on a note which defendants had given to the plaintiff. The defendants filed an answer in which they denied the material allegations of the complaint and pled as an affirmative defense that the note was given as a part of a financing agreement to purchase a backhoe and the parties had verbally agreed that if the defendants would voluntarily surrender the backhoe to the plaintiff, the plaintiff would not seek a money judgment against the defendants. The defendants also alleged that the backhoe had been sold for less than its value.

The plaintiff made a motion for summary judgment which it supported with affidavits of C. E. Shope, president of plaintiff, and J. W. Parker, collection manager of the Bank of Asheville. These affidavits showed the Bank of Asheville had possession of

the note and the defendants were delinquent in their payments, that the bank gave notice to the defendant that the backhoe would be sold at private sale, and the backhoe was sold at private sale to the plaintiff for $4,500.00 leaving a deficiency on the note of $6,106.45. The plaintiff purchased the note from the bank. C. E. Shope said in his affidavit that he submitted a bid on behalf of plaintiff of $4,500.00 which he believed was a reasonable fair market price for the backhoe in its condition then.

Billy Richard Rhodes and Mr. Shope testified at the hearing on the motion for summary judgment. Mr. Rhodes testified that John Warren, whom Mr. Shope stated was the sales representative for plaintiff at the time, told Mr. Rhodes "that if we would release the backhoe to the Bank of Asheville, that the backhoe was worth what was owed on it and we shouldn't have any problem." He testified further that after being told this, he called the bank and told them he would not contest the repossession. Mr. Rhodes also testified the backhoe "should have brought around $10,000.00 at the sale."

The court granted the plaintiff's motion for summary judgment and the defendants appealed.

Van Winkle, Buck, Wall, Starnes and Davis, by Albert L. Sneed, Jr., for plaintiff appellee.

Donald O. Mayer for defendant appellants.

WEBB, Judge.

[1] In his first assignment of error, the defendant contends there was a genuine issue of a material fact under G.S. 25-9-504 which provides in part:

> (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing.
>
> * * *
>
> (3) Disposition of the collateral may be by public or private proceedings and may be made by one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and any place and on any terms but

every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable.

The defendants argue that there is an issue as to whether the sale was made in a commercially reasonable manner. There have been several cases decided by this Court on the question of whether the sale by a creditor of a secured chattel is commercially reasonable. *See Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 245 S.E. 2d 566 (1978); *Credit Co. v. Concrete Co.*, 31 N.C. App. 450, 229 S.E. 2d 814 (1976) and *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E. 2d 848 (1976). For a well-reasoned comment on this subject, see Dunn, "The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina", 15 Wake Forest L. Rev. 71 (1979). In order to recover a deficiency judgment against the defendants, the burden of proof is on the plaintiff to show the sale of the secured chattel was commercially reasonable.

In the instant case there is little evidence in the record as to the manner of the sale by the bank except that it was sold to the plaintiff at private sale for $4,500.00. The plaintiff offered evidence that the backhoe was worth $4,500.00. The defendants offered evidence through the testimony of Mr. Rhodes that John Warren, a sales representative for the plaintiff, said the backhoe was "worth what was owed on it." Mr. Rhodes testified that in his opinion the backhoe "should have brought around $10,000.00 at the time of the sale." This testimony as to Mr. Warren's statement and Mr. Rhodes' opinion as to the value of the backhoe was evidence that the sales price was grossly inadequate. We held in *Allis-Chalmers Corp. v. Davis, supra*, that evidence of a grossly inadequate sales price was evidence of unreasonable terms so that a directed verdict for the secured party was in error. In this case there was not sufficient evidence of the "manner, time, place, and terms" so that if the evidence had been offered at trial it would have required a directed verdict for the plaintiff. It was error to grant the plaintiff's motion for summary judgment. *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

[2] The defendants also argue that it was error to grant the motion for summary judgment because they offered evidence that there was an agreement that if the defendant would not contest

the repossession of the backhoe, no deficiency judgment would be sought. All the evidence showed the bank was entitled to possession of the backhoe. There was no consideration to support this agreement. *See Tile and Marble Co. v. Construction Co.*, 16 N.C. App. 740, 193 S.E. 2d 338 (1972).

Reversed and remanded.

Judges MARTIN (Robert M.) and WELLS concur.

STATE OF NORTH CAROLINA v. ROGER LEE McBRYDE

No. 8112SC647

(Filed 19 January 1982)

1. **Criminal Law § 162.2— failure to object to question—waiver**

By failing to object to a question and answer eliciting evidence concerning defendant's post-*Miranda* silence, defendant waived his objection and right to assert its submission as grounds for a new trial.

2. **Criminal Law § 162— failure to object—waiver**

Where defendant failed to object or move to strike testimony that a magistrate had found probable cause to arrest defendant and had issued a warrant for his arrest, he waived his right to assert its admission as grounds for a new trial. G.S. 15A-1446(a) and (b).

3. **Criminal Law § 120— instructions on evidence and verdict**

In charging the jury upon the law and evidence pursuant to G.S. 15A-1232, and instructing that a verdict must be unanimous, G.S. 15A-1237(b), the trial judge is not required to anticipate that the jury may be unable to reach a verdict, much less to express such anticipated result by instructing that a mistrial would result if the jury could not reach a verdict as such an instruction would tend to coerce a verdict.

APPEAL by defendant from *Lee, Judge.* Judgment entered on the verdict 18 February 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 20 November 1981.

Defendant was indicted on counts of breaking or entering with intent to commit larceny and felonious larceny.

The State's evidence tended to show that at 1:06 p.m. on 7 September 1980, a Fayetteville business named "Roy's Cigarette

Outlet" was broken into. A burglar alarm immediately alerted the police, who found the outer rear wall of the business had been ripped open, through which 149 cartons of cigarettes had been stolen. Behind the store, there was a path leading into the woods which looked recently trodden. The police officers followed the path, shortly coming upon several cartons of cigarettes plus a crowbar, a hammer, and a screwdriver. Officer Johnson asked a group of men sitting in the woods for descriptions of anyone they had just seen traveling the path. Following Officer Johnson's broadcast of the descriptions given, Officer Croom matched one of the descriptions to defendant, who was found nearby, running away from the woods. Defendant was sweating heavily, his clothes were dirty and rumpled, and a small fiber of wood protruded from a tear in his shirt. A thread found in the splintered wall of the outlet matched the shirt defendant was wearing. Defendant's fingerprints also matched those found on the inside wall of the outlet.

Defendant presented no evidence.

From an active, consolidated sentence imposed on the verdicts of guilty to both charges, defendant appeals.

Attorney General Rufus L. Edmisten, by Associate Attorney G. Criston Windham, for the State.

Marc D. Towler, Assistant Appellate Defender, for defendant-appellant.

WELLS, Judge.

Defendant brings forth three assignments of error relating to the admission of evidence of defendant's post-*Miranda* silence, to evidence that a magistrate had found probable cause to issue an arrest warrant, and to the court's instructions to the jury, "requiring" them to reach a verdict.

[1] Defendant first assigns error to the trial court's failure first to exclude *ex mero motu* and later on defendant's objection evidence regarding defendant's post-*Miranda* silence. Officer Jimmy Johnson testified on direct examination as follows:

> [A] [W]e had advised him of his Miranda rights when we asked him some questions.

[Q] . . . he make a statement at that point?

A. He did not open up with a statement.

. . .

Q. Now, would you describe the physical condition of Mr. McBryde at the time?

A. [H]e didn't basically answer a lot of questions. He was very quiet, you know. He would maybe answer a little bit and then wouldn't say any more.

MR. BRITT: Objection to that; move to strike.

COURT: Motion denied; overruled.

By failing to object to the first question and answer eliciting this evidence, defendant waived his objection and right to assert its admission as grounds for a new trial. *State v. Logner*, 297 N.C. 539, 256 S.E. 2d 166 (1979), *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091 (1976), *State v. Little*, 278 N.C. 484, 180 S.E. 2d 17 (1971). This assignment is overruled.

[2] In his next assignment, defendant contends that the trial court erred in failing to exclude testimony that a magistrate had found probable cause to arrest defendant and had issued a warrant for his arrest. Defendant did not object to this testimony, nor did he make a motion to strike. He has therefore waived his right to assert its admission as grounds for a new trial. *See* G.S. 15A-1446(a) and (b), *State v. Foddrell*, 291 N.C. 546, 231 S.E. 2d 618 (1976), *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858 (1972). Defendant contends that the jury may have accepted this testimony as a previous judicial determination and opinion of defendant's guilt. In light of the substantial evidence connecting defendant to this crime, we do not find that this testimony was prejudicial to defendant's case, and we overrule this assignment.

[3] Defendant finally contends that the court coerced a guilty verdict by giving the following charge:

> Under the law and evidence, Members of the Jury, it will be your duty, as to Count Number One, to return one of two possible verdicts: guilty of felonious breaking or entering or not guilty; and as to Count Number Two, it will be your

duty to return one of two possible verdicts: guilty of felonious larceny or not guilty.

Defendant contends that the jury also should have been instructed that if they were unable to reach a verdict, a mistrial would be declared. In charging the jury upon the law and evidence pursuant to G.S. 15A-1232, and in instructing that a verdict must be unanimous, G.S. 15A-1237(b), the trial judge is not required to anticipate that the jury may be unable to reach a verdict, much less to express such anticipated result by instructing that a mistrial would result if the jury could not reach a verdict. Such an instruction, if given before the jury began its deliberations, would in itself tend to coerce a verdict, increasing the risk of error. *See State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978). This assignment is overruled.

No error.

Judges ARNOLD and MARTIN (H. C.) concur.

STATE OF NORTH CAROLINA v. SHIRLEY BEVIN

No. 8125SC716

(Filed 19 January 1982)

Assault and Battery § 15.6— inadequate instruction on self-defense in final mandate

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries, the trial court's instruction that "if you find the defendant acted properly on the first, second, or third issue, you would find her not guilty, self-defense being a complete defense to the crime charged," made between instructions on two lesser included offenses, was an insufficient instruction on self-defense in the final mandate since it did not adequately explain to the jury that not guilty by reason of self-defense was a possible verdict and that the burden was on the State to show that the defendant did not act in self-defense.

APPEAL by defendant from *Friday, Judge.* Judgment entered 16 December 1980 in Superior Court, BURKE County. Heard in the Court of Appeals 11 December 1981.

Defendant was charged in a bill of indictment with assault with a deadly weapon with intent to kill, inflicting serious injury.

State's evidence consisted of testimony by the prosecuting witness, Christine Johnson, who stated that defendant came to her home and attacked her without provocation, cutting her arm.

Defendant, testifying on her own behalf, raised the defense of self-defense, claiming that Ms. Johnson attacked her first and that defendant used only reasonable force in defending herself.

The jury found defendant guilty of assault with a deadly weapon, inflicting serious injury. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant appellant.

ARNOLD, Judge.

As her first assignment of error, defendant argues that the trial court erred in failing to instruct the jury properly on self-defense in its final mandate. While the defendant concedes that the jury was properly instructed on self-defense earlier in the charge, she contends that a later reference to self-defense made between instructions on two lesser included offenses was insufficient to fulfill the requirement introduced by our Supreme Court in *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974).

In *Dooley*, the Court set forth a model instruction to be included in the final mandate where evidence of self-defense had been introduced at trial. While this Court has not construed *Dooley* to require rigid adherence to this model instruction, we have held that the trial court's final mandate must adequately explain to the jury that they can find the defendant not guilty by reason of self-defense. *State v. Carter*, 42 N.C. App. 325, 256 S.E. 2d 535 (1979).

In the present case, the trial judge, after instructing on assault with a deadly weapon inflicting serious injury, and prior to instructing on assault with a deadly weapon, gave the jury the following instruction:

> [I]f you find the defendant acted properly on the first, second, or third issue, you would find her not guilty, self-defense being a complete defense to the crime charged.

We find that this instruction did not adequately explain to the jury that not guilty by reason of self-defense was a possible verdict, and that the burden was on the State to show that the defendant did not act in self-defense.

We find it unnecessary to address defendant's second assignment of error since the trial court's failure to include an adequate instruction on self-defense in its final mandate is prejudicial error entitling defendant to a new trial.

New trial.

Judges MARTIN (Harry C.) and WELLS concur.

STATE OF NORTH CAROLINA v. JOHN EDGAR RANKIN

No. 8118SC780

(Filed 19 January 1982)

Robbery § 2— armed robbery statute—no need to name person in attendance in indictment

The armed robbery statute, G.S. 14-87(a), does not require that the name of the person in attendance at a store during a robbery be set out in the bill of indictment. It is only required that, upon trial, the State must prove someone was in attendance.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 13 March 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 January 1982.

Attorney General Edmisten, by Assistant Attorney General Henry T. Rosser, for the State.

Assistant Appellate Defender Marc D. Towler for defendant.

MARTIN (Harry C.), Judge.

Defendant was charged and convicted of armed robbery under the following bill of indictment:

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 30 day of November, 1980, in Guildford County John Edgar Rankin unlawfully and wilfully did feloniously having in possession and with the use and threatened use of a certain (dangerous weapon) (firearm) to wit: a gun, whereby the life of Gerald Durham was endangered and threatened, did commit an assault upon and put in bodily fear the said Gerald Durham and by means aforesaid and by threats of violence and by violence did unlawfully, wilfully and feloniously take, steal and carry away personal property, to wit: Three Hundred Sixty-Six Dollars in good and lawful United States Currency from the place of business know [*sic*] as John Harris t/d/b/a Harris Curb Market, 2602 McConnell Road, Greensboro, North Carolina where, at said time, the said _____ was in attendance, said money and items of value being the property of John Harris t/d/b/a Harris Curb Market, 2602 McConnell Road, Greensboro, North Carolina against the form of the statute in such case made and provided and against the peace and dignity of the State.

Defendant contends the bill is fatally defective because it does not specify the name of the person who was in attendance at the store during the robbery. We reject this contention and hold the bill of indictment to be proper.

The armed robbery statute reads in pertinent part:

> Any person or persons who . . . with the use or threatened use of any firearms . . . whereby the life of a person is endangered or threatened, unlawfully takes . . . personal property . . . from any place of business . . . where there is a person or persons in attendance . . . shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87(a) (1981).

It is plain from the statute that it is not necessary that the name of the person in attendance be set out in the bill of indictment. It is only required that, upon trial, the state must prove someone was in attendance. The bill in question alleges that the robbery was accomplished by means of an assault upon Gerald Durham with a gun, whereby the life of Gerald Durham was

threatened. The bill is legally sufficient to charge the substance of the offense and puts defendant on notice that he will be called upon to defend against proof of the manner and means by which the crime was perpetrated. *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978). It is sufficient to protect defendant from subsequent prosecution for the same offense. *Id.* Furthermore, the defendant could have obtained the name of the person in attendance if he felt it necessary to prevent surprise at trial or if necessary to prepare his defense. *Id.*; N.C. Gen. Stat. § 15A-925 (1978). A bill is sufficient in form for all purposes if it expresses the charge in a plain, intelligible and explicit manner, and it will not be quashed by reason of any informality. N.C. Gen. Stat. § 15-153 (1978). Evidentiary matters are not required to be alleged. *State v. Palmer*, 293 N.C. 633, 239 S.E. 2d 406 (1977). The bill in question complies with the requirements of N.C.G.S. 15A-924.

No error.

Judges ARNOLD and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 JANUARY 1982

STATE v. CALDWELL No. 814SC655	Onslow (80CR22431)	No Error
STATE v. DEMPSEY No. 816SC631	Bertie (80CRS2528) (80CRS231)	No Error
STATE v. EFIRD No. 8120SC724	Union (80CRS6962) (80CRS6963)	No Error
STATE v. HESTER No. 8121SC685	Forsyth (80CRS37716)	No Error
STATE v. HORNE No. 8119SC517	Montgomery (80CRS3390)	No Error
STATE v. HOUSAND No. 815SC679	New Hanover (80CRS23058)	New Trial
STATE v. JOHNSON No. 8117SC488	Stokes (80CR735)	No Error
STATE v. KENT No. 8126SC612	Mecklenburg (80CRS50847)	Affirmed
STATE v. LEAK No. 8120SC684	Richmond (80CRS7237)	New Trial
STATE v. McGRAW No. 8129SC638	Polk (79CRS1665)	Reversed
STATE v. SCOTT No. 8116SC658	Robeson (80CRS12981)	No Error
STATE v. TREADWELL No. 8129SC703	Transylvania (80CRS2641)	No Error
WILLIAMS v. COOK No. 813DC423	Pitt (80CVD1645)	Reversed
WILLIARD v. FRANCK No. 8118SC353	Guilford (77CVS1647)	No Error

FILED 19 JANUARY 1982

FAGLEY v. FAGLEY No. 811DC419	Dare (80CVD95)	Affirmed

HUMANE SOCIETY OF BEAUFORT COUNTY v. TILLETT No. 812SC256	Beaufort (79CVS510)	Affirmed
STATE v. BATTLE No. 817SC693	Wilson (80CRS7285)	No Error
STATE v. GLENN No. 8127SC788	Gaston (80CRS21059)	No Error
STATE v. LEAK No. 8112SC689	Hoke (80CRS996) (80CRS997)	No Error
STATE v. LUSTER No. 8114SC749	Durham (79CRS22551) (79CRS28603)	No Error (d)
STATE v. STRUTHERS No. 812SC695	Beaufort (80CRS8371)	No Error

JUDY W. SIMONS v. NICHOLAS GEORGIADE, DUKE UNIVERSITY, PRIVATE DIAGNOSTIC CLINIC, AND CARL QUILLEN

No. 8114SC347

(Filed 2 February 1982)

1. **Evidence § 50.2— medical expert—hypothetical question—use of inferences from facts assumed to form opinion**

Where there was evidence that 14 injections were made around plaintiff's left breast to anesthetize the breast area for surgery and that plaintiff began exhibiting the first symptoms of collapsed lungs approximately three hours after she awakened from surgery, an expert medical witness could state his opinion, based on a hypothetical question which assumed such facts, that the surgical procedure caused the collapsed lungs even though the witness must have inferred entry of the needle into plaintiff's lungs to effect the collapse, since an expert witness may employ inferences from facts assumed in a hypothetical question to form an opinion.

2. **Evidence § 49.3— expert medical testimony—no use of "could or might"**

A medical witness's opinion testimony as to whether the cause of plaintiff's collapsed lungs was a deviation from standard medical practice could not properly be excluded on the ground that the questions did not employ "could or might" language.

3. **Evidence § 50; Physicians, Surgeons, and Allied Professions § 15.2— expert medical testimony—familiarity with standard of care in same or similar communities**

The exclusion of a plastic surgeon's answers to questions as to whether the cause of plaintiff's collapsed lungs was a deviation from standard medical practice cannot be upheld on the ground that the questions failed to ask whether the cause was a deviation from standard medical practice "in Durham, North Carolina or in similar communities in 1975 and 1976" where other questions asked the witness established his familiarity with the standards of practice of plastic surgeons in Durham or similar communities at the time of the acts giving rise to plaintiff's cause of action. G.S. 90-21.12.

4. **Evidence § 50; Physicians, Surgeons, and Allied Professions § 15.2— plastic surgeon—qualification to give expert testimony**

A plastic surgeon who testified that he was trained and experienced in the fields of general plastic surgery in hospitals and communities similar to Duke Medical Center and Durham in 1975 and 1976 was qualified to give expert testimony in a medical malpractice case although he had not completed his training as a plastic surgeon in 1975 and 1976, he had not practiced in this State since 1967, and he had been practicing in hospitals in communities smaller than Durham.

5. **Physicians, Surgeons, and Allied Professions § 11.1— consent to medical treatment—reasonable person test**

The "reasonable person" test of G.S. 90-21.13, which is utilized to show a valid consent to medical treatment, applied to litigation commenced after the

effective date of the statute, 1 July 1976; therefore, the trial court properly instructed the jury in a medical malpractice action that "plaintiff must prove by the greater weight of the evidence that a reasonably prudent person in the plaintiff's condition would reasonably have been expected to withhold her consent to the operation if she had been informed of the circumstances and risks of the procedure."

6. **Physicians, Surgeons, and Allied Professions § 15— withdrawal of consent to surgery—testimony by plaintiff**

The trial court in a medical malpractice action properly excluded testimony by plaintiff that she would not have proceeded with the surgery in question had she been fully informed of the possible complications since the probative value of the testimony was so weak that to receive it would have only confused the jury.

7. **Evidence §§ 34.4, 36; Physicians, Surgeons, and Allied Professions § 15— medical malpractice action—admission by partner of defendant**

In this medical malpractice action, the statement of a physician who treated plaintiff's collapsed lungs and who was a partner with an individual defendant in the defendant Private Diagnostic Clinic that "I'm not the one that punched those . . . holes in your wife's lungs" was competent as an admission against such defendants under an exception to the hearsay rule.

APPEAL by plaintiff from *Martin (John C.), Judge.* Judgment entered 14 October 1980 as to defendants Duke University and Carl Quillen; judgment entered 16 October 1980 as to defendants Nicholas Georgiade and Private Diagnostic Clinic in Superior Court, DURHAM County. Heard in the Court of Appeals 12 November 1981.

This is an action by a former patient against her doctors, seeking damages for negligence in the performance of a surgical procedure. At the conclusion of plaintiff's evidence, the trial judge granted the directed verdict motions of defendants Quillen and Duke University and entered a judgment for them thereon. The jury found that defendants Georgiade and Private Diagnostic Clinic were not negligent in the performance of the surgery.[1] Plaintiff appeals from these judgments.

Pulley, Wainio, Stephens & Lambe, by W. Paul Pulley, Jr., for plaintiff-appellant.

Newsom, Graham, Hedrick, Murray, Bryson & Kennon, by Lewis A. Cheek, for defendant-appellees.

1. Defendant Georgiade was a member of defendant Private Diagnostic Clinic.

HILL, Judge.

In 1972, plaintiff consulted her family doctor in Elizabeth City about discharges from her breasts. A biopsy by wedge resection was performed at that time, but plaintiff continued to have soreness and tenderness in her breasts along with a continued discharge. The family doctor referred plaintiff to Georgiade, a physician at Duke Medical Center.

On 16 April 1975, Georgiade examined plaintiff, diagnosed her condition as due to fibrocystic disease, and prescribed treatment by a surgical procedure known as a bilateral subcutaneous mastectomy. Georgiade explained to plaintiff that the procedure "was the only way [she] would ever get rid of [her] problem." Surgery was performed on 20 May 1975 at which time the diseased tissue was removed. A prosthesis was inserted to replace tissue removed from each breast.

Plaintiff left the hospital on 27 May 1975 and "was doing pretty good." She eventually returned to work as a hairdresser but found that she could no longer manage all of the physical requirements of dressing hair. Plaintiff's condition improved until December when she began "having a lot of pain again and the left prosthesis, or the left breast had gotten very hard."

Georgiade saw plaintiff again on 2 March 1976. He diagnosed plaintiff's malady as a capsular formation, or scar tissue buildup around the left prosthesis, which should be surgically released. The capsular release was scheduled for 17 March 1976, with plaintiff as an outpatient. Quillen assisted Georgiade in the procedure by anesthetizing plaintiff's breast area. Fourteen injections were made around the circumference of the breast, which was opened at the old incision. The prosthesis was removed, then the scar tissue, and the prosthesis was replaced. Plaintiff checked out of the hospital after the surgery and went with her husband to a local motel.

At about 8:00 p.m. the same evening, plaintiff awakened thinking her bandage "was cutting [her] breath off." Plaintiff's breathing difficulty grew progressively worse, and her husband carried her to the emergency room at Duke Medical Center. Plaintiff's lungs were X-rayed, and it was determined that greater than 50% of both her lungs had collapsed. Emergency room physi-

cians reinflated plaintiff's lungs without anesthesia because "[t]ime was a great element." Following the emergency room treatment, plaintiff "point-blank asked Dr. Quillen did he puncture my lungs with those needles when he gave me the needles the day of the surgery. He told me that they try to be very careful to avoid those things but sometimes they happen anyway." Plaintiff eventually was discharged from the hospital on 24 March 1976.

Plaintiff returned home to Elizabeth City but continued to have trouble with her breasts and her chest. A few months later the right prosthesis began exhibiting symptoms similar to that of the left breast prior to the capsular release. Plaintiff refused to see Georgiade again and sought treatment at Durham County General Hospital, where additional surgery on both breasts was performed.

I

Plaintiff's first argument assigns error in the trial judge's exclusion of her expert witness's opinion on the nature of the cause of the collapsed lungs. During the *voir dire* examination of Dr. Gerald Golden, tendered as plaintiff's expert witness, plaintiff asked two hypothetical questions. First, Golden was asked, based on certain assumed facts, "do you have an opinion within a reasonable medical certainty as to the cause of the bilateral pneumothoracies [collapsed lungs]?" Defendants' objection was sustained, but the record shows that the answer would have been, "It came from a needle puncture of the lung." Second, Golden was asked, based on certain assumed facts, "do you have an opinion as to whether the causing of the bilateral pneumothoracies was a deviation from standard practice?" Defendants' objection again was sustained, but the record shows that Golden's answer would have been, "It is a deviation from accepted standard of care."

Plaintiff offered further "qualifying questions" which the trial judge deemed to relate back to the first hypothetical question. The questions to Golden sought to elicit further evidence that plaintiff's lung collapse was not spontaneous. Under a continuing, sustained objection, Golden stated that "the likelihood of anybody having a spontaneous pneumothorax bilaterally is almost nil." Nevertheless, defendants' objection to the first hypothetical question again was sustained.

Later, before the jury, plaintiff asked Golden the following hypothetical question:

> Please assume that a 34 year old female suffering from fibrocystic disease of both breasts, assume that the patient on or about May 20, 1975 had a bilateral subcutaneous mastectomy with prosthesis being implanted and that subsequent to that bilateral subcutaneous mastectomy being performed that it was determined that capsular scarring had taken place and that replacing of the breast prosthesis should be performed, and that capsular release surgery was performed March 17, 1976. Doctor, I ask you to assume further that in the performance of this surgery, that is the replacement of the breast prostheses and the capsular release the anesthesia was injected as follows: assume that approximately 14 injections were made around the circumference of each breast injecting into the patient .5% Xylocaine, and assume further that after the surgery was performed the patient left the hospital and went to a local motel and then approximately 2 hours later the patient began to experience shortness of breath and chest pain, and assume further that the patient was immediately rushed to the emergency room of the hospital and that there it was discovered that she had bilateral pneumothoracies greater than 50% in each lung. *Making those assumptions, do you have an opinion as to whether the surgical procedure performed in 1976 could or might have caused the bilateral pneumothoracies?*

(Emphasis added.)

Defendants' objection to this question was overruled, and Golden was permitted to answer that his opinion was, "Yes." However, defendants' objection to the following question was sustained: "Doctor, I ask you in the causing of the bilateral pneumothoracies you've just testified about, if causing that there was a deviation from standard medical practice?" Golden's answer for the record was, "Yes, it was (WHISPERED)."

Plaintiff argues that the exclusion of the above answers and of Golden's *voir dire* testimony concerning the possibility of a spontaneous cause of plaintiff's collapsed lungs are the bases for his assignment of error. However, we note that although the answer to the first hypothetical question was excluded, the same

question was asked again, and the answer allowed, apparently upon plaintiff's rephrasing in the emphasized portion of the question quoted *supra*. We fail to see how plaintiff was prejudiced by the trial judge's first ruling under these circumstances.

Defendants cross-assign error to the trial judge's ruling, which allowed Golden to answer the hypothetical question quoted *supra*, on the ground "that without the crucial fact of entry into the lung by a needle, there was an insufficient predicate so as to allow the basing of an opinion thereon." We therefore must discuss the propriety of the judge's ruling on the hypothetical question quoted *supra* from defendants' perspective. In addition, we will discuss plaintiff's exceptions to the judge's rulings on the hypothetical questions concerning whether the cause of plaintiff's collapsed lungs was a deviation from standard medical practice.

HYPOTHETICAL QUESTIONS AS TO THE CAUSE OF PLAINTIFF'S COLLAPSED LUNGS

[1] Defendants argue that the hypothetical question quoted *supra* provides no basis, except for speculation and conjecture, from which a negligent act can be shown.

> When an expert witness testifies as to the facts based upon his personal knowledge, he may testify directly as to his opinion, . . . and when the facts are not within the knowledge of the witness himself, the opinion of an expert must be based upon facts supported by evidence stated in a proper hypothetical question, ... If the expert witness has personal knowledge of some of the facts but not all, a combination of these two methods may be employed.
>
> . . . .
>
> *In asking a hypothetical question, it is customary to incorporate in the question the relevant facts in evidence which counsel hopes will be accepted as true by the jury and to ask the witness his opinion based on such facts, if the jury shall believe them to be facts.*
>
> *. . . In framing such a question, only such facts as are in evidence or such as the jury will be justified in inferring from the evidence should be included.*

Taylor v. Boger, 289 N.C. 560, 564-65, 223 S.E. 2d 350, 353 (1976) (emphasis added). *See also Todd v. Watts*, 269 N.C. 417, 152 S.E. 2d 448 (1967). In light of these general principles, the question is whether an expert witness may make additional inferences from the facts assumed in a hypothetical question to form the basis of his opinion.

The function of an expert witness is to utilize his superior skill in a particular field to form an opinion which will be helpful to the jury. Such an opinion is admissible "where the witness is better qualified than the jury to draw appropriate inferences from the facts." 1 Stansbury's N.C. Evidence (Brandis rev. 1973) § 132, p. 425. "An inference is nothing more than a permissible deduction from the evidence . . .." *Cogdell v. Wilmington & Weldon Railroad Co.*, 132 N.C. 852, 854, 44 S.E. 618, 619 (1903). Thus, a medical expert must use his "education and training . . . to deal with and express [his] opinion as to what ills and the causes that constantly threaten and affect humanity." *Shaw v. National Handle Co.*, 188 N.C. 222, 232, 124 S.E. 325, 330 (1924).

In *Shaw*, a medical expert opined that decedent's cause of death was due to "gas poisoning, monoxide poisoning" based merely upon a hypothesis of the surrounding external conditions as he observed them. *Id.* at 231, 124 S.E. at 330. Even though no autopsy was performed, and thereby no direct evidence of the cause of death received, our Supreme Court found that the expert's opinion was competent since it came "from one who has had personal observation of the facts, and from practical training and experience is qualified to give an opinion which is likely to aid the jury to a correct conclusion . . .." *Id.* at 232, 124 S.E. at 330, *quoting Davenport v. Railroad Cos.*, 148 N.C. 287, 294-95, 62 S.E. 431, 433 (1908).

Similarly, in *Hargett v. Jefferson Standard Life Insurance Co.*, 258 N.C. 10, 128 S.E. 2d 26 (1962), admitted evidence showed that plaintiff's decedent had a discoloration at the end of a finger with a pierce in the middle. Decedent was in intense pain and died minutes after losing consciousness. A medical expert who had not personally attended decedent, but who had great experience in dealing with the effects of insect bites on humans, testified to decedent's cause of death. The expert opined, based merely upon the "external evidence," that "death resulted from

an insect sting." *Id.* at 12, 16, 128 S.E. 2d at 28, 31. The Supreme Court sustained the expert's answer, stating that the above facts were "sufficient predicate for the conclusion reached by the witness." *Id.* at 16, 128 S.E. 2d at 31.

Shaw and *Hargett* support the proposition that an expert witness may employ inferences from facts assumed in a hypothetical question to form an opinion. Defendants, however, have sought to distinguish these cases from the case *sub judice* on the ground that Golden had no personal observation of plaintiff's condition. It is not necessary that an expert's opinion be based "*solely* from matters personally observed. . . . [A]n expert witness has wide latitude in gathering information and may base his opinion on evidence not otherwise admissible." *State v. DeGregory*, 285 N.C. 122, 132, 203 S.E. 2d 794, 801 (1974) (emphasis original). Although Golden did not personally examine plaintiff, he testified as follows: "I have reviewed the Duke University Medical Center medical records of Judy Simons for 1975 and 1976. I have also reviewed the Plaintiff's Exhibit 9, the Durham County General Hospital record and I have also reviewed Plaintiff's Exhibits 10, 11 and 12 from the Albemarle record." We find that the expert's knowledge gained by a review of plaintiff's medical records is a sufficient basis on which to form an opinion. *See Potts v. Howser*, 274 N.C. 49, 161 S.E. 2d 737 (1968).

Even so, the analysis of the Third Circuit in *Friedman v. General Motors Corp.*, 411 F. 2d 533 (3d Cir. 1969), is particularly determinative of defendants' argument. In *Friedman*, plaintiff's thumb was injured and had to be amputated because of alleged defects in the design and construction of her washing machine. Defendant corporation's medical expert gave opinion evidence as to how plaintiff Friedman could have been injured. He testified, in response to a question asking for an opinion as to the cause of the accident, "[I]f Mrs. Friedman had opened the lid to the washing machine during the middle of the spin cycle and then reached in and put her hand on the lid safety switch, this would have started to spin again." *Id.* at 535. Plaintiffs there argued, as do defendants here, that the opinion was mere "conjecture" and not based on any evidence. The Third Circuit reasoned as follows:

> While there was no *direct* evidence that Mrs. Friedman had put her hand on the lid safety switch, *the evidence shows that she could have done so however inadvertently.* We can-

> not say that [the witness's] statement was mere conjecture . . . for it is the opinion of an expert based on material facts which are part of the record.

Id. at 535-36, n. 3 (emphasis added). In the case *sub judice* there was evidence that approximately fourteen injections were made around plaintiff's breast in preparation for the capsular release procedure. Approximately three hours after she awakened from surgery, plaintiff began exhibiting the first symptoms of her collapsed lungs. Upon these facts assumed from the evidence, Golden concluded that the surgical procedure caused the collapsed lungs. Since that opinion clearly is based upon material facts in the record, it is not fatal to the hypothesis that Golden must have inferred, or deduced, entry of the needle into plaintiff's lungs to effect the collapse. *See generally Lee v. Capital Tire Co.*, 40 N.C. App. 150, 252 S.E. 2d 252, *disc. rev. denied*, 297 N.C. 454, 256 S.E. 2d 807 (1979).

Thus, the rule is that "[d]irect testimony supporting the fact assumed is not required. It is sufficient if it is fairly inferable from circumstances proved." E. Cleary, *McCormick's Handbook of the Law of Evidence* (2d ed. 1972) § 14, p. 33. Defendants' cross-assignment of error is overruled.[2]

QUESTIONS AS TO THE DEVIATION FROM STANDARD MEDICAL PRACTICE

Plaintiff contends that the trial judge's exclusion of Golden's answers to the questions of whether the cause of plaintiff's collapsed lungs was a deviation from standard medical practice was "based upon the court's decision to exclude Dr. Golden's testimony concerning causation, or its rationale." If plaintiff's evaluation of the trial judge's rulings is correct, our analysis of the previous issue would sustain her exceptions. However, we find a more plausible basis for the rulings in plaintiff's phrasing of the questions, quoted in pertinent part *supra*, the essence of which is, "do you have an opinion as to whether the causing of the bilateral pneumothoracies was a deviation from standard practice." Plaintiff made two possible omissions in the phrasing of

2. We note that effective 1 October 1981 G.S. 8-58.12 eliminates the requirement "that expert testimony be in response to a hypothetical question." *See* 1981 N.C. Sess. Laws, c. 543, § 4. This issue will not arise in the new trial.

these questions: first, plaintiff did not employ the "could or might" language in her questions; second, plaintiff did not ask her expert witness whether the causing of her collapsed lungs was a deviation from standard medical practice *in Durham, North Carolina or in similar communities in 1975 and 1976.* If these omissions were the bases for the sustained objections, we must reverse the trial judge's rulings for the following reasons.

A

[2] In plaintiff's first question, couched hypothetically, her failure to employ the "could or might" language is not fatal to the admission of Golden's answer. "[I]f the expert has a *positive* opinion on the subject, he should be allowed to express it without using the 'could' or 'might' formula." *Taylor v. Boger, supra* at 565, 223 S.E. 2d at 353 (emphasis original). Since the question relates to the cause and effect of plaintiff's injury, adoption of the "could or might" language would force Golden into a more speculative answer when the nature of the question required, and the witness would have, a more positive opinion. *See Mann v. Virginia Dare Transportation Co.* and *Tillett v. Virginia Dare Transportation Co.*, 283 N.C. 734, 198 S.E. 2d 558 (1973). This would be "patently unjust." 1 Stansbury's N.C. Evidence (Brandis rev. 1973) § 137, p. 455, n. 97. The same reasoning must apply to plaintiff's second question, although it was not couched in hypothetical form.[3]

B

[3] The phrasing of both of plaintiff's questions arguably did not establish adequately the standard of care upon which Golden would have been permitted to testify to defendants' deviation therefrom. Thus, the question is whether plaintiff had to ask her expert whether the causing of her collapsed lungs was a deviation from standard medical practice *in Durham, North Carolina or in similar communities in 1975 and 1976.* Under the circumstances of the case *sub judice,* we find that the standard of care was adequately established.

3. That plaintiff's second question was not couched in hypothetical form is not fatal to the admission of the expert's answer because of our previous determination that Golden had sufficient personal knowledge on which to base his opinion.

G.S. 90-21.12 codified the standard of health care necessary for the trier of the facts to establish a defendant's liability. The statute states, in pertinent part, that

> 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.

G.S. 90-21.12. This standard of care is the same as that developed by our case law. *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). We find the following testimony of Golden in the record:

> Q. Doctor, are you familiar with the amount of skill and knowledge of the average plastic surgeon in the Town of Durham, North Carolina or in similar communities in 1975 and 1976?
>
> . . . .
>
> A. Yes, sir.
>
> Q. Are you familiar with the amount of care ordinarily exercised by the average plastic surgeon in the Town of Durham or other similar communities in 1975 and 1976?
>
> . . . .
>
> A. Yes, sir.
>
> Q. Doctor, how did you acquire that familiarity?
>
> . . . .
>
> A. Well, I did my education at two medical centers located in communities of roughly the same size, Winston-Salem for four years, and I spent seven years in Charlottesville at the University of Virginia, and in addition, my practice — we're only an hour from Washington and we have a large metropolitan population within Martinsburg.

Q. Are the standards of board certified surgeons the same throughout the country?

. . . .

A. Yes, sir.

Golden also testified that he is a plastic surgeon. This testimony is sufficient under G.S. 90-21.12 to establish the standard of health care upon which plaintiff's expert could testify to defendants' deviation therefrom. It is of no material consequence that plaintiff's questions did not include the additional language indicated.

We therefore conclude that if these omissions from plaintiff's questions were the bases for defendants' sustained objections, they are not supportive of the trial judge's rulings. Careful examination of the questions reveals error in excluding Golden's answers.

II

[4] Defendants cross-assign error to the trial judge's ruling which allowed Golden to testify as plaintiff's expert witness on the ground that he was not sufficiently familiar with the standard of medical practice in Durham, North Carolina, or in similar communities in 1975 and 1976. Defendants contend, *inter alia*, that because Golden had not completed his training as a plastic surgeon in 1975 and 1976, nor had he practiced in this State since 1967, and because he had been practicing in hospitals in communities smaller than that of Durham, he could not be familiar with the appropriate standard of care.

G.S. 90-21.12 mandates the establishment of a standard of health care by "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." Golden's testimony, quoted in part *supra*, shows that he was trained and experienced in the fields of general and plastic surgery in hospitals and communities similar to Duke Medical Center and Durham in 1975 and 1976. This is sufficient to qualify Golden as an expert witness. *See Lowery v. Newton*, 53 N.C. App. 234, 278 S.E. 2d 566 (1981); *Whitehurst v. Boehm*, 41 N.C. App. 670, 255 S.E. 2d 761 (1979). It would be unduly restrictive under G.S. 90-21.12 to require an expert to have knowledge of the standard of care in a similar community at the time of the

alleged act only by having practiced in the particular field *at that time. Cf. Dickens v. Everhart,* 284 N.C. 95, 199 S.E. 2d 440 (1973). This cross-assignment of error is overruled.

III

Plaintiff's second and third arguments assign error to the trial judge's ruling excluding her testimony that she would not have proceeded with the 1975 surgery had she been fully informed of the possible complications, and the trial judge's instruction that "[t]he plaintiff must prove by the greater weight of the evidence that a *reasonably prudent person* in the plaintiff's condition would reasonably have been expected to withhold her consent to the operation if she had been informed of the circumstances and risks of the procedure . . .." (Emphasis added.)

A

[5] Generally, plaintiff contends that the proper standard of proof to apply in this case is the " 'true test of causation' which focused on the motives of the particular patient/plaintiff," because G.S. 90-21.13 does not apply to actions arising prior to its effective date. We do not agree. G.S. 90-21.13, govening informed consent to health care treatment or procedure, utilizes a "reasonable person" test to show a valid consent. The statute became effective on 1 July 1976 and expressly did not apply to cases *pending* on that date. *See Thompson v. Lockert, supra; see also* 1975 N.C. Sess. Laws (2d Sess. 1976) c. 977, §§ 8, 10. We agree with defendants' statement that "[t]here is no provision in the statute . . . regarding the applicability of the act to causes of action which allegedly arose before the effective date of the statute but in which no litigation was pending on the effective date." G.S. 90-21.13 therefore must apply to the present litigation since it commenced after the effective date, 1 July 1976. The trial judge's instruction was not in error.

B

[6] In sustaining defendants' objections to plaintiff's question as to whether she would have proceeded with the surgery had she known the possible complications, the trial judge relied upon *Watson v. Clutts,* 262 N.C. 153, 136 S.E. 2d 617 (1964). Plaintiff contends that the exclusion of her answer is prejudicial error because it removes from the jury's consideration "the testimony

of the only person in the courtroom who has actually experienced a situation substantially like the hypothetical one which they must consider . . .." However, we find *Watson* to be controlling in this instance.

Plaintiff Watson attempted to testify that if her doctor had advised her that the operation might paralyze her vocal cords she would have withdrawn her consent. The exclusion of that plaintiff's testimony was sustained because she could not "change the decision" after the operation. *Id.* at 161, 136 S.E. 2d at 622. The same rationale applies in the case *sub judice.* In essence, the probative value of plaintiff's testimony is so weak that to receive it would only confuse the jury. *See* 1 Stansbury's N.C. Evidence (Brandis rev. 1973) § 77, pp. 234-36. The trial judge's ruling is sustained.

IV

[7] Plaintiff's Assignment of Error No. 2 is grounded upon the trial judge's refusal to admit into evidence the substance of a conversation she heard between her husband and Dr. Walter Wolfe, a thoracic surgeon treating plaintiff's collapsed lungs. When plaintiff proposed to testify to the substance of the conversation, a *voir dire* examination of plaintiff was conducted. She testified that Wolfe is a member of Private Diagnostic Clinic and that she was charged for the services of Wolfe by Private Diagnostic Clinic. This testimony and the following answer were not admitted before the jury:

> A. Dr. Wolfe came upon request and when he came in Howard asked him was there any goddamn body in that hospital that knew how to do anything right. And Dr. Wolfe gave it back to him just as good as he did. Dr. Wolfe told him, he said: I'm not the one that punched those goddamn holes in your wife's lungs. If you want to get upset with anybody go find him. He said: all I've done is try to save your wife's life.

Plaintiff's husband's testimony concerning this conversation with Wolfe also was excluded. Plaintiff argues that these rulings were in error because Wolfe, a partner in Private Diagnostic Clinic and thereby a partner of defendant Georgiade, could make admissions admissible against the named defendants in exception to the hearsay rule. We agree.

> The extrajudicial declarations of an alleged partner cannot be used (except as against himself) to prove the existence of the partnership [footnote omitted] or that the declarant was engaged in the firm's business at the time. [footnote omitted] *But if these facts are independently established,* his declarations within the scope of his authority as a partner are admissible against other members of the partnership as well as against himself, in an action between the partnership and an outsider. [footnote omitted]

2 Stansbury's N.C. Evidence (Brandis rev. 1973) § 170, pp. 20-21 (emphasis added). Thus, the question is whether the partnership of Wolfe in Private Diagnostic Clinic was sufficiently proven by plaintiff's voir dire testimony to require the admission of his statements.

In *Tapp v. Dibrell,* 134 N.C. 546, 548, 47 S.E. 51, 51 (1904), plaintiff Tapp testified that defendants Carrington and Dibrell were partners, "that he talked with Carrington in August, 1902, and said that he wanted to settle the claim but he would be liable on garnishment." Defendants objected to the admission of this testimony, but the Supreme Court affirmed. "[The testimony] was certainly admissible against him, and if there was a partnership, against his co-partner. It was not offered to prove a partnership. The witness had testified to the partnership. While this was not conclusive it was a sufficient basis to admit the declaration of Carrington." *Id.* Plaintiff's testimony in the case *sub judice* likewise was a sufficient, albeit inconclusive, basis to admit Wolfe's statements pursuant to the hearsay rule exception quoted *supra.* The trial judge's rulings therefore were improper.

V

Defendants Quillen and Duke University were granted a directed verdict at the conclusion of plaintiff's evidence. The question raised by a directed verdict motion is whether the evidence is sufficient to go to the jury. *Rappaport v. Days Inn of America, Inc.,* 296 N.C. 382, 250 S.E. 2d 245 (1979); *Kelly v. International Harvester Co.,* 278 N.C. 153, 179 S.E. 2d 396 (1971).

> In passing upon such motion at close of plaintiff's evidence in a jury case, as here, the evidence must be taken as true, considered in the light most favorable to plaintiffs, and may be

granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiffs.

Huff v. Thornton, 287 N.C. 1, 10, 213 S.E. 2d 198, 205 (1975), *quoting Dickinson v. Pake*, 284 N.C. 576, 583, 201 S.E. 2d 897, 902 (1974). *Accord, Younts v. State Farm Mutual Automobile Insurance Co.*, 281 N.C. 582, 189 S.E. 2d 137 (1972).

In light of our rulings upon the critical evidentiary issues discussed at length *supra*, we find that the evidence improperly excluded would have been sufficient to withstand the directed verdict motions of defendants Quillen and Duke University. For this reason, the granting of those motions was reversible error.

VI

We have carefully examined plaintiff's remaining assignments of error and defendants' remaining cross-assignments of error and find them to be without merit, not warranting further discussion in this opinion.

For errors found in the trial below, we make the following disposition:

Reverse as to defendants Quillen and Duke University.

New trial as to defendants Georgiade and Private Diagnostic Clinic.

Judges VAUGHN and WHICHARD concur.

JOE M. SNIPES v. IDA M. SNIPES (WIDOW); VERNON P. DAVIS AND WIFE, BARBARA S. DAVIS

No. 8115SC324

(Filed 2 February 1982)

1. Rules of Civil Procedure § 50.5— failure to object to noncompliance with Rule 50

Defendants waived their ability to object on appeal to plaintiff's failure to comply with Rule 50(a), not stating the specific grounds for his directed verdict motion, when they failed to object at trial.

2. **Landlord and Tenant § 13.2; Vendor and Purchaser § 1— right of first refusal in lease—not unreasonable restraint on alienation**

The right of first refusal of purchase provision in a lease was not an unreasonable restraint on alienation as (1) the duration of the right fell within the perpetuities period and (2) the price provisions in the lease were reasonable.

3. **Landlord and Tenant § 18— failure to make rental payments—lease still in effect**

Plaintiff's failure to make rental payments did not result in the lease between the parties becoming ineffective as, under N.C.G.S. 42-3, forfeiture for failure to pay rent is not effective until the expiration of ten days after a demand is made on the lessee for all past due rent, and a statement by defendant that she "wanted to get all this business settled" was not clear and unequivocal enough to constitute a demand.

Judge HEDRICK dissenting.

APPEAL by defendants from *Bailey, Judge*. Judgment filed 9 December 1980 in Superior Court, CHATHAM County. Heard in the Court of Appeals 10 November 1981.

This action arises out of a lease agreement between Joe M. Snipes and wife and defendant Ida M. Snipes and her deceased husband. The agreement provided that Grady and Ida Snipes would lease a certain parcel of real estate to the plaintiff and his wife for a period of five years, beginning 1 October 1974, with an option to renew the lease for two additional five-year periods. The lease also provided that the plaintiff was to have "an absolute right of first refusal in any contract to sell any of the interest" that Grady and Ida Snipes had in the real estate which was the subject of the lease agreement. The lease further stated that "[t]he intention of this provision is to allow Joe M. Snipes to have the opportunity to keep the real estate which is the subject of this Lease in the Snipes family." The lease contains no forfeiture clause for nonpayment of rent.

On 19 April 1977, Ida M. Snipes executed two deeds to Vernon P. Davis and wife, wherein she conveyed all of her interest in the leased property which she had acquired from her deceased husband. Plaintiff was not notified of the sale and was therefore not given the opportunity to purchase the land as provided in the right of first refusal clause of the lease.

Plaintiff brought this action in an effort to have the deeds declared void and to obtain an order of specific performance re-

quiring that the defendant widow convey the property to him. Defendants counterclaimed, alleging breach of the lease agreement for failure to pay rent and asking that the lease be declared terminated.

At trial plaintiff testified that on 4 October 1975 he met with Ida Snipes and at that time she agreed to forego weekly rental payments until some arrangement could be made between them concerning payment of taxes on the leased land. Plaintiff had some outstanding debts at the time and had apparently paid more than his share of the taxes for the previous year. Eventually plaintiff did pay the 1975 property taxes.

There were no further discussions between the parties until October or November of 1976 when Ida Snipes approached plaintiff concerning payment for a truck she had sold to him. During the course of the conversation she expressed the desire that they "should settle the affair" with respect to the lease, including the possibility that plaintiff either exercise his option to buy or that they reach an agreement to sell the property to a third party. Mrs. Snipes made no demand for rent at this time, but only stated that she would "see her lawyer and get back in touch" with plaintiff. Her attorney then contacted the plaintiff. Mrs. Snipes was not present at the meeting. Plaintiff expressed his willingness to "settle the affair" and the attorney stated that he would talk with his client and get back in touch. No demand was made for rent. Six months later Mrs. Snipes informed plaintiff that the property had been sold to the Davises.

Mrs. Snipes admitted that she had signed the lease. Her recollection of the November 1975 conversation with the plaintiff was as follows:

> The next discussion I had with Joe Snipes concerning the rent that was provided in the lease was in October or November of 1975, he came and told me that he was unable to make the rent payments; and he talked about the land tax having to be paid. I offered to borrow the money to pay my part of the tax; and he said he was not clear as to how much my part was. So we decided to let this go for a little while and get everything straight and then pick it up again. I believe that he stated that he had paid the land tax for the previous year.

She also testified that she met with plaintiff in October or November of 1976 and that during that conversation she stated that she "wanted to get all this business settled." However, she did not make a demand for rent at this time or at any subsequent time before selling the land.

Plaintiff moved for a directed verdict at the close of all the evidence and this motion was granted. The trial court denied defendants' motions for directed verdicts on their counterclaims.

Barber, Holmes & McLaurin, by Edward S. Holmes, and B. C. Smith for plaintiff appellee.

Gunn & Messick, by Paul S. Messick, Jr., for defendant appellants.

MARTIN (Harry C.), Judge.

[1] Defendants first contend that it was error for the trial court to grant plaintiff's motion for directed verdict where plaintiff failed to state the specific grounds for his motion as required by Rule 50(a) of the North Carolina Rules of Civil Procedure. Not only does the record disclose plaintiff's failure to comply with Rule 50(a), but it also discloses that defendants failed to object at trial to the Rule 50(a) violation. "[W]hen a motion for a directed verdict is granted, the adverse party who did not make a specific objection at trial to the movant's failure to state specific grounds therefor is precluded from raising the objection on appeal." *Byerly v. Byerly*, 38 N.C. App. 551, 553, 248 S.E. 2d 433, 435 (1978).

Defendants further contend that the trial court erred in granting a motion for a directed verdict in favor of the party having the burden of proof "upon a controverted issue involving the credibility of witnesses."

It is now established law in North Carolina that any party may move for a directed verdict at the close of all the evidence. *Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979). Where the moving party has the burden of proof, our courts generally will not direct a verdict if credibility remains an issue unless "the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn." *Id.* at 536, 256 S.E. 2d at 395. The Court in *Burnette* set out three situations in which

the credibility of the movant's evidence is manifest as a matter of law:

> (1) Where non-movant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests. . . .
>
> (2) Where the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents. . . .
>
> (3) Where there are only latent doubts as to the credibility of oral testimony and the opposing party has "failed to point to specific areas of impeachment and contradictions."

297 N.C. at 537-38, 256 S.E. 2d at 396 (citations omitted).

Plaintiff contends that his right to recover does not depend upon the credibility of his testimony, but is established by the documents in evidence and the admissions of the defendants, as follows:

> (1) A valid written lease was executed between the parties. The lease is recorded in the Office of the Register of Deeds of Chatham County and was admitted and stipulated by both parties.
>
> (2) This lease includes a provision which, in unequivocal terms, entitles plaintiff to a right of first refusal if Ida Snipes decided to sell the subject property.
>
> (3) Mrs. Snipes sold the property without first notifying the plaintiff of her intention or offering plaintiff the opportunity to purchase. The deeds conveying the property to Vernon P. Davis and wife, Barbara S. Davis, were duly executed and recorded and were introduced into evidence at trial.
>
> (4) The lease was in effect at the time of the sale.

[2] Defendants would first urge us to hold that the right of first refusal language contained in the lease was unenforceable as an unreasonable restraint upon alienation. Our Supreme Court in *Smith v. Mitchell*, 301 N.C. 58, 269 S.E. 2d 608 (1980), addressed this precise question. The Court considered two factors in determining the reasonableness or unreasonableness of a preemptive

right or a right of first refusal. The first factor is the duration of the right, which should be limited to a period within the rule against perpetuities. As the total period of the Snipes lease would not exceed fifteen years, including the two five-year renewal periods, the duration of the right falls well within the perpetuities limit. Second, the court considered the provisions in the lease for determining the price of exercising the right and held "that a reasonable price provision in a preemptive right is one which somehow links the price to the fair market value of the land, or to the price the seller is willing to accept from third parties." *Id.* at 66, 269 S.E. 2d at 613. Defendants contend that the language in the lease that "Joe M. Snipes shall have an absolute right of first refusal in any contract to sell" the leased property fails as a reasonable price provision. We disagree. The language contemplates that Ida Snipes "contract" or agree on a price with a buyer. It presumes that the price will be one that she would be willing to accept from a third party.

Whether the lease contained a valid preemptive right is a question of law and not of fact. On this issue Judge Bailey was correct in granting plaintiff's motion for a directed verdict. *See Thornton v. Thornton*, 45 N.C. App. 25, 262 S.E. 2d 326 (1980).

[3] Defendants next argue that the lease was not in effect at the time of the sale because of plaintiff's breach in failing to make the rental payments. For the reasons set out below, we find it unnecessary to discuss the various contentions of the parties respecting the oral agreements made between them. We note that neither party raised a Statute of Frauds defense in the pleadings, nor was this interesting question discussed in the briefs.

Plaintiff testified that he failed to make rental payments beginning 4 October 1975. Subsequent to this date no demand was made on him either to pay past due rent or to resume rental payments. As the lease contains no forfeiture clause for failure to pay rent, we must look to N.C.G.S. 42-3 and the rule in *Reynolds v. Earley*, 241 N.C. 521, 85 S.E. 2d 904 (1955). That is, a forfeiture under N.C.G.S. 42-3 for failure to pay rent is not effective until the expiration of ten days after a demand is made on the lessee for all past due rent.

We reject defendants' contention that plaintiff's failure to take the initiative and "settle the affair" or tender rent subse-

quent to 4 October 1975 constituted positive and unequivocal acts and conduct such as to infer an abandonment or rescission of the lease and to make demand unnecessary. The language of the statute is clear. Demand is a necessary prerequisite to forfeiture for nonpayment of rent.

Nor can we agree that Ida Snipes's conversation with plaintiff in October or November of 1976 constituted a "demand." At that time she merely informed plaintiff that she "wanted to get all this business settled." We hold that to constitute a "demand" under N.C.G.S. 42-3, a clear, unequivocal statement, either oral or written, requiring the lessee to pay all past due rent, is necessary. *See* 26A C.J.S. Demand 169 (1956). A demand is a peremptory claim to a thing as a matter of right. Black's Law Dictionary 516 (4th ed. rev. 1968). The demand must be made with sufficient authority to place the lessee on notice that the lessor intends to exercise his or her statutory right to forfeiture for nonpayment of rent. Thus we find no error in the trial court's granting a directed verdict in favor of plaintiff based upon the existence of a valid lease in force at the time of the sale. Conversely, the trial court was correct in denying defendants' motions for directed verdicts on their counterclaims. We agree with plaintiff that his case is fully established by the documents in evidence and the admissions of the defendants.

Defendants correctly point out that the trial judge included findings of fact and conclusions of law in the judgment. In *Kelly v. Harvester Co.*, 278 N.C. 153, 159, 179 S.E. 2d 396, 399 (1971), the Court held that in resolving the questions presented by a motion for a directed verdict, findings of fact and conclusions of law "were not required or appropriate and *have no legal significance.*" (Emphasis ours.) Judge Bailey's effort to clarify the issues in his judgment does not constitute reversible error and will be treated as mere surplusage.

Finally, defendants assign as error the exclusion of testimony which they sought to elicit from plaintiff's attorney. The defendants have failed to include in the record what the purport of this testimony would have been. The exclusion of testimony, if error, cannot be held to be prejudicial where the record does not show answers that the witness would have given. *Service Co. v. Sales Co.*, 259 N.C. 400, 131 S.E. 2d 9 (1963); *Hurst v. West*, 49 N.C.

App. 595, 272 S.E. 2d 378 (1980). Motion for directed verdict in favor of the plaintiff was properly granted.

Affirmed.

Judge CLARK concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

The majority points out that "[d]emand is a necessary prerequisite to *forfeiture* for nonpayment of rent." [Emphasis added.] Indeed, *Reynolds v. Earley*, 241 N.C. 521, 85 S.E. 2d 904 (1955) does require that demand be made before there can be "[a] *forfeiture under G.S. 42-3* for failure to pay rent." *Id.* at 525, 85 S.E. 2d at 907. [Emphasis added.] The evidence in the present case, however, is sufficient to bring into play a contract-vitiating legal doctrine other than "forfeiture under G.S. 42-3." That doctrine is known as rescission by mutual agreement. *See Brannock v. Fletcher*, 271 N.C. 65, 155 S.E. 2d 532 (1967). There is a distinction between rescission and forfeiture. *Brannock v. Fletcher, supra.* An implied agreement to rescind may consist in an abandonment or repudiation of the contract by one of the parties assented or acquiesced in by the other party; but to constitute rescission by mutual consent, both these elements, the abandonment or repudiation and the assent or acquiescence, must be present. *Brannock v. Fletcher, supra.* Further, abandonment may be inferred only from acts and conduct which are clearly inconsistent with the contract. *Brannock v. Fletcher, supra.*

In the present case, there is evidence that plaintiff had not paid rent owing under the lease agreement and that he told defendant that the lease agreement was made for her husband and not for defendant. Such nonpayment of rent would constitute a repudiation and an abandonment by plaintiff of his obligations under the contract. Further, there was evidence that the defendant landlord acquiesced to plaintiff's nonpayment of rent and that defendant believed that plaintiff "just felt like [he] didn't have to pay [rent]." There is, therefore, evidence of each element of mutual rescission, and such evidence would be sufficient to support a verdict that the lease agreement containing the right of

first refusal no longer existed. A directed verdict for the party with the burden of proof is proper only when his evidence so clearly establishes the fact in issue that no reasonable inference to the contrary can be drawn. *North Carolina National Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979). The continued existence of the lease agreement is the fact in issue in the present case, and defendant's evidence of mutual rescission was sufficient to permit a reasonable inference of the contract's nonexistence. In my opinion, when all of the evidence is considered together with all of the circumstances surrounding the lease between members of the same family and the death of one of the lessors and the conduct of the lessee and the surviving lessor, there was sufficient evidence to raise an inference that there was a rescission of the lease; and, in my opinion, a directed verdict for the plaintiff was improper.

I vote to reverse.

ALICE JEAN HENDERSON v. GARY M. HENDERSON

No. 815DC495

(Filed 2 February 1982)

1. **Divorce and Alimony § 21.6; Husband and Wife § 13— consent judgment adopted by court—provision for no modification—enforcement by civil contempt**

A consent judgment in a domestic relations case which has been adopted by the court but which contains unequivocal language to the effect that its property settlement and alimony provisions are not subject to modification may still be enforced by civil contempt.

2. **Contempt of Court § 6.3; Divorce and Alimony § 21.5— contempt for failure to pay alimony—insufficient findings as to ability to pay**

The trial court's finding that defendant is an able-bodied man under no legal, mental or physical disabilities is insufficient to support the court's order that defendant be imprisoned for contempt until he pays an alimony arrearage since such finding is insufficient to support determinations that defendant had the ability during the period of default to comply with the court's alimony order and that he has the present ability to pay the arrearage either by making immediate payment or by taking reasonable measures to obtain that amount.

Henderson v. Henderson

APPEAL by defendant from *Lambeth, Judge.* Order entered 15 December 1980 in District Court, NEW HANOVER County. Heard in the Court of Appeals 8 January 1982.

On 13 March 1980 plaintiff and defendant attempted to resolve their differences with respect to their marital separation by consenting to a judgment of the court. Based on findings of fact and conclusions of law included in the judgment, the court provided that:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

. . . .

. . . That Defendant pay into the office of the Clerk of Superior Court of New Hanover County the sum of FIVE HUNDRED AND NO/100 ($500.00) DOLLARS per month as periodic alimony payments for the support and maintenance of Plaintiff commencing on March 22, 1980 . . ..

Plaintiff was awarded custody of the minor child, with defendant being given visitation rights as provided by the agreement. In addition, the judgment included the following provisions:

That this Judgment is an integrated agreement of the parties, that each provision contained herein is intended to be in consideration for each of the other provisions, and that none of the terms and provisions set forth herein shall be modified in the future unless both of the parties consent to such modifications except for the matter of the custody and support of the minor child born of the marriage of Plaintiff and Defendant which said matter of custody and support will remain open for review and modification by this court until the majority of said child.

On 17 July 1980, the defendant filed a motion in the cause, alleging *inter alia*:

That Plaintiff has failed and refused to abide by the terms of the Order of this court dated March 13, 1980 by denying Defendant his visitation privileges set forth therein and by attempting to poison the mind of said child against his father and his father's family and to totally destroy the affection of said child for his father and his father's family as well as by maintaining an environment which Plaintiff [*sic*] is informed

and believes and therefore alleges is detrimental to the mental health, and general well-being of said child.

Defendant asked that plaintiff be held in contempt for willful failure to abide by the terms of the judgment and further requested that he be awarded custody of the minor son.

In her answer, plaintiff admitted that the defendant had not visited their son as provided for in the judgment, offering as an excuse the child's unwillingness to do so and her unwillingness to force the child against his wishes.

On 18 September 1980, plaintiff filed a motion alleging that the defendant had ceased paying periodic alimony and requesting that he be adjudged in willful contempt for his failure to abide by the terms of the judgment.

After hearing evidence from the parties, the court found as a fact that:

(1) "Both parties have exhibited vindictiveness, hatred and disrespect for the other" in and out of the presence of the child and "have created an environment which is detrimental to the physical and mental health, welfare and general well-being of the minor child. Neither Plaintiff nor Defendant has encouraged the minor child to honor, respect or love the other parent."

(2) The plaintiff had admitted denying defendant visitation privileges at various times, including the child's birthday and one two-weeks' summer visitation.

(3) Defendant had ceased making periodic alimony payments in June 1980 in willful violation of the consent judgment.

(4) "The court in adopting this Judgment containing [the language that the judgment is unmodifiable in the future except for the matter of custody and support] did not intend nor did it waive any right of the court to enforce a willful violation of any term of this Judgment by civil contempt."

(5) "[E]ven if those portions of the March 13, 1980, Judgment dealing with the property settlement and alimony provisions amount to nothing more than a contract, then the violation by Plaintiff of the visitation provisions of this Judgment (though willful) was provoked by the conduct of the Defendant. This court

further finds that both parties have breached provisions of the Judgment and that each breach has been provoked by the conduct of the other party and that neither party has clean hands or is without fault. The court further finds as a fact that both Plaintiff and Defendant are entitled to specific performance of the Judgment."

The court concluded as a matter of law that it had "the power to enforce orders and judgments (even consent judgments) dealing with child custody, support and alimony for willful violations by the use of civil contempt"; "[t]hat the court has the power to enforce in equity specific performance of consent judgments"; and "[t]hat it is presently in the best interest and welfare of the minor child that the legal custody of the child be placed in the New Hanover County Department of Social Services, and that actual joint physical custody remain with the parents under strict supervision of the Department of Social Services under the terms and conditions for custody and visitation found in the Findings of Fact above." Plaintiff was ordered to purge her willful contempt by agreeing to comply fully with the visitation privileges. Defendant was ordered to be confined to the common jail of New Hanover County for failure to pay alimony until such a time as he paid $2,750 in arrearage.

Defendant contends that plaintiff's breach of the agreement by failing to allow him visitation privileges excused his performance under the agreement to pay periodic alimony and that the court had no authority to hold him in contempt or to order him to specifically perform a provision under the judgment.

Bruce H. Jackson, Jr. for plaintiff appellee.

Goldberg & Anderson, by Frederick D. Anderson, for defendant appellant.

MARTIN (Harry C.), Judge.

Once again this Court is asked to determine the effects of a consent judgment in a domestic relations setting. It is defendant's contention that because the agreement contemplates a full and final settlement, the terms of which are unmodifiable absent consent of the parties, a fortiori, the judgment is unenforceable by contempt. And, if contract law applies to the agreement, then by

its terms a breach by the plaintiff would excuse performance by the husband. *Wheeler v. Wheeler*, 299 N.C. 633, 263 S.E. 2d 763 (1980).

From our review of the law involving consent judgments in domestic settings, we first note that exceptions have all but engulfed the "general" rule that a husband and wife who have entered into a valid separation agreement are remitted to the rights and liabilities under the agreement or the terms of a consent judgment entered thereon. The agreement cannot be modified, ignored, or set aside by the court without the consent of the parties and is enforceable only as an ordinary contract. *Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E. 2d 71 (1967); *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964); *Kiger v. Kiger*, 258 N.C. 126, 128 S.E. 2d 235 (1962); *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118 (1956); *Ellis v. Ellis*, 193 N.C. 216, 136 S.E. 350 (1927). Consent judgments under this category have been distinguished as receiving only the approval or sanction of the court. They serve no useful purpose and have been a source of litigation giving rise to unforeseen consequences in the form of numerous exceptions.

A consent judgment which constitutes nothing more than a contract between the parties made with the approval of the court is not final and binding as to those provisions involving custody or support of minor children. *Bunn, supra; Kiger, supra; Holden, supra.* A contract-type consent judgment may also be set aside or modified upon a showing of fraud, coercion, or mutual mistake in its procurement or execution. *McLeod v. McLeod*, 266 N.C. 144, 146 S.E. 2d 65 (1966); *Kiger, supra.* Moreover, there is authority that such a contract-type consent judgment may be enforceable by contempt proceedings for a willful violation of its terms. *McLeod, supra.* In addition, even if not initially enforceable by contempt, the same result is now obtainable through the vehicle of a decree for specific performance. *Moore v. Moore*, 297 N.C. 14, 252 S.E. 2d 735 (1979).

By far the most significant exception to the general rule that the court is without authority to modify or enforce a consent judgment is a finding that the court has adopted the agreement of the parties as its own determination of their respective rights and obligations. The judgment is thus superseded by the adoption of the parties' agreement as an order of the court. *White v.*

White, 296 N.C. 661, 252 S.E. 2d 698 (1979); *Bunn, supra; Britt v. Britt*, 36 N.C. App. 705, 245 S.E. 2d 381 (1978). Upon such a finding, the court has the authority to enforce its judgment through civil contempt proceedings. *Levitch v. Levitch*, 294 N.C. 437, 241 S.E. 2d 506 (1978); *Mitchell, supra; Bunn, supra; Elmore v. Elmore*, 4 N.C. App. 192, 166 S.E. 2d 506 (1969); *Dunn v. Dunn*, 1 N.C. App. 532, 162 S.E. 2d 73 (1968). In addition, a court-adopted judgment is subject to modification within certain limitations. The order must be one to pay alimony; that is, the payments must be denominated alimony or be alimony equivalents rather than, as the result of a property division, constituting reciprocal consideration for a property settlement. *White, supra.* Changed circumstances must be found to justify modification. *Bunn, supra; Britt, supra.*

Turning now to the facts of our case, we cannot agree with defendant that the no modification/final settlement provisions of the agreement is the determinative factor in reaching a conclusion that this is a contract-type consent judgment. It is not the intent of the parties, but the intent of the judge which controls. Such is the fate of those attorneys who persist in soliciting the "rubber-stamp" approval of the court on out-of-court settlement agreements. Rarely will the court's judgment not be prefaced by the words "It is Ordered, Adjudged and Decreed," evidencing the court's intent to adopt and order rather than merely "approve" the provisions of agreement. *White, supra; Britt, supra; Dunn, supra.* Moreover, when a court enters judgment on the facts found by it, it loses its character as a consent judgment. *McRary v. McRary*, 228 N.C. 714, 47 S.E. 2d 27 (1948). In the case sub judice, the court made extensive findings of fact. It is not for this Court to second guess the circumstances under which these findings were made, *i.e.*, that the attorneys drew up the entire agreement and submitted it only for Judge Lambeth's signature. It is apparent from the 15 December 1980 judgment that Judge Lambeth intended to adopt the findings as his own. Moreover, while recognizing that certain provisions relating to property settlement and alimony in the judgment may not be modifiable, "[t]he Court in adopting this Judgment containing this language did not intend nor did it waive any right of the court to enforce a willful violation of any term of this Judgment by civil contempt."

[1] We are thus faced with the question of whether a judgment which has been adopted by the court, but which contains unequivocal language to the effect that it is not subject to modification, may yet be enforced by civil contempt. We answer in the affirmative. In so holding we reject the ipso facto argument that because provisions in a judgment may preclude modification, enforcement of those provisions is beyond the reach of the court. In 1957 one astute commentator wrote:

> North Carolina follows a consistent pattern in saying consent judgments can neither be modified nor enforced by contempt, whereas the majority rules refuse modification but allow contempt proceedings. It is submitted that as to contempt the majority is the better view; otherwise the judgment is of no practical value to the wife other than as a judicial affirmation of the contract existing between the parties. She would be as well off without the decree because she can enforce it only by the usual methods of enforcing contracts.

35 N.C.L. Rev. 408-09 (1957).

Matters involving custody and support of minor children remain within the court's jurisdiction. *Holden, supra.* As alimony provisions in a separation agreement are now enforceable through a decree of specific performance, *Moore, supra,* it seems appropriate to recognize a distinction between modification and enforcement of these judgments and to permit a court to do directly what it may do indirectly.

> The fact that a failure to comply with a decree for specific performance of the support provisions of a separation agreement might be punishable by contempt renders the separation agreement no less a contract of the parties. Similarly, the fact that a consent judgment incorporating an agreement of the husband to provide support may be enforceable by contempt proceedings renders it no less a contract.

Haynes v. Haynes, 45 N.C. App. 376, 383, 263 S.E. 2d 783, 787 (1980). Hence, once it is determined that a court has adopted the judgment, and the presumption favors adoption, the court may enforce its provisions upon a showing of willful failure to comply. This is so notwithstanding the fact that some or all of the provi-

sions relating to property settlement or alimony are not subject to modification, *i.e.*, are either contractual in nature or are otherwise reciprocal as discussed in *White, supra.*

In light of the foregoing, we find that the trial judge did not err in ordering each party to comply with the order of the court as contained in the 13 March 1980 judgment. In his 15 December 1980 judgment, Judge Lambeth was merely exercising his authority under the original judgment.

Defendant further raises several issues relating to the sufficiency of the evidence to support the trial court's findings of fact and conclusions of law. While we do not have the benefit of certain tapes offered at trial, we have read the testimony carefully and conclude that neither party is without fault. What surfaces from the record is an unceasing series of attacks and counterattacks, each designed to further the bitterness and animosity between the parties, to the detriment of the child. We hold that Judge Lambeth's efforts to resolve the dispute were positive and correct in every respect.

[2] Defendant finally contends that the evidence at trial was insufficient to support the court's finding that, during the period of default, he had the ability to comply with the alimony provisions as set forth in the 13 March 1980 judgment. Judge Lambeth based this finding on the fact that defendant was an "able-bodied man" under no legal, mental or physical disabilities; that on 13 March 1980 he had the ability to comply with the alimony provisions; and that there had been no change of circumstances. This finding falls short of the mark to support the court's ordering defendant imprisoned for contempt until he pays the arrearage. The question before the court was not a modification or reduction of alimony, which would necessitate a finding of changed circumstances. Under these facts it is necessary to find that defendant's failure to pay was willful; that is, the evidence must support a finding that, during the period of default, defendant had the ability to comply with the order. *Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966); *Teachey v. Teachey*, 46 N.C. App. 332, 264 S.E. 2d 786 (1980). In order to support a sentence of confinement in jail for contempt, it is further necessary to find that defendant has the present ability to pay the arrearage, either by making immediate payment or by taking reasonable measures to obtain that

amount. *Mauney, supra; Frank v. Glanville*, 45 N.C. App. 313, 262 S.E. 2d 677 (1980). On the record before us, there is insufficient evidence of defendant's ability to comply with the order during the period of default, or with the order to pay the arrearage, and there were no findings detailing his ability to pay.

We therefore vacate that portion of the judgment dealing with the court's finding defendant in contempt and ordering his confinement until he pays the arrearage. Upon remand, further proceedings may be held with respect to the willfulness of defendant's failure to pay. The judgment is affirmed in all other respects.

Modified and affirmed.

Judges ARNOLD and WELLS concur.

FRANK J. CLIFFORD, AND DOLORESE R. CLIFFORD v. RIVER BEND PLANTATION, INC., J. FRANK EFIRD, PRESIDENT, RIVER BEND PLANTATION, INC., AND J. FRANK EFIRD, INDIVIDUALLY AND AS PRESIDENT OF RIVER BEND, INC.

No. 813SC386

(Filed 2 February 1982)

Damages §§ 5, 17— breach of express warranty—excessive verdict—erroneous instructions to jury

In an action to recover for flood damage to a home purchased by plaintiffs from defendants, the jury returned a verdict in excess of the amount to which plaintiffs may have been properly entitled. The errors in the damages awarded stemmed from the court's instructions to the jury as the court failed to explain to the jury the relationship between the evidence presented at trial and the issues involved. Further, by submitting both the issue on false representation and the issue on breach of warranty to the jury, the court allowed plaintiffs to recover twice for the same damages.

Clifford v. River Bend Plantation

APPEAL by defendants from *Cornelius, Judge.* Judgment entered 22 November 1980 in Superior Court, CRAVEN County. Heard in the Court of Appeals 19 November 1981.

This is an action in which plaintiff homebuyers sought to recover damages from defendant seller for breach of express warranties, fraud, breach of repurchase agreement, and unfair and deceptive trade practices.

In their complaint plaintiffs alleged that they agreed to purchase for $40,000 a house and lot located at 220 Rockledge Road in River Bend Plantation in New Bern; that the property was owned by defendant; and that plaintiffs entered into this agreement based upon representations from defendant's salesman, Philip Nelson, and defendant's president, J. Frank Efird, that the property was not subject to flooding, that it carried a full one-year warranty, and that defendant would execute a buy-back agreement to repurchase the house after one year if plaintiffs were dissatisfied.

In plaintiffs' first claim for relief, they alleged that the property had flooded. They sought to recover damages to their personal property, damages for personal injury to Mr. Clifford, and damages for repairs and extensive landscaping to the real estate. They alleged they were entitled to damages because defendant had breached the express warranty that the property was free from flooding. In their second claim for relief, plaintiffs sought actual and punitive damages based on defendant's alleged fraudulent representations concerning the flooding problems. In their third claim for relief, plaintiffs sought damages for breach of a one-year warranty on the home for workmanship, alleging that defendant refused to make repairs to the attic and roof. In their fourth claim for relief, plaintiffs sought damages on grounds that defendant had breached the buy-back agreement; and in their fifth claim for relief, they alleged that they were entitled to treble damages for unfair and deceptive trade practices by defendant.

Defendant filed an answer and amended answer denying the material allegations of the complaint and asserting numerous defenses including failure by plaintiffs to perform various provisions of the repurchase agreement.

PLAINTIFFS' EVIDENCE

Stipulations and testimony from plaintiff Frank Clifford tended to show that in March of 1976 Philip Nelson, a real estate salesman for defendant, showed plaintiffs the house which is the subject of this action and which was built by defendant. Upon inspection of the house, Clifford noticed a wash area in the backyard. Nelson indicated that this had been caused by settling of the septic system. Clifford also noticed some dampness under the house and asked if the property flooded. Nelson responded that it did not. Clifford also inquired about the appearance of the roof, but Nelson assured him any problem would be taken care of when the weather was warmer. Nelson stated that the house was warranted for one year against structural defects and that there would be a buy-back agreement which would enable plaintiffs to obtain a full refund at the end of one year if they were dissatisfied with the house. Clifford later met with J. Frank Efird, President of defendant corporation, and was told by Efird that there was no flooding problem on the property. The offer to purchase signed by Clifford on 19 March 1980 stated that there would be a buy-back agreement between the parties. The offer to purchase contained no express warranties and stated that it contained the entire agreement between the parties. Clifford testified that he would not have decided to purchase the house but for Nelson and Efird's representations that the house was not subject to flooding, that there would be a buy-back agreement and Nelson's assurances of a one-year warranty.

The closing for the sale of the house occurred on 29 April 1976. Plaintiffs paid cash for the house. Plaintiffs refused to sign the buy-back agreement prepared by defendant because it required them to have an eighty-percent assumable loan on the property before defendant would repurchase the house. At Clifford's insistence that he had understood no mortgage was to be involved, an additional paragraph was added to the agreement, which reads as follows:

> "8. River Bend Plantation, Inc. agrees to allow full $40,000, purchase price against purchase of any house owned and for sale by River Bend Plantation, Inc., or J. Frank Efird at any time. Subject to temporary financing being available at no cost to other than River Bend Plantation, Inc."

Clifford signed the revised buy-back agreement, with the understanding that he did not have to have an assumable mortgage to trade his house back to defendant.

On 30 May 1976 Clifford moved into the house. On 1 June 1976 it began to rain and continued for several days, leaving five to six inches of water in the garage and over a foot of water underneath the house. In Clifford's opinion the personal property that was stored in the garage and was destroyed by the flooding had an estimated value of $4,000. After plaintiffs gave Efird a list of their damaged property, he took some corrective action to prevent further flooding, but the property has continued to flood. The plaintiffs spent around $1,000 for reseeding, replacing shrubbery, installing gutters, downspouts and run-off lines.

In April of 1977 plaintiffs attempted to exercise the buy-back agreement by trading their house for a condominium. This offer was rejected by defendant because plaintiffs did not have an assumable mortgage. Plaintiffs have not tried to sell their house due to the flooding and roof problems. Clifford presented evidence that he suffered muscular-skeletal injury and pain as a result of removing boxes from his garage after the June flood.

The previous owner of the house, Patricia Swendel, testified that the yard had flooded up to her knees when she lived in the house and that she had complained to Efird about it. Philip Nelson, the realtor involved, stated that he had shown the house to Clifford but did not recall Clifford asking about flooding or drainage problems. Nelson testified that it was his understanding the price of the house was reduced from $43,000 to $40,000 because it was sold "as is" with no warranties to plaintiffs. Nelson stated that he did not know until Efird testified in court that Clifford had a full one-year warranty on the house.

Durwood Andrews, a carpentry foreman, inspected the house and estimated it would cost $6,600 to repair the roof. Alex Kelly, an engineer with the State Highway Division, testified there were drainage problems that would have required correction before the State would have accepted the road in front of plaintiffs' house. An expert real estate appraiser who had not personally inspected the house testified that a house with defects such as those of plaintiffs' residence would have a depreciated market value.

Defendant's motion for a directed verdict was granted as to plaintiffs' claim for unfair and deceptive trade practices and punitive damages. The motion was denied as to all other claims.

DEFENDANT'S EVIDENCE

Defendant's evidence tended to show that Efird's reputation in the community was good and that the road work done in River Bend met minimum State standards. Efird testified that he had never told Clifford the lot was not subject to flooding. After the heavy rainfall of June 1976, he took corrective measures on plaintiffs' property, although he felt this was beyond the provisions of the one-year warranty. Efird stated that he was willing to comply with the buy-back agreement if plaintiffs performed the necessary conditions. Defendant's renewed motion for a directed verdict was denied.

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

"1. Did the Defendant, River Bend Plantation, Inc., J. Frank Efird, President, warrant to Plaintiff, Frank J. Clifford and Delorese R. Clifford, that the property at 220 Rockledge Road, River Bend Plantation, was not subject to flooding?

ANSWER: Yes.

2. Was the warranty breached by the property at 220 Rockledge Road being subject to flooding?

ANSWER: Yes.

3. What amount of damages have Plaintiff, Frank J. Clifford and Delorese Clifford sustained?

ANSWER: $7,475.00.

4. Did the Defendant, River Bend Plantation, Inc., J. Frank Efird, President, warrant to Plaintiff Frank J. Clifford and Delorese R. Clifford, that the house situated at 220 Rockledge Road, River Bend Plantation carried a one year warranty concerning workmanlike quality?

ANSWER: Yes.

5. Was the warranty breached by the house at 220 Rockledge Road not being of workmanlike quality during the one year period?

ANSWER: Yes.

6. What amount of damages have Plaintiff Frank J. Clifford and Delorese R. Clifford sustained?

ANSWER: $6,600.00.

7. Did the Defendant, River Bend Plantation, Inc., J. Frank Efird, President, make a false representation with the intent it should be acted upon that the property at 220 Rockledge Road, River Bend Plantation was not subject to flooding; and did the Plaintiffs Frank J. Clifford and Delorese R. Clifford, act upon the representation and suffer damages to their reliance upon the false representation?

ANSWER: Yes.

8. What amount of damages, if any, have Plaintiffs Frank J. Clifford and Delorese R. Clifford sustained?

ANSWER: 40,000.00.

9. Did the Defendant, River Bend Plantation, Inc., J. Frank Efird, President, agree to repurchase the property known as house and Lot #10-E located at 220 Rockledge Road, River Bend Plantation from the Plaintiff, Frank J. Clifford and Delorese R. Clifford after one year or to allow full $40,000 purchase price against purchase of any house owned and for sale by River Bend Plantation, Inc., or J. Frank Efird at any time?

ANSWER: Yes.

10. Did the Defendant, River Bend Plantation, Inc., J. Frank Efird, President breach the agreement to repurchase the property?

ANSWER: Yes.

11. What amount of damages, if any, have the plaintiffs Frank J. Clifford and Delorese R. Clifford sustained?

ANSWER: $46,000.00."

In order to clarify the jury's verdict, the court submitted the following supplemental issues:

"1. Are the damages awarded in response to issue #8 separate and apart from the damages awarded in response to any other issue?

ANSWER: Yes.

2. Are the damages awarded in response to issue #11 separate and apart from the damages awarded in response to any other issue?

ANSWER: Yes.

3. Do you mean by your verdict that plaintiffs are entitled to recover from defendant the total sum of $100,075 and do you mean that in answer to the 8th issue that $40,000 represents the difference between the market value of the property at the time of sale and the market value had its value been what it was represented to be?

ANSWER: Yes.

4. Did the jury intend by the answer to the 11th issue that the plaintiff was to receive a sum payment of $46,000 and be allowed to keep the residence at 220 Rockledge Road or was it the intent and verdict of the jury that the defendant repurchase the residence at 220 Rockledge Road for $46,000 or in the alternative to allow the plaintiff a credit of $46,000 against purchase of other property owned by River Bend, the defendant?

ANSWER: Yes."

Judgment was entered for plaintiffs in the amount of $100,075, which was the total of all damages specified in the jury's responses to the original issues.

Perdue & Voerman by David P. Voerman for plaintiff appellees.

White, Allen, Hooten, Hodges & Hines by John M. Martin; and Jeffress, Morris, Rochelle & Duke by A. H. Jeffress for defendant appellants.

CLARK, Judge.

The trial court treated the plaintiff with undue munificence. The judgment based on the jury verdict awarded the plaintiffs $100,075, and they still have the house and lot for which they paid $40,000 in April 1976. The recovery did not include punitive damages. Plaintiffs did not appeal from the directed verdict for defendants on the claim for unfair and deceptive trade practices and for punitive damages.

The jury verdict included $7,475 on the breach of warranty claim (Issues 1, 2 and 3), for which the measure of damages, according to jury instructions, was the difference between the actual market value of the property and the market value of the property as warranted; also included was $40,000 on the fraud claim (Issues 7 and 8), for which the measure of damages, according to jury instructions, was the difference between the actual market value of the property and the market value of the property as falsely represented. The warranty and the false representation was the same—that the property was not subject to flooding. And the measure of damages for both claims was the same—the difference between the actual market value of the property and the market value if the property had not been subject to flooding. The jury verdict on these two claims, though inconsistent as to amount, awarded plaintiffs a double recovery. Then, after the awards of damages on these two claims and after an award of $6,600 on the breach of warranty for workmanlike quality claim (Issues 4, 5 and 6), for the total sum of $54,075, the jury awarded the plaintiffs an additional $46,000 on the breach of repurchase claim (Issues 9, 10, and 11). It is obvious that plaintiffs should not have recovered such damages for breach of the repurchase agreement claim after recovering $54,075 and retaining the house and lot, for which they paid only $40,000.

Much of the confusion in regard to the damages awarded undoubtedly stems from the court's instructions to the jury. The trial court failed to explain and apply the law to the evidence as required by G.S. 1A-1, Rule 51. It is the duty of the court to explain the law and apply it to the evidence presented on all substantial features of the case. The failure to do so constitutes prejudicial error for which the aggrieved party is entitled to a new trial. *Board of Transportation v. Rand*, 299 N.C. 476, 263 S.E.

2d 565 (1980); *Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972); *Owens v. Harnett Transfer*, 42 N.C. App. 532, 257 S.E. 2d 136 (1979).

The record reveals that in the charge to the jury the trial court, after summarizing the evidence, read the eleven issues to the jury and then in instructing on each of the eleven issues stated abstract principles of law. The record is void of any instructions to the jury as to what facts, if found by them to be true, would justify answering the issues submitted to them in the affirmative or negative. At no point in the charge did the trial judge explain to the jury the relationship between the evidence presented at trial and the issues involved. This error was prejudicial to the defendant and requires a new trial.

We discuss other errors for the limited purpose of providing some guidance to the trial court on retrial.

The trial court erred in the instructions to the jury in allowing damages on both the breach of warranty and the fraud claims.

As the trial judge instructed, the measure of damages in a tort action for fraud is the same as in contract actions for breach of warranty; that is, the difference between the actual value of the property as it exists and its value if it had been as represented. A plaintiff may allege and prove alternative causes of action, but he must elect to pursue only one to judgment. 37 Am. Jur. 2d *Fraud and Deceit* § 353 (1968); D. Dobbs, *Remedies*, "Damages for Deception," § 9.2 (1973). By submitting both the issue on false representation and the issue on breach of warranty to the jury, the court allowed plaintiffs to recover twice for the same damages.

It is noted that plaintiffs alleged special damages, damages to personal property resulting from flooding. On retrial the issues relating to the breach of warranty claims or to the fraud claim, whichever they elect to pursue, should include an issue or issues relating to the personal property damage.

On the claim for breach of the repurchase agreement the jury awarded damages (Issue 11) in the sum of $46,000. There was no evidence to support this award. When the jury reached this issue it had already awarded damages that would compensate plaintiffs for any breach of warranty or false representation relative to

flooding and for breach of warranty of workmanlike quality, and thus the answer to this damage issue (Issue 11) should not include any award based on the decreased value of the property because of flooding. On retrial the burden is on the plaintiff to prove that he was damaged by the breach of the repurchase agreement and the extent of such damage.

Other assignments of error are not discussed since they may not recur upon retrial.

New trial.

Judges WHICHARD and BECTON concur.

SAMMY G. HIATT v. BURLINGTON INDUSTRIES, INC.

No. 8118SC268

(Filed 2 February 1982)

Limitation of Actions § 8.2; Patents § 1— fraud in obtaining patent right—statute of limitations applicable—summary judgment proper

In an action in which plaintiff alleged defendant defrauded him by paying a grossly inadequate consideration for an invention used in defendant's mill and by obtaining a patent for that invention in defendant's name, summary judgment for defendant was proper. The uncontraverted facts established that more than three years before he filed the lawsuit plaintiff knew or with due diligence should have known the facts constituting the alleged fraud, and under G.S. 1-52(9) actions based on fraud or mistake are governed by a three year statute of limitations.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 19 January 1981, in Superior Court, GUILFORD County. Heard in the Court of Appeals 19 October 1981.

In August 1980, plaintiff filed complaint against defendant and alleged the following matters: In 1963, while employed by defendant, plaintiff "on his own time" invented an apparatus for liquid treatment of textile fabric and process (endless strand dyeing apparatus). Plaintiff informed his superiors of his invention, and they immediately became interested in it. Defendant built an apparatus which conformed to plaintiff's invention and later began dyeing cloth on it. The complaint continued:

. . . .

VI. In 1964, plaintiff was given some papers to sign by his employer. The papers were not explained to plaintiff except defendant told plaintiff they were applying for a patent.

VII. In late 1964, a patent was applied for in the name of the plaintiff and others named. The patent was granted in 1974 with plaintiff being the sole inventor as U.S. Patent No. 3,820,950.

VIII. On December 9, 1964, plaintiff signed . . . [a document by which he assigned the full and exclusive right to the invention to defendant.] The One ($1.00) Dollar consideration recited was not actually paid. Plaintiff was simply told by defendant to sign the paper. Plaintiff did not read the paper and did not know the purported effect thereof until he consulted a lawyer concerning his patent in approximately July, 1980.

IX. The defendant defrauded the plaintiff by paying a grossly inadequate consideration for plaintiff's invention and the defendant exercised undue influence over the plaintiff in obtaining the plaintiff's signature on Exhibit A. The defendant knew that the patent had great commercial value and that the plaintiff was relying on the defendant to treat him fairly. The defendant breached the confidence reposed in defendant by plaintiff and thereby defrauded plaintiff through the exercise of undue influence over the plaintiff.

X. The plaintiff relied on the defendant's statements that the defendant was applying for a patent on plaintiff's invention. Defendant's statements were materially false, inadequate and misleading and plaintiff relied thereon to his detriment.

XI. Plaintiff was never advised by defendant that he was giving, or even being asked to give, his patent to defendant, and plaintiff would not have done so had he been asked.

XII. Plaintiff is informed and believes that defendant has enjoyed considerable savings and commercial success from plaintiff's invention. Plaintiff is informed and believes

that defendant has licensed others to utilize plaintiff's patent and has received considerable income therefrom.

. . . .

As a second count in his complaint, plaintiff claimed that part of the assignment referred to in the first count (assigning future inventions) was too broad and constituted a "patent misuse." Plaintiff sought, *inter alia*, rescission of the assignment, restitution for all sums earned by defendant from plaintiff's invention, including savings derived by defendant from the invention, and assignment to him of all foreign patents or applications of plaintiff's invention.

By its answer, defendant denied the essential allegations of plaintiff's complaint and, among other things, pleaded in bar the statute of limitations, estoppel, ratification, and laches.

Defendant thereafter filed a motion to dismiss or, in the alternative, a motion for summary judgment. After reviewing affidavits and depositions, the trial court allowed defendant's motion for summary judgment. Plaintiff appeals.

Nichols, Caffrey, Hill, Evans & Murrelle, by Edward L. Murrelle and Robert D. Albergotti, for plaintiff appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by C. T. Leonard, Jr. and Edward C. Winslow, III, for defendant appellee.

MORRIS, Chief Judge.

Under G.S. 1A-1, Rule 56, summary judgment is proper when "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 judgment as a matter of law." The purpose of the rule is not to allow the trial court to decide an issue of material fact, but to allow it to determine whether a genuine issue of material fact exists. *Hotel Corp. v. Taylor*, 301 N.C. 200, 271 S.E. 2d 54 (1980). In ruling on a motion for summary judgment, the trial court must review the record in the light most favorable to the party opposing the motion. *Investment Co. v. Greene*, 48 N.C. App. 29, 268 S.E. 2d 810, *disc. review denied*, 301 N.C. 235, --- S.E. 2d --- (1980).

By his appeal, plaintiff seeks to raise questions concerning whether there were genuine issues of material fact relating to his allegations concerning fraud. We do not, however, reach these issues since we hold, after careful review of case authority and the undisputed facts set forth in the record, that plaintiff's action was barred by the statute of limitations.

G.S. 1-52 outlines those actions which are barred after a three-year period. G.S. 1-52(9) deals specifically with actions based on fraud or mistake:

> (9) For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

Plaintiff's action, therefore, was barred by the statute of limitations if plaintiff discovered the facts constituting the fraud more than three years prior to 11 August 1980, the date on which he filed his complaint.

In proper situations, the running of the statute of limitations may be the basis for granting summary judgment. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E. 2d 878 (1971). Ordinarily, when the evidence is not conclusive or is conflicting, the question of whether plaintiff, in the exercise of due diligence, should have discovered the facts constituting mistake (and, therefore, fraud) more than three years prior to institution of the action is for the jury. *Lowery v. Wilson*, 214 N.C. 800, 200 S.E. 861 (1939). Failure of plaintiff, however, to exercise due diligence in discovering fraud can be determined as a matter of law where it is clear that there was both capacity and opportunity to discover the fraud. *See Moore v. Casualty*, 207 N.C. 433, 177 S.E. 406 (1934). In *Peacock v. Barnes*, 142 N.C. 215, 218, 55 S.E. 99, 100 (1906), the Supreme Court aptly stated the duty of one to discover the facts of an alleged mistake:

> A man should not be allowed to close his eyes to facts readily observable by ordinary attention, and maintain for his own advantage the position of ignorance. Such a principle would enable a careless man, and by reason of his carelessness, to extend his right to recover for an indefinite length of time, and thus defeat the very purpose the statute was designed and framed to accomplish.

We believe that the case before us contains an example of inexcusable procrastination even after discovery of the facts which plaintiff contends constituted fraud.

Under the established facts of this case, plaintiff, while standing in front of a dye beck at defendant's plant, conceived the idea of the endless strand dyeing apparatus. This was in 1963, and by early 1964, the defendant had reduced the idea to a model, had had it built, and was using it. In June 1964, plaintiff quit his job with defendant. When he left, he made no inquiry about money generated or saved by his invention. He was rehired by defendant later in 1964, and shortly thereafter executed a patent agreement whereby he agreed to assign all improvements and inventions to defendant. In December 1964, plaintiff, along with four other men involved in production of the apparatus, assigned their full and exclusive rights to the apparatus for liquid treating of textile fabric and process to the defendant. By the same agreement, plaintiff authorized the Commissioner of Patents to issue Letters Patent to defendant. Some eight or nine years later, plaintiff testified in a case involving the patent, *Hiatt v. Ziegler*, 179 U.S. P.Q. 757 (1973), and the Patent Office Board of Patent Interferences awarded priority of invention of the apparatus to Hiatt. A deposition by plaintiff showed that he was aware that he had assigned the patent to defendant and that he knew of the success and the income-generating capability of the project:

> I do not have right now a framed patent document which showed me as "assignor of his first patent to Burlington Industries, Inc." which was among certain documents produced by me purusant to a request. I did have it, and I have had it since about 1975. Among other things in there, I had a copy of the patent which I received in 1975. Concerning whether I know that the patent wasn't actually issued until 1974, I knew it after—I received everything I've got in 1975. I had not seen the copy of the patent or any of that until 1975. I received that paper work in a brown envelope. Later on I received that plaque that has been referred to. Concerning whether I knew as late as 1971 that my testimony was being taken in connection with the challenge to the patent, or an interference with the patent, and the patent couldn't be issued until that was concluded, I did not understand all that. Concerning whether I knew there was some purpose for me giving all this testimony, I knew that there was a conflict of

> interest between us — I say "us" because I worked for Burlington — and United. I didn't know what the whole thing was about. That's all I understood, that there was a conflict. I knew that this invention was being used on dye becks throughout Burlington. I knew that it was being used by other companies. I did not know that it was being used particularly through United Merchants. I was told that there was a settlement made between Burlington and United, and that Burlington had won this settlement. An attorney called me and told me that United had to reimburse Burlington for the royalties they had collected, and the thing was settled. I didn't call him; he called me. I didn't ask him anything. The only thing I said was, "That's good." I never asked any questions or raised any objections when I received my plaque showing that I was the assignor of the patent or the patent that showed that Burlington was the assignee. I never raised any objections to it, because I knew Burlington was going to use it.

Plaintiff continued to work for defendant until 27 January 1977, when he retired. In July 1980, plaintiff read a patent law article which prompted him first to see an attorney and then to file this action.

In its argument that the statute of limitations had run, defendant contends that plaintiff should be charged with knowledge of the contents of the agreement he signed. In *Williams v. Williams*, 220 N.C. 806, 809-810, 18 S.E. 2d 364, 366 (1942), the Supreme Court stated the rule:

> In this State it is held that one who signs a paper writing is under a duty to ascertain its contents, and in the absence of a showing that he was willfully misled or misinformed by the defendant as to these contents, or that they were kept from him in fraudulent opposition to his request, he is held to have signed with full knowledge and assent as to what is therein contained.

If plaintiff, as defendant contends, "knew" of the agreement when he signed it, the statute of limitations began to run at the time he signed it, in 1964.

Plaintiff's response to this argument is that there was a confidential relationship between the plaintiff and the defendant,

employee and employer, such that the plaintiff was under no duty to make inquiry as to the contents of the writing. Citing *Vail v. Vail*, 233 N.C. 109, 63 S.E. 2d 202 (1951), plaintiff argues that, where the person perpetrating the fraud is in a fiduciary relationship with the defrauded party, the latter is under no duty to make inquiry, and the cause of action does not accrue until something happens which excites his suspicion that the person has breached his duty to disclose all the essential facts and to take no unfair advantage of him.

Under our case law, it has been stated that the relation of employer and employee is not one of those regarded as confidential; nor is it one from which a presumption of fraud or undue influence will arise. *King v. R. R.*, 157 N.C. 44, 72 S.E. 801 (1911). At the same time, however, our courts have recognized that the employer has great influence in determining the conduct of the employee and may use it to the employee's injury. *Id.*

We do not find it necessary to re-examine the question of whether an employer-employee relationship is or can be a confidential one. Assuming, *arguendo*, that it was a confidential relationship, that fact does not toll the running of the statute once the plaintiff has actually discovered the facts allegedly constituting the fraud.

The essence of plaintiff's complaint is that defendant defrauded him into assigning to it his interest in the endless dyeing strand apparatus and that, had plaintiff known what he was signing, he would not have done so. From the facts set forth above, however, it is clear that plaintiff knew or, by due diligence should have known, of the facts allegedly constituting this fraud no later than 1975, five years before he filed this lawsuit. If plaintiff, as he alleges in his complaint, did not know in 1964 that he was giving up his rights to his invention and that he would receive no benefit therefrom, his deposition shows that he knew these matters in 1975. Plaintiff was aware that the apparatus was being used not only by defendant, but also by other companies in the industry. He knew that defendant was collecting royalties from these other companies, and finally he knew that he was receiving none of the pecuniary benefits being derived from his invention.

Plaintiff attempts to prolong the statute of limitations by arguing that his knowledge of the facts of the alleged fraud was

not complete until 1980 when he read an article about the law of patents. We reject this argument. Knowledge of the *law* governing alleged fraud is not included in the G.S. 1-52(9) requirement of knowledge of the *facts* constituting the alleged fraud.

In summary, we find that the uncontroverted facts established that, more than three years before he filed this lawsuit, plaintiff knew, or with due diligence should have known, the facts constituting the alleged fraud. He waited too long to initiate this action which is, consequently, barred by the statute of limitations. Summary judgment is

Affirmed.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. DENNIS WOOTEN

No. 818SC798

(Filed 2 February 1982)

1. **Criminal Law § 111.1— court's pretrial comments—wrong date for offense—no denial of fair trial**

Defendant was not denied a fair trial when the trial court erroneously stated to the jury pool that defendant was charged with two drug counts because of events occurring on 25 September 1980 and the court corrected its error by instructing after the jury had been impaneled that the correct date was 12 September 1980.

2. **Narcotics § 3.1— testimony not result of entrapment**

Statements made by defendant to an undercover agent that he had some "bam" for sale but could not get his hands on it at that time and that he had heroin for sale were not the result of entrapment and were admissible.

3. **Criminal Law § 95.2— instruction on corroborative evidence**

The trial court adequately instructed the jury on corroborative evidence, and defendant was not prejudiced by the fact that the court later shortened its explanation of corroborative evidence.

4. **Narcotics § 3.3— substance containing heroin—expert testimony**

An expert in the field of forensic chemistry was properly permitted to testify that a substance purchased from defendant contained 3% heroin hydrochloride where the expert testified about the various tests that had been conducted to determine the identity of the substance.

5. Narcotics § 4.2— possession of heroin with intent to sell—sale of heroin—sufficiency of evidence

The State's evidence was sufficient for the jury on issues of defendant's guilt of possession of heroin with intent to sell and sale of heroin where it tended to show that defendant offered to sell two bags of heroin to an undercover agent, that he negotiated with the agent on the price, that he told a female companion to go get the two bags, and that the female companion actually handed the bags to the undercover agent.

6. Criminal Law § 112.1— instructions on reasonable doubt

The trial court's definition of reasonable doubt coupled with its frequent references in the charge to the requirement that the jury be satisfied of defendant's guilt beyond a reasonable doubt constituted adequate instructions on reasonable doubt tying the definition of reasonable doubt to the State's evidence.

7. Criminal Law § 113.9— instructions—misstatement of evidence—necessity for objection at trial

A minor misstatement of facts by the court in its recapitulation of the evidence should have been brought to the attention of the trial judge in time for him to make a correction, and defendant's attempt to raise the issue on appeal comes too late.

8. Narcotics § 4.7— possession of heroin with intent to sell—instruction on lesser offense

In this prosecution for possession of heroin with intent to sell, the trial court did not err in instructing the jury on the lesser included offense of possession of heroin or in instructing the jury that if it found defendant guilty of possession with intent to sell, the case would end.

APPEAL by defendant from *Tillery, Judge.* Judgments entered 17 March 1981 in Superior Court, WAYNE County. Heard in the Court of Appeals on 12 January 1982.

On 8 December 1980, defendant was indicted on three felony charges: conspiracy to possess with intent to sell and deliver a controlled substance, heroin; possession with intent to sell and deliver heroin; and sale and delivery of heroin. At his trial, the State presented evidence tending to show that, on 12 September 1980, J. L. Bowden, an undercover agent of the State Bureau of Investigation (S.B.I.), working with local police officers and another S.B.I. agent, went to Rockefeller Court in Goldsboro. There he saw defendant, along with Brenda Allen, as they were entering apartment 130. When Bowden went to the apartment and approached defendant about purchasing preludin, defendant informed him that he had some but, according to Bowden, "could

not get his hands on it at that time." Defendant told the agent that he had some fifteen dollar bags of heroin for sale, and Bowden negotiated and completed the purchase of two of these bags for $28.00. An expert in the field of forensic chemistry testified that the contents of the bags contained three percent heroin hydrochloride.

The defendant presented testimony by defendant's sister that defendant did not live at 130 Rockefeller Court but, rather, that he lived with her.

The jury found defendant guilty of possession with intent to sell heroin and of the sale of heroin. From the imposition of concurrent prison terms of seven to nine years each, defendant appealed.

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

Duke and Brown, by J. Thomas Brown, Jr., for defendant appellant.

HEDRICK, Judge.

[1] Defendant first assigns error to the court's pretrial comments concerning the charges against him. The record shows that the trial court erroneously stated to the jury pool that the defendant was charged with the three drug counts because of events occurring on 25 September 1980. After members of the jury were selected and impaneled, the court corrected its error by the following statement:

> I inadvertently used the wrong date when I was giving you my little synopsis of the case. The court now understands that the date that you are concerned with is the 12th of September. . . .
>
> . . .
>
> Just disregard what I said about the other date.

Defendant contends that the error "placed in the jurors [sic] minds a conjecture that the Defendant might be involved in other drug possessions or sales. . . ," thus depriving defendant of a fair trial.

We reject defendant's contention. We can find absolutely nothing in the trial court's comments which amounted to more than an inadvertent and harmless *lapsus linguae* and an equally harmless attempt to correct it. Defendant's assignment of error is overruled.

The second of defendant's contentions is that the trial court committed eight separate errors in rulings on the admissibility of evidence. Defendant first took exception to testimony by which the S.B.I. agent showed his experience in other undercover campaigns. While we find the evidence to which defendant excepted to be irrelevant to his case, we nonetheless can see no error which was prejudicial to defendant. *See* 1 Stansbury's N.C. Evidence §§ 9, 80 (Brandis rev. 1973).

[2] Defendant's second exception to the admission of evidence involved the following direct examination of Agent Bowden:

Q. What happened at that point?

A. Mr. Wooten told me that —

OBJECTION: OVERRULED.

EXCEPTION NO. 6

A. Mr. Wooten told me that he had some bam for sale; however, he could not get his hands on it at that time but he did say that he had heroin for sale.

MOTION TO STRIKE. Denied.

EXCEPTION NO. 7

Defendant contends that the statements made by defendant to Agent Bowden resulted from his being entrapped and should have been inadmissible. We, however, find no evidence in this or any other part of the record to support defendant's contention of entrapment.

The third of defendant's exceptions to the admission of evidence followed the court's overruling defendant's objection to a question concerning whether Bowden had "received anything back from the State Bureau of Investigation Laboratory . . . ." The State's question followed and was tied to its questions about sending the substance to the S.B.I. Laboratory for tests. Limited

as it was, the question was not, as defendant argues, "too broad and vague."

Next defendant excepted to Agent Bowden's testimony concerning his statements to the two police officers and to the other S.B.I. agent about the events which occurred in the apartment. Defendant contends that this reiteration of matters to which Bowden had already testified prejudiced his case unnecessarily. While we might agree with defendant that Bowden's reiteration was unnecessary, we can find no prejudicial error in his testimony. Likewise, we reject defendant's related contention that the following testimony of Agent Bowden exculpated the defendant from any wrongdoing:

> I told them the details of the purchase; that I went to the apartment at 130 Rockefeller Court in Westhaven and there saw Brenda Allen and Dennis Wooten and in talking to Mr. Wooten agreed on a price of twenty-eight dollars for two aluminum foil packets of heroin and Mrs. Allen delivered those packets to me.

As our later discussion will show, there was clearly ample evidence indicating that defendant made the sale to Bowden.

Defendant's fifth exception to the admission of evidence was to the testimony by the second S.B.I. agent about what Agent Bowden had told him concerning the purchase of heroin. We find this testimony to be corroborative of the testimony of Agent Bowden, and its admission was no error. *See* 1 Stansbury's N.C. Evidence § 51 (Brandis rev. 1973).

Defendant's sixth argument concerns the trial court's refusal to allow him to question a Goldsboro Police Department Investigator about how the police department gets witnesses into court. The questions thus posed were obviously rhetorical since the witness had already stated that he had not had a particular witness subpoenaed. This Court sees no purpose in the questions defendant posed and finds the trial court's action proper.

[3] Defendant's argument that the trial court failed to instruct the jury adequately about corroborating evidence is likewise rejected. The record shows that the court instructed the jury in the following manner:

> Members of the jury, this evidence which you are about to hear is competent but only for a limited purpose. Statements that a witness may have made at an earlier time, if you find that they tend to corroborate his testimony here in the courtroom under oath are competent for the purpose of corroboration; that is giving you a basis upon which to decide whether to believe the testimony of Mr. Bowden in this courtroom. They are not evidence of the truth or lack of truth of what was said because what was being told back there was not under oath as was his testimony here.

The fact that the court later shortened its explanation of corroborative evidence was not error prejudicial to defendant.

[4] Defendant's final argument concerning the admissibility of evidence is that the court erred in allowing the forensic chemist to identify the material purchased by Bowden. We have reviewed this portion of the record and can find no error. The chemist testified about the various tests that had been conducted to determine the identity of the powder. The trial court properly overruled defendant's objection to the question of whether the witness had an opinion satisfactory to himself as to what the substance was. Likewise, we reject defendant's argument that the court erred in allowing the State to pass to the jury the contraband substance.

We turn now to defendant's contentions that the trial court erred in denying his motions to dismiss the cases against him. These motions were made at the end of the State's evidence as well as at the end of all the evidence. When the defendant offered evidence, he waived his motion to dismiss at the close of the State's evidence, and only his motion made at the close of all of the evidence is considered on appeal. *State v. Mendez*, 42 N.C. App. 141, 256 S.E. 2d 405 (1979). Defendant argues that the "case . . . was fraught with too many inconsistencies," particularly on the question of whether it was the defendant or Brenda Allen who actually sold the controlled substance to Bowden.

[5] In considering a motion to dismiss, the trial court is bound by the principle that the evidence for the State is to be considered in the light most favorable to it and is deemed to be true; inconsistencies or contradictions therein are disregarded. *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971). In this case, the State

was not required to prove that defendant had exclusive possession or control of the contraband substance. *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974). He had possession if he had both the power and the intent to control its disposition or use. *Id.* From the record, we find that there was ample evidence that defendant offered to sell the heroin to Bowden, that he negotiated with Bowden on the price, and that he told Allen to go get the two bags. The fact that the woman actually handed the bags to the undercover agent does not nullify the strong evidence that, under our law, defendant possessed the controlled substance and that he sold it to Bowden.

[6] The final assignment of error that we consider is based on four exceptions defendant took to the trial court's instructions to the jury. First, defendant excepted to that portion of the charge in which the court explained the concept of reasonable doubt. We find nothing wrong with the court's explanation and, indeed, defendant does not argue that they were erroneous. Rather, he argues that the court should have tied the definition of reasonable doubt to the State's evidence. We find, however, that the trial court's definition of reasonable doubt coupled with its frequent references to the requirement that the jury be satisfied of defendant's guilt beyond a reasonable doubt was clearly adequate. *Cf. State v. Hammond*, 23 N.C. App. 544, 209 S.E. 2d 381 (1974); *State v. Conyers*, 2 N.C. App. 637, 163 S.E. 2d 657 (1968).

[7] The second exception defendant took to the court's instructions related to the court's recapitulation of State's evidence. In summarizing the evidence, the court erroneously stated that Bowden, the S.B.I. agent, approached the apartment (130 Rockefeller Court) where he was admitted by defendant who was in the apartment. In fact, the agent testified that he stopped defendant and Allen as they were entering the apartment.

There is nothing in the record to show that the defendant brought this minor misstatement of facts to the attention of the trial court. His attempt to raise this issue now comes too late, for, as the Supreme Court has stated, "[i]f the defendant deemed such variance . . . [in the summary of evidence] to have been prejudicial to him, he should have directed this to the attention of the court in time for a correction prior to the verdict." *State v. Willard*, 293 N.C. 394, 407, 238 S.E. 2d 509, 517 (1977).

[8] Defendant's third exception to the instructions was to the court's indication to the jury that, in the words of defendant, "a third charge was hanging over Defendant's head." Defendant is referring to the court's entirely proper instructions on possession of heroin, a lesser included offense of possession with intent to sell heroin. When, as here, there is conflicting evidence of the essential elements of the greater crime and there is evidence of lesser included offenses, the trial court is required to instruct on the lesser included offenses. *State v. Brown*, 300 N.C. 41, 265 S.E. 2d 191 (1980). Furthermore, we reject defendant's attempt to argue that the trial court erred in its instructions that, if the jury found defendant guilty of possession with intent to sell, the case would end. If it were error, it benefited the defendant, and he should not be allowed to complain.

The fourth exception to the jury instructions was made to the following:

> The Court instructs you that the exchange of two packets containing heroin for $28.00 in money would constitute a sale within the meaning of the law and if you find that that occurred beyond a reasonable doubt.

Defendant again argues that "[t]here was clear evidence from Bowden that he actually made the purchase from Brenda Allen." As our discussion *supra* indicates, the record belies this argument.

Defendant's remaining assignments of error, being dependent upon his success in his earlier arguments, are overruled.

No error.

Judges HILL and BECTON concur.

MABLE RUTH BINGHAM, WIDOW: GARY HOWARD BINGHAM, EXECUTOR OF THE ESTATE OF BILL HOWARD BINGHAM, DECEASED, EMPLOYEE, PLAINTIFFS v. SMITH'S TRANSFER CORPORATION, EMPLOYER; TRANSPORT INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8110IC320

(Filed 2 February 1982)

1. **Master and Servant § 96.5— workers' compensation—findings supported by evidence**

In a workers' compensation proceeding, the evidence was sufficient to support the Commission's findings that decedent did not experience injury by accident arising out of and in the course of employment when he moved a trailer containing flammable liquids from a burning building and suffered a heart attack.

2. **Master and Servant § 94.2— findings of Commission—disregarding testimony**

In a workers' compensation proceeding, the plaintiffs failed to show that a medical expert's testimony was either disregarded or discounted in arriving at the findings of fact and conclusion of law.

3. **Master and Servant § 96.4— workers' compensation—heart attack—finding of no extra exertion—proper**

The Industrial Commission properly applied the test of determining whether work related strain or exertion was the causing or precipitating factor of the decedent's heart failure and found that plaintiff failed to establish a causal link by finding that, when stricken, decedent "was performing his assigned duties in the customary fashion without interruptions of unusualness."

APPEAL by plaintiff from Order of the North Carolina Industrial Commission filed 5 November 1980. Heard in the Court of Appeals 11 November 1981.

Decedent (Bill Howard Bingham) was employed by defendant, Smith's Transfer Corporation, as a switcher. His duties were to fuel tractors, hook them to trailers and separate tractors from trailers by hooking and unhooking air hoses and rolling dollies, spotting trailers to the dock and on the yard, and taking trailers away from the dock after they are loaded.

Plaintiffs' evidence tended to show that decedent had been hospitalized in 1975 for an acute myocardial infarction (a heart attack), and that he was diagnosed as suffering from myocardial ischemia, or transient decreased blood flow to the heart muscle.

On the morning of 21 March 1978, there was a fire at the Rollins Supply Company warehouse building in Greensboro. Bingham's supervisor, Jimmy Earl Mitchell, between 5:00 and 5:30 a.m. received a call from Rollins Supply asking him to send someone to pull a trailer away from the burning building. He assigned the task to decedent.

Decedent left the terminal in a tractor with Billy Joe Matthews, also an employee of Smith's. Bingham drove about 45 or 50 miles an hour, normal speed. He told Matthews in an ordinary tone that "[W]e may not get that trailer" as they approached the scene of the fire.

Harvey Jenkinson, manager of Electric Supply Company, a business located in the Rollins Supply Company building, was at the burning warehouse. He saw a tractor come into the warehouse parking lot, back up to a trailer marked with red diamond-shaped "flammable" labels, connect it, and pull the trailer away from the building about 30 or 40 feet. He testified that the driver stopped, set the trailer down, pulled away from the trailer, then hit a nearby dock "with a pretty good thump." Firemen removed Bingham from the cab. He was blue and had no blood pressure or pulse. Paramedics were unable to revive him.

Dr. Theodore A. Keith testified that in his opinion, Bingham died a sudden cardiac death, most likely that of ventricular fibrillation—rapid, irregular heart rhythm precipitated by a bout of severe myocardial ischemia or an acute myocardial infarction. Dr. Keith opined that given the fire at the warehouse, decedent's circulatory insufficiency of the heart, the physical activity of hooking up a potentially explosive trailer, and normal response to fear or emotional stress, the situation could result in myocardial infarction in a susceptible individual.

Matthews testified that the rear of the trailer had been burned, including the rear door, that the rubber around the lights was burned, but that the trailer had been watered down by firemen. He said that the fire was concentrated on the back side of the building, was under control in the area where he and decedent were working, and that there was a standing eight-foot high cement block wall. The wall apparently separated the men from the fire. Matthews testified on cross-examination that decedent did not appear excited.

Deputy Commissioner Ben E. Roney, Jr., entered an opinion and award containing findings of facts and the conclusion that decedent did not suffer death by accident arising out of and in the course of his employment, and denying plaintiffs' claim. The Full Commission with one dissent, affirmed the award. Plaintiff gave notice of appeal.

William Z. Wood, Jr., and Douglas R. Hux for plaintiff appellant.

Bell, Davis and Pitt, by Walter W. Pitt, Jr., for defendant appellees.

MORRIS, Chief Judge.

We note at the outset that plaintiffs have failed to comply with Rule 28(b)(5) of the Rules of Appellate Procedure in that references to pertinent assignments of error and exceptions are not identified by number in their brief. However, in this instance, we will suspend the requirements of Rule 28 pursuant to our residual authority expressed in Rule 2, and discuss the appeal on its merits.

[1] Plaintiffs contend that the deputy commissioner erred in making findings of fact numbers 13, 14 and 15 and in his conclusions of law, and that the Full Commission incorrectly affirmed them. The findings and conclusions upon which the denial of compensation was based are as follows:

> 13. There was no emergency regarding the trailer or the contents thereof when decedent and the co-employee arrived at the scene. Extra exertion was not required of decedent in connection with pulling the trailer away from the warehouse.
>
> 14. Decedent was performing his assigned duties in the customary fashion without interruptions of unusualness on 21 March 1978 when he experienced sudden cardiac death.
>
> 15. Decedent did not experience injury by accident arising out of and in the course of the employment on 21 March 1978.

Based upon the foregoing, the deputy commissioner determined that "[d]ecedent did not experience sudden cardiac death by accident arising out of and in the course of the employment . . . because he was performing his assigned duties in the customary

fashion without interruptions of unusualness. N.C.G.S. 97-2(6); . . ." (Citing authority.) The claim was thus denied. The Full Commission, with one dissent, affirmed and adopted the deputy commissioner's opinion as its own.

Plaintiff argues that findings of fact Nos. 13, 14 and 15 "are not supported by the evidence or by any evidence." On the contrary, there is plenary evidence from which it may be inferred that no emergency existed and that no extra exertion was required of the decedent. Although there was a fire at the location, Billy Joe Matthews testified that "[t]he fire was under control from where we was at (sic). There was a cement block wall probably eight-foot high (sic) . . . [T]he fire was burning on the back side of the building from where we was at at that time . . . (sic)." He said that "[t]he fire was over on the back side of the building. I would say just roughly speaking the building was something like eighty or a hundred feet wide. It was long. The fire was concentrated on the back side of the building away from us." The Commission may have concluded from this testimony that the fire was not burning dangerously near the men at that time, and that the remaining flames were isolated from the employees by the concrete block wall. Matthews also testified that decedent drove to the scene of the fire at normal speed. He said that decedent "didn't seem to be excited or nothing (sic). We got on Wendover and he still, everything was real calm, . . ., (sic)." Although there was evidence that the trailer, possibly containing flammable material, was scorched and blackened, Mr. Matthews testified that firemen had sprayed the trailer with water. Plaintiffs offered no direct evidence that decedent was subjected to any physical or emotional stress. In fact, Matthew's testimony suggests that decedent was composed and that he employed the customary switching procedure without strain.

Plaintiffs assert that the circumstances surrounding the execution of the task of moving the trailer created an emergency, and espouse, by virtue of the fact that decedent was pulling a trailer labelled "flammable" away from a burning warehouse, that he was subjected to unusual mental and physical strain resulting in death. They introduced medical testimony regarding decedent's circulatory insufficiency to the heart to bolster this hypothesis. Indeed, this may be a reasonable surmise despite the lack of direct evidence of overexertion. "Evidential facts which cannot be

established by direct evidence may be proved by reasonable and legitimate inferences drawn from the established facts." *Holloman v. City of Raleigh*, 273 N.C. 240, 249, 159 S.E. 2d 874, 880 (1968). The facts would perhaps have allowed the Commission to find that a dangerous, urgent situation existed, as well. However,

> if there is any competent evidence to support a finding of fact of the Industrial Commission, such finding is conclusive on appeal, even though there is evidence that would support a finding to the contrary. (Citations omitted.)

Blalock v. Durham, 244 N.C. 208, 212, 92 S.E. 2d 758, 760 (1956), *cert. denied*, 274 N.C. 378; quoted in *Eaton v. Klopman Mills, Inc.*, 2 N.C. App. 363, 163 S.E. 2d 17 (1968). Our duty goes no further than to determine whether the record contains any evidence tending to support the finding. *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272 (1965). We find that there was ample competent evidence to support the commissioner's findings.

[2] Plaintiffs next assign error to the Commission's findings of fact and conclusion of law, because, it is argued, "in arriving at those Findings of Fact and Conclusion of Law and Award, the Industrial Commission ignored or disregarded or discounted the evidence of Dr. Theodore Keith, the only medical expert to testify in this case." Plaintiffs cite *Harrell v. J. P. Stevens and Co., Inc.*, 45 N.C. App. 197, 262 S.E. 2d 830, *cert. denied*, 300 N.C. 196, 269 S.E. 2d 623 (1980), for the proposition that the Commission must weigh and evaluate the entire evidence. However, the Commission in *Harrell* specifically stated that it had discounted certain medical testimony. The precedent is therefore inapposite to the case *sub judice*. Without more, we must reject plaintiffs' contention that the Commission disregarded the testimony of Dr. Keith or shirked its duty to consider all the evidence in arriving at its findings and conclusion of law.

> This is said in *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272: "The Workmen's Compensation Act, G.S. 97-86, vests the Industrial Commission with full authority to find essential facts. The Commission is the sole judge of the credibility of the witnesses *and the weight to be given their testimony*. . . . The court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether

> the record contains any evidence tending to support the finding."

Holloman v. City of Raleigh, supra at 249, 159 S.E. 2d at 880. There is no showing that Dr. Keith's testimony was ignored.

In their third assignment, plaintiffs urge that the Industrial Commission erred in failing to find that the heart attack precipitating the death of plaintiff's decedent was an accident arising out of and in the course of employment within the meaning of the North Carolina Workers' Compensation Act. "The requirement of the Act that an injury to be compensable must be shown to have resulted from an accident arising out of and in the course of the employment is known and referred to as the rule of causal relation; . . .". *Bryan v. Free Will Baptist Church*, 267 N.C. 111, 115, 147 S.E. 2d 633, 635 (1966). An "accident" as that word is used in the Workers' Compensation Act has been variously defined as "an unlooked for and untoward event which is not expected or designed by the injured employee," "a result from a fortuitous cause," and "an unexpected or unforeseen event; an unexpected, unusual or undesigned occurrence." *Gabriel v. Newton*, 227 N.C. 314, 316-17, 42 S.E. 2d 96, 97 (1947).

> We said in *Bell v. Dewey Brothers, Inc.*, 236 N.C. 280, 72 S.E. 2d 680, " 'arising out of' means arising out of the work the employee is to do, or out of the service he is to perform. The risk must be incidental to the employment. *Hunt v. State*, 201 N.C. 707, 161 S.E. 203; *Berry v. Furniture Co.*, 232 N.C. 303, 60 S.E. 2d 97."
>
> *Adams, J.*, said in *Hunt v. State, supra*, " 'in the course of' refer (sic) to the time, place and circumstances under which the accident occurs, and the words 'out of' to its origin and cause;" . . . .

Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 403, 82 S.E. 2d 410, 414 (1954). A death does not arise out of employment unless it can be traced to the employment as a proximate cause. *Id.* "Whether the accident arose out of the employment is a mixed question of law and fact. . . . "*Alford v. Chevrolet Co.*, 246 N.C. 214, 216, 97 S.E. 2d 869, 871 (1957). We have already said that the finding of the Commission as to the factual portion of the question is conclusive here, since supported by competent evidence.

[3] At this point, we must consider plaintiffs' fourth and final assignment of error, which was that the test which the Industrial Commission should have applied was whether work related strain or exertion was the causing or precipitating factor of the plaintiff's decedent's heart failure. That the Commission in considering the conclusion of the deputy commissioner should apply this test is accurate, as plaintiffs showed decedent to be suffering from a heart condition and raised the question of overexertion and stress in their evidence. We are not persuaded that the proper standard was not employed, however. "When one is carrying on his usual work in the usual way and suffers a heart attack, the injury does not arise by accident out of and in the course of employment." *Jackson v. Highway Commission*, 272 N.C. 697, 701, 158 S.E. 2d 865, 868 (1968). It is well settled in North Carolina that extra exertion by an employee resulting in injury may qualify as an injury by accident. *Gabriel v. Newton*, supra; *King v. Forsyth County*, 45 N.C. App. 467, 263 S.E. 2d 283, *cert. denied*, 300 N.C. 374, 267 S.E. 2d 676 (1980). The findings of fact state that no extra exertion was required of decedent to engage and pull the trailer away from the warehouse. By saying that when stricken decedent "was performing his assigned duties in the customary fashion without interruptions of unusualness," the deputy commissioner merely indicated that plaintiff failed to establish a causal link, i.e., that decedent was carrying on his usual work in the usual way, and did not meet with an accident arising out of his employment as those words are used in the Workers' Compensation Act.

We deem that there is competent evidence to support the facts found, and that the findings fully and fairly support the conclusion of law and denial of compensation. The deputy commissioner's opinion and award is, therefore,

Affirmed.

Judges ARNOLD and BECTON concur.

BARBARA JANE JONES v. NEW HANOVER MEMORIAL HOSPITAL, SUCCESSOR TO JAMES WALKER MEMORIAL HOSPITAL, COLUMBUS COUNTY MEMORIAL HOSPITAL, WALTER L. CROUCH, AND J. T. WYCHE

No. 815SC440

(Filed 2 February 1982)

Hospitals § 3.1 — charitable hospital — corporate negligence — prospective application of decision

The doctrine of corporate negligence adopted in *Bost v. Riley*, 44 N.C. App. 638 (1980), pursuant to which a charitable hospital may be found liable to a patient for violations of duties owed directly to the patient by the hospital, is to be applied prospectively and not retroactively. Therefore, the doctrine of charitable immunity barred plaintiff's claim against defendant hospital for alleged negligence in failing to have an established policy at the time of plaintiff's birth in 1961 prohibiting the administration of oxygen exceeding 40% fraction of inspired air to premature newborns so that defendant's agents administered excessive oxygen to plaintiff following her premature birth and caused her to develop retrolental fibroplasia and to become totally blind.

APPEAL by plaintiff from *Rouse, Judge.* Judgment entered 11 March 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 10 December 1981.

Having attained majority, plaintiff, on 24 June 1980, filed this action seeking to recover damages from the Columbus County Memorial Hospital and the New Hanover Memorial Hospital and from two physicians for their alleged negligence in administering excessive oxygen to her following her premature birth in 1961. Plaintiff was delivered prematurely at Columbus County Hospital on 24 November 1961. Shortly thereafter, she was transferred to James Walker Memorial Hospital (now New Hanover Memorial Hospital) for post-natal care. As a result of the alleged negligence, plaintiff developed retrolental fibroplasia rendering her totally blind and ultimately requiring the surgical removal of her eyes. The sole issue on appeal is whether the trial court erred in granting the defendant New Hanover Memorial Hospital (Hospital) summary judgment on the basis that plaintiff's claims against the Hospital were barred by the doctrine of charitable immunity.[1]

1. This appeal is not interlocutory as the trial court provided in its order that there was no just reason for delaying entry of final judgment as to the Hospital's claim pending the disposition of other claims for relief in this case.

Grover C. McCain, Jr. for plaintiff appellant.

Marshall, Williams, Gorham & Brawley, by A. Dumay Gorham, Jr., for defendant appellee New Hanover Memorial Hospital.

BECTON, Judge.

I

The relevant allegations of negligence against the Hospital in plaintiff's Complaint are as follows:

> The defendant James Walker Memorial Hospital (now New Hanover Memorial Hospital), acting by and through its medical staff, failed and neglected to have established at the time of plaintiff's birth a policy prohibiting the administration of oxygen in concentrations exceeding 40% fraction of inspired air to premature newborns, with the direct and proximate result that agents, servants and employees of the defendant hospital administered to plaintiff, levels of oxygen in excess of 40% fraction of inspired air to the extent that she developed retrolental fibroplasia and was rendered totally blind, at a time when reasonable standards of care for such patients in hospitals required that such hospitals have in force and effect a regulation and policy forbidding the administration of oxygen in quantities exceeding a 40% fraction of inspired air to premature newborn infants since at that time it was well known that the administration of oxygen in quantities in excess of 40% fraction of inspired air produces retrolental fibroplasia in premature newborn infants, as indeed it did in plaintiff.

On 17 December 1980, the Hospital filed its motion for summary judgment with an accompanying affidavit of Z. Franklin Pridgett which specifically alleged the charitable nature of the Hospital. Plaintiff's attorney subsequently filed a counter-affidavit stating, among other things, that plaintiff did not base her claim against the Hospital on the theory of vicarious liability for the negligence of any of the Hospital's employees or servants but that plaintiff's claims were grounded solely upon a theory of corporate negligence for violations of duties owed plaintiff directly by the Hospital. Plaintiff's attorney stated that if outstanding discovery

to defendants were completed, the discovery would establish the duties owed by the Hospital to plaintiff regarding the administration of oxygen and would support his corporate negligence theory. Following the hearing on the Hospital's motion for summary judgment, the court entered an order granting the Hospital's motion for summary judgment and stating that "the plaintiff's claim against the defendant New Hanover Memorial Hospital, successor to James Walker Memorial Hospital, is barred by the doctrine of charitable immunity as a matter of law."

II

With the factual and procedural history outlined, we now proceed with our analysis.

Prior to 20 January 1967, a charitable hospital in North Carolina was liable to a patient for injuries caused by the negligence of the hospital's employees or servants only (1) if the hospital was negligent in the hiring or retention of the employee or servant, *Williams v. Hospital*, 237 N.C. 387, 75 S.E. 2d 303 (1953); or (2) if the hospital provided defective equipment, *Payne v. Garvey*, 264 N.C. 593, 142 S.E. 2d 159 (1965). The doctrine of charitable immunity for hospitals along with its exceptions was abolished effective 20 January 1967 by the North Carolina Supreme Court's decision in *Rabon v. Hospital*, 269 N.C. 1, 152 S.E. 2d 485 (1967).

Although the term "corporate negligence" was used in *Payne* and *Rabon*, the first North Carolina decision to analyze the doctrine of corporate negligence in a medical malpractice context was *Bost v. Riley*, 44 N.C. App. 638, 262 S.E. 2d 391, *pet. for disc. review denied* 300 N.C. 194, 269 S.E. 2d 621 (1980). Under the doctrine of corporate negligence, a hospital may be held responsible for the negligence of members of its medical staff. The basis of liability is not *respondeat superior;* rather, it is the independent negligence on the part of the hospital in breaching a duty that runs directly from the hospital to the patient. As we said in *Bost*, "[t]he proposition that a hospital may be found liable to a patient under the doctrine of corporate negligence appears to have its genesis in the leading case of *Darling v. Hospital*, 33 Ill. 2d 326, 211 N.E. 2d 253 (1965), *cert. denied* 383 U.S. 946, 16 L.Ed. 2d 209, 86 S.Ct. 1204 (1966)." 44 N.C. App. at 646, 262 S.E. 2d at 396.

Because plaintiff concedes (1) that James Walker Hospital was a charitable institution at the time of the alleged tort and (2) that New Hanover Hospital, as successor to James Walker Hospital, is entitled to raise the defense of charitable immunity in this action, the issue, squarely presented, is whether, under the pre-*Rabon* decisions, North Carolina recognized a doctrine of corporate negligence in suits by patients against charitable hospitals separate and distinct from the two well-recognized exceptions to the defense of charitable immunity.

The parties have cited only one pre-*Rabon* decision—*Payne v. Garvey,* decided in 1965—involving a suit by a patient against a hospital wherein the court used the terms "corporate" or "administrative negligence." In *Payne*, as in this case, plaintiff conceded that since the hospital was a charitable institution, it was not liable under the doctrine of *respondeat superior* for injuries plaintiff received as a result of being hit in the eye by a piece of a thermometer which broke as it was being shaken by a nurse. The plaintiff in *Payne* contended that the hospital was liable on a theory of "corporate or administrative negligence" in failing to provide safe equipment, in the selection of its nurse, and in failing to give its nurse proper instructions. Significantly, the *Payne* Court nonsuited plaintiff and referred to "corporate or administrative negligence" only as a position stated in the plaintiff's brief. Equally important, the theories of liability asserted in *Payne* were traditional theories that had long been recognized as exceptions to the charitable immunity rule—that is, the hospital had a duty to provide safe equipment, and the hospital had a duty to use due care in the selection and retention of its employees.

In 1967, our Supreme Court in *Rabon* again used the term "corporate negligence." In an exhaustively detailed analysis showing which states accorded charitable hospitals full immunity, qualified immunity, or no immunity, the *Rabon* Court characterized North Carolina as one of the "[j]urisdictions in which immunity is qualified." 269 N.C. at 17-18, 152 S.E. 2d at 46. Citing *Williams v. Hospital,* the *Rabon* Court explained its characterization: "[Charitable hospitals are] liable to patients only for 'corporate negligence'." *Id.* at 18, 152 S.E. 2d at 496. Because *Williams v. Hospital* held only "that a charitable institution may not be held liable to a beneficiary of the charity for the negligence of its servants or employees if it has exercised due care in their selection

and retention," 237 N.C. at 389, 75 S.E. 2d at 304, we believe the *Rabon* Court's reference to "corporate negligence" was merely a shorthand reference to the *Williams v. Hospital* exception of nonliability of charitable hospitals to patients.

We are mindful that several post-*Rabon* cases refer to liability based upon "administrative," "managerial," or "corporate" negligence.[2] We do not believe those cases are relevant to the precise issue before us: whether, under the pre-*Rabon* cases, North Carolina recognized a doctrine of corporate negligence separate from the two well-recognized exceptions to the defense of charitable immunity. We do believe the following to be relevant, however: (1) *Bost* explicitly recognized a broader rule of corporate negligence—one dealing with the nature and extent of a hospital's direct duty to its patients—than had previously been recognized and applied in North Carolina; and (2) this broader concept of corporate negligence appears to have had its genesis in a 1965 Illinois case, *Darling v. Hospital*. *See* 44 N.C. App. at 646, 262 S.E. 2d at 396.

Since this doctrine of corporate negligence had its genesis in *Darling* and since this doctrine was not expressly recognized in North Carolina until 1980 in *Bost*, the doctrine should not be applied to determine the duty of New Hanover Memorial Hospital to the plaintiff in 1961. As defendant Hospital suggests, legal duties being fashioned and applied by courts to hospitals today as a result of constant changes that are taking place in the operation and management of hospitals should not be applied retroactively to the operation of a hospital twenty years ago. *Bost*, itself, supports a prospective, rather than a retroactive, application of the doctrine, for in *Bost* we recognize that the changing legal attitude regarding the nature and extent of a hospital's duty to a patient is directly related to the "changed structure of the modern hospital." 44 N.C. App. at 645, 262 S.E. 2d at 395. Moreover, a prospective application of the doctrine would be consistent with what the *Rabon* Court said when it abolished the doctrine of charitable immunity—that is, "[t]he rule of liability herein announced applies only to this case and to those causes of actions

2. *See Robinson v. Duszynski*, 36 N.C. App. 103, 243 S.E. 2d 148 (1978); *Starnes v. Hospital Authority*, 28 N.C. App. 418, 221 S.E. 2d 733 (1976); and *Habuda v. Rex Hospital*, 3 N.C. App. 11, 164 S.E. 2d 17 (1968).

arising after January 20, 1967, the filing date of this opinion." 269 N.C. at 21, 152 S.E. 2d at 499. This court has consistently followed the principle in *Rabon* that the defense of charitable immunity is available in an action arising before January 20, 1967, notwithstanding the fact that the action is not commenced until after January 20, 1967. *See Darsie v. Duke University,* 48 N.C. App. 20, 268 S.E. 2d 554 (1980), *pet. for disc. review denied* 301 N.C. 400, 273 S.E. 2d 445 (1980); *Williams v. Lewis,* 11 N.C. App. 306, 181 S.E. 2d 234, *cert. denied* 279 N.C. 351, 182 S.E. 2d 584 (1971); *McEachern v. Miller,* 6 N.C. App. 42, 169 S.E. 2d 253 (1969); *Helms v. Williams,* 4 N.C. App. 391, 166 S.E. 2d 852 (1969); and *Habuda v. Rex Hospital,* 3 N.C. App. 11, 164 S.E. 2d 17 (1968).

We conclude as defendant Hospital concluded in its brief: (1) Plaintiff's claim against the Hospital is barred by the doctrine of charitable immunity as the same was recognized and applied in North Carolina in 1961; (2) to the extent a doctrine of corporate negligence was recognized in North Carolina prior to the *Rabon* decision, it was limited to the two exceptions to the charitable immunity doctrine which made a charitable hospital liable to a patient only (a) if the hospital was negligent in the selection and retention of an agent, servant or employee who injured the patient, or (b) if the hospital supplied defective equipment for the care and treatment of the patient; and (3) the doctrine of corporate negligence, first set forth in *Darling v. Hospital* and adopted by this Court in *Bost,* is different in principle and in application from the limited doctrine of corporate negligence recognized in *Rabon,* and it should be applied prospectively, not retroactively.

The judgment below is

Affirmed.

Judge CLARK and Judge WHICHARD concur.

Pake v. Byrd

JOHN T. PAKE v. J. C. BYRD, BOBBY BYRD, AND MACKIE WHITE, T/A BYRD FARMS

No. 813DC520

(Filed 2 February 1982)

1. Sales § 5— used tractor—express warranty given

In an action by plaintiff for the refund of the purchase price of a used tractor, the trial court did not err in finding that defendants expressly warranted that, at the time of the sale, the tractor was in good condition and free from mechanical defect where: (1) defendants had superior knowledge of the subject matter; (2) the circumstances were such that the plaintiff, as a reasonable man, was entitled to rely on the defendant's statements; (3) the statements were a part of the basis of the bargain.

2. Sales § 5— used tractor—breach of express warranty

Plaintiff offered sufficient evidence to establish breach of an express warranty that a used tractor he purchased was in good condition and free from major mechanical defects where the evidence was sufficient to support the trial court's finding that the defective condition of the tractor existed at the time of purchase.

APPEAL by defendants from *Phillips (Herbert O.), Judge.* Judgment filed 5 March 1981 in District Court, CARTERET County. Heard in the Court of Appeals 13 January 1982.

Defendants appeal the decision of the trial court granting plaintiff a recovery, under an express warranty, for the refund of the purchase price of a used tractor. The transaction which is the subject matter of this litigation involved the purchase for $4,013 of a used John Deere 3020 gas tractor which, shortly after the sale, required repairs for major mechanical defects, the estimated cost of which would have been $3,500. In his complaint plaintiff alleged that at the time of the sale, defendants had represented the tractor as being in good operating condition. Plaintiff subsequently notified defendants concerning the defects, tendered its return, and demanded refund of the purchase price. Defendants answered, stating that the sale was "as is" and that no warranties were made regarding the condition of the tractor.

Bennett, McConkey & Thompson, by Thomas S. Bennett, for plaintiff appellee.

Bryan, Jones & Johnson, by Robert C. Bryan, for defendant appellants.

MARTIN (Harry C.), Judge.

[1] In order to determine the rights of the parties under these facts, we must first resolve the threshold question of whether, under the provisions of N.C.G.S. 25-2-313, defendants expressly warranted to plaintiff that the tractor was in good condition and free from major mechanical defects.

The statute states in pertinent part:

> Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

N.C. Gen. Stat. § 25-2-313(1)(a) (1965).

We note initially that secondhand goods may have an express warranty attached to them and that the warranty provisions are applied without regard to whether the seller is a manufacturer, merchant, or farmer. *See* 3 Williston on Sales § 17-4 (4th ed. 1974). Moreover, neither the formal words of an express warranty nor the seller's intent to afford such a warranty is necessary to fulfill the requirements of the statute. *See* N.C. Gen. Stat. § 25-2-313(2). "The single most important decision to make is whether the seller's statements were so regarded by the buyer as part of his reason for purchasing the goods." Williston, *supra*, § 17-5 at 12. Whether the parties to the transaction have created an express warranty is a question of fact. N.C. Gen. Stat. § 25-2-313, Comment 3 (1965).

We are persuaded under the facts before us that defendants expressly warranted to plaintiff that the tractor was in good condition and free from major mechanical defects. Plaintiff testified that his decision to purchase the tractor was initiated by the following advertisement which appeared in The News and Observer: "John Deere, 3020, gas, PWR [power shift], with 4 by 16 bottom plow. *Good condition.* $5,000.00." (Emphasis ours.) Plaintiff further testified that defendants represented to him that "they had never had any trouble; [t]hat it was a good tractor"; that "the only thing wrong with the tractor was that it was a used tractor; that it operated as good as when it was new"; and that "the transmission was in good condition and the hydraulic was in good condition." Plaintiff allegedly told defendants that if

he bought the tractor he would "buy it based on what they said because they had been operating the tractor and he had not." Plaintiff's father, who was present during these negotiations, corroborated plaintiff's testimony.

Defendants did not deny that they represented the tractor as being in good condition, but denied ever giving plaintiff an unqualified statement that there was nothing wrong with it. Bobby Byrd testified that he responded to each of plaintiff's inquiries concerning the condition of the tractor by stating that "as far as I know, it's good." Rather than intended as affirmations of fact, defendants contend that their responses were intended as mere opinion, "puffing" or sales talk. *See* N.C. Gen. Stat. § 25-2-313(2).

> The distinction between an affirmation or a description . . . from mere sales talk, or opinion, or puffing is so hazy that the courts in the final analysis will often rely on their own sense of fairplay, thereby evaluating the intentions of the parties to create an express warranty.

Williston, *supra*, § 17-5 at 10.

As the essential ingredient for this determination is whether the seller's affirmation became the basis of the bargain, we may look to certain objective criteria. The first is whether the statements were made before or after the sale was consummated. The second is whether the buyer knew of the seller's statements. Finally, where the buyer relies on his own skill and judgment, thereby essentially disclaiming any warranty, the seller's statements cannot be viewed as the basis of the bargain.

In the case sub judice, plaintiff was induced to inquire about the tractor by an advertisement representing it as being in good condition. Furthermore, defendants' statements were made prior to the purchase. Plaintiff testified that his decision to purchase was based on defendants' assurances. Although plaintiff and his father had many years of experience with tractors and knew something of their operation, Bobby Byrd testified that it would have been impractical for plaintiff to conduct more than an outward inspection of the engine. An examination by the buyer of goods does not necessarily discharge the seller from an express warranty if the defect was one which couldn't be located by the buyer. *Id.* § 17-5.

We hold that because of the following circumstances, defendants expressly warranted that, at the time of the sale, the tractor was in good condition and free from major mechanical defects: (1) Defendants had superior knowledge of the subject matter; (2) The circumstances were such that the plaintiff, as a reasonable man, was entitled to rely on the defendants' statements; (3) The statements were a part of the basis of the bargain. *See* 1 Anderson on the Uniform Commercial Code § 2-313:40 (2d ed. 1970).

[2] A second and more difficult question raised by these facts is whether plaintiff has offered sufficient evidence to establish breach of the express warranty. "The seller's warranty is not his personal guarantee concerning the continuous and future operation of the goods which he has sold." Williston, *supra*, § 17-5 at 13-14. *See Blade v. Sloan*, 108 Ill. App. 2d 397, 248 N.E. 2d 142 (1969). It is therefore necessary to determine from the record before us that the defects complained of existed at the time of the sale.

In *Blade*, a seller's statement on the date of the sale that a used combine was "in good repair and ready to go into the field" was held to be an express warranty. Sellers, however, recovered on buyer's failure to establish a breach. In that case the combine had been checked and any necessary repairs to put it in good operating condition were made a week prior to the sale. The sellers testified that they had never had problems with the motor of the combine and that the machine ran smoothly when driven two days before the sale.

We find the facts before us distinguishable and the evidence sufficient to support a finding that the defect of which plaintiff complains existed at the time of the sale. Defendants delivered the tractor to the plaintiff on a Saturday. The following Monday plaintiff first attempted to use the tractor. He immediately detected a knocking sound in the engine, turned the engine off, and notified his father. Plaintiff's father testified that when he telephoned the defendants to report the noise, J. C. Byrd "admitted that he had had trouble with that." However, he assured Mr. Pake, Sr. that "it was nothing to worry about, just a minor adjustment," and that "sometimes the hydraulic system knocks." J. C. Byrd denied having this conversation.

Isaac Boyd, a diesel mechanic, testified that when he checked the engine of the tractor, the bearing was locked to the shaft, the shaft was ruined, and the damage could have been caused by excessive wear in the motor. He stated that "there is no way of telling in advance that it is going to happen except when it begins to knock; that knocking was caused by loose motion in the bearing of the shaft, and that's a warning sign you had better get it fixed."

Based on this testimony, the evidence is sufficient to support the trial court's finding that the defective condition of the tractor existed at the time of the purchase.

> Where the trial judge sits as the trier of the facts, his findings of fact are conclusive on appeal when supported by competent evidence. This is true even though there may be evidence in the record to the contrary which could sustain findings to the contrary. . . . The trial judge is both judge and jury, and he has the duty to pass upon the credibility of the witnesses who testify. He decides what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom. The appellate court cannot substitute itself for the trial judge in this task.

General Specialties Co. v. Teer Co., 41 N.C. App. 273, 275, 254 S.E. 2d 658, 660 (1979) (citations omitted).

The decision of the trial court is

Affirmed.

Chief Judge MORRIS and Judge VAUGHN concur.

DONNA DANIELS, PLAINTIFF v. JAMES E. SWOFFORD, INDIVIDUAL DEFENDANT, AND DERMOX, INC., CORPORATE DEFENDANT

No. 8122SC476

(Filed 2 February 1982)

1. Master and Servant §§ 49.1, 55.3— workers' compensation—status as employee—assault as accident

Plaintiff was still an employee of defendant employer for the purposes of workers' compensation when she was allegedly assaulted by defendant's presi-

dent immediately after she had orally tendered her resignation. Furthermore, the assault was an accident arising out of and in the course of plaintiff's employment where defendant's president and plaintiff were discussing plaintiff's job performance at the time it occurred.

2. **Master and Servant § 87— workers' compensation—common law action against employer precluded—action against assaultive employee not precluded**

The Workers' Compensation Act precluded plaintiff from asserting a common law action against her corporate employer for the alleged intentional assault on her by her supervisory employee who was not the alter ego of the corporate employer. However, the Workers' Compensation Act did not preclude plaintiff from pursuing a common law action against the employee who allegedly committed the intentional assault.

APPEAL by plaintiff from *Hairston, Judge.* Judgment entered 24 March 1981 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 7 January 1982.

Plaintiff appeals from a dismissal of her action pursuant to Rule 12(b)(1).

Plaintiff's complaint alleges that in September 1978 she began work as a food service employee with Dermox, Inc. On 21 September 1979, pursuant to the regular duties of her employment, she delivered salad bar receipts to a corporate office of Dermox, Inc. While she was there, James E. Swofford, President of Dermox, Inc., criticized her job performance. Plaintiff alleges that after being subjected to verbal abuse by Mr. Swofford, she orally tendered her resignation.

Plaintiff then left the office and proceeded down the hall. Mr. Swofford followed her and "intentionally, unlawfully, wantonly and maliciously" kicked the plaintiff in her right leg behind the knee. As a result, plaintiff sustained personal injuries for which she seeks compensatory and punitive damages, and damages for intentional infliction of emotional distress.

Plaintiff's complaint further alleges that at all times James Swofford was undertaking to do that which he was employed to do as President of Dermox, Inc., namely to manage the business affairs and supervise the employees. Because he was acting in furtherance of the business purposes of Dermox, Inc. at the time of the incident, he was acting as an agent of the corporate defendant.

Defendants moved to have plaintiff's action dismissed on grounds that the North Carolina Industrial Commission had exclusive jurisdiction. The trial court granted the motion.

V. Edward Jennings, Jr., for plaintiff appellant.

McElwee, Hall, McElwee and Cannon, by John E. Hall, for defendant appellees.

VAUGHN, Judge.

At issue is whether the trial court has subject matter jurisdiction over plaintiff's claim or whether the Industrial Commission has exclusive jurisdiction. We conclude that the Workers' Compensation Act precludes plaintiff from seeking recovery from the corporate employer. Plaintiff, however, does have the right to bring a tort action against the assaultive coemployee. Summary judgment in favor of that defendant was improperly granted.

[1] We must first determine whether plaintiff has the right to proceed under the Workers' Compensation Act. It is well settled that to maintain an action for compensation, the claimant must be an employee of the party from whom compensation is sought. *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965); *Hart v. Motors*, 244 N.C. 84, 92 S.E. 2d 673 (1956).

Plaintiff argues she cannot proceed under the Act because she was not an employee of Dermox, Inc. at the time of the alleged assault. Under similar facts, however, North Carolina and Tennessee courts found that the employer/employee relationship did continue to exist. *McCune v. Manufacturing Co.*, 217 N.C. 351, 8 S.E. 2d 219 (1940); *Williams v. Smith*, 222 Tenn. 284, 435 S.W. 2d 808 (1968).

In both *McCune* and *Williams*, the plaintiff sought damages for injuries intentionally inflicted by his supervisor immediately *after* the supervisor had fired him. In both cases the corporate defendant sought dismissal based on its state's Workers' Compensation Act. By applying the Act's exclusivity provisions to the issues on appeal, the courts by necessity had to find that an employer/employee relationship existed. We, therefore, hold as a matter of law that at the time of the alleged incident, plaintiff was still an employee of Dermox, Inc.

Plaintiff argues the Act is nevertheless unavailable to her because the alleged assault was not a risk incident to employment. We disagree.

In order to be compensable, an injury must result from an accident arising out of and in the course of employment. G.S. 97-2(6); *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977). Under North Carolina's Workers' Compensation Act, the term "accident" includes "an unlooked for and untoward event which is not expected or designed by the injured employee." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 428, 124 S.E. 2d 109, 110-11 (1962). An unexpected assault, therefore, may be considered an accident despite its characterization as an intentional act. We conclude that the alleged assault in the present action was an accident as defined by the Workers' Compensation Act. The pleadings do not indicate that the assault was personally motivated so as to remove the necessary connection with employment. *See Gallimore v. Marilyn's Shoes*, 292 N.C. at 404-05, 233 S.E. 2d at 532. In fact, defendants admit in their answer that at the time of the incident Mr. Swofford was discussing business and plaintiff's job with the plaintiff. We, therefore, further conclude that the alleged assault arose out of and in the course of plaintiff's employment.

[2] We must next determine whether North Carolina Workers' Compensation Act is plaintiff's *exclusive* remedy.

Worker compensation laws were enacted to treat the cost of industrial accidents as a cost of production. W. Prosser, Handbook of the Law of Torts § 80 (4th ed. 1971). Under these acts, employers assure employees compensation for accidental injuries "arising out of and in the course of employment." The economic loss is then passed on to consumers. *Id.*

In return for guaranteed compensation, employees give up their right to common law verdicts. 2A A. Larson, The Law of Workmen's Compensation § 72.20 (1976) [hereinafter cited as Larson]. G.S. 97-10.1 is similar to provisions of other states' worker compensation acts:

> "If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee . . . shall ex-

clude all other rights and remedies of the employee . . . as against the employer at common law or otherwise on account of such injury or death."

See 2A Larson § 65.10 (Supp. 1981). Citing this statute, our courts have barred injured employees covered by the Act from bringing negligence actions against their employers. *Johnson v. United States*, 133 F. Supp. 613 (E.D.N.C. 1955); *Bryant v. Dougherty*, 267 N.C. 545, 148 S.E. 2d 548 (1966); *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E. 2d 886 (1953). The employees' remedy lies exclusively under the statute.

Contrary to most jurisdictions, North Carolina has extended the employer's immunity to coemployees. *See* Annot., 21 A.L.R. 3d 845 (1968). G.S. 97-9 states "Every employer subject to the compensation provisions of this Article shall secure the payment of compensation to his employees . . . and while such security remains in force, he or those conducting his business shall only be liable to any employee for personal injury or death . . . in the manner herein specified." In *Altman v. Sanders*, 267 N.C. 158, 148 S.E. 2d 21 (1966), the Supreme Court interpreted the phrase "those conducting his business" to include fellow employees. By reading G.S. 97-9 in conjunction with the exclusivity provisions of G.S. 97-10.1, *Smith v. Liberty Mut. Ins. Co.*, 409 F. Supp. 1211 (M.D.N.C. 1976), excluded fellow employees from common law liability.

One can understand the extension of an employer's immunity to employees when one considers the industrial setting. By accepting employment, a worker increases not only the risk of injuring himself but also the risk of negligently injuring others. *Andrews v. Peters*, --- N.C. App. ---, 284 S.E. 2d 748 (1981). Rather than forcing a worker to shoulder the cost of any such injury, our courts have determined that industry, and ultimately the consumer, should bear the economic loss. The Industrial Commission, therefore, has exclusive jurisdiction over all accidents "arising out of employment" negligently caused by an employer or employee.

Where injury is caused by intentional or malicious acts, however, North Carolina's Workers' Compensation Act is *not* necessarily the exclusive remedy. Our courts early held that in-

tentional assault by an employer removed him from his common law immunity:

> " 'Where the employer is guilty of a felonious or willful assault on an employee he cannot relegate him to the compensation act for recovery. It would be against sound reason to allow the employer deliberately to batter his helper, and then compel the worker to accept moderate workmen's compensation benefits. . . .' "

S. Horovitz, Injury and Death Under Workmen's Compensation Laws 336 (1944), as quoted in *Warner v. Leder*, 234 N.C. 727, 733-34, 69 S.E. 2d 6, 10 (1952); *Essick v. Lexington*, 232 N.C. 200, 210, 60 S.E. 2d 106, 113-14 (1950).

A number of other jurisdictions have reached the same result when the employer is a corporation, and the assailant is in effect an alter ego of the corporation. 2A Larson § 68.00. In the present action, however, there is no allegation that the defendant coemployee was acting as an alter ego of Dermox, Inc. Nor is there any evidence in the record from which we may conclude that Mr. Swofford was so acting. *Compare with Heskett v. Fisher Laundry & Cleaners Company, Inc.*, 217 Ark. 350, 230 S.W. 2d 28 (1950). Plaintiff's only allegation is that Mr. Swofford was acting as an agent of the corporate defendant within the course, scope, and authority of his employment.

When the intentional injury is committed by a supervisory employee rather than an employee who is the alter ego of the corporation, the majority rule is that an action in damages will *not* lie against the employer. 2A Larson § 68.21. Larson gives the following explanation:

> "The legal reason for permitting the common-law suit for direct assault by the employer, as we have seen, is that the same person cannot commit an intentional assault and then allege it was accidental. This does not apply when the assailant and the defendant are two entirely different people. Unless the employer has commanded or expressly authorized the assault, it cannot be said to be intentional from his standpoint any more than from the standpoint of any third person. Realistically, it to him is just one more industrial mishap in the factory, of the sort he has a right to consider exclusively covered by the compensation system."

2A Larson § 68.21.

In light of the foregoing, we conclude that plaintiff's claim of an intentional tort is insufficient to avoid the exclusivity provision of G.S. 97-10.1 unless there was an actual intent on the part of the corporate employer to injure her. *See Gallegos v. Chastain*, 95 N.M. 551, 624 P. 2d 60 (1981). We will not impute the malice of the assaultive employee to the corporation where the employee's status with the corporation is that of supervisor rather than of alter ego. *Contra, Meyer v. Graphic Arts International Union*, 88 Cal. App. 3d 176, 151 Cal. Rptr. 597 (1979). Since plaintiff has not alleged the employer intended her injuries, the basis of the corporate employer's liability could only be a *negligent* failure to prevent its agent's alleged attack. *See also Camacho v. Innersprings, Inc.*, 142 N.Y.S. 2d 886 (1955). We, therefore, sustain the dismissal of plaintiff's claims against Dermox, Inc. *E.g., Jablonski v. Multack*, 63 Ill. App. 3d 908, 380 N.E. 2d 924 (1978); *Gallegos v. Chastain, supra; Williams v. Smith*, 222 Tenn. 284, 435 S.W. 2d 808 (1968); *Bryan v. Utah International*, 533 P. 2d 892 (Utah 1975).

McCune v. Manufacturing Co., 217 N.C. 351, 8 S.E. 2d 219 (1940), provides additional support for our decision. That case involved a supervisor's assault on an employee the supervisor had just fired. Without discussion, the Court held that the Workers' Compensation Act was the exclusive remedy against an employer and allowed dismissal of plaintiff's charges against the defendant corporation.

We next address plaintiff's claim against James Swofford. As stated earlier, our courts have construed the Workers' Compensation Act to provide coemployees immunity from common law liability. Several jurisdictions with similar express coemployee immunity provisions have judicially limited the immunity provisions to *exclude* intentional acts causing injury. *See, e.g., Elliott v. Brown*, 569 P. 2d 1323 (Alaska 1977); *Jablonski v. Multack*, 63 Ill. App. 3d 908, 380 N.E. 2d 924 (1978); *George Petro, Inc. v. Bailey*, 438 S.W. 2d 88 (Ky. 1968); *Mazarredo v. Levine*, 274 A.D. 122, 80 N.Y.S. 2d 237 (1948); *Bryan v. Utah International*, 533 P. 2d 892 (Utah 1975).

Early decisions by our courts suggested that assault by a coemployee would be outside the immunity of our Act also: "[T]o take the case out of the Workmen's Compensation Act the injury

to an employee by a co-employee must be intentional." *Wesley v. Lea*, 252 N.C. 540, 545, 114 S.E. 2d 350, 354 (1960); *Warner v. Leder*, 234 N.C. at 733, 69 S.E. 2d at 10; *Essick v. Lexington*, 232 N.C. at 210, 60 S.E. 2d at 113.

Recently, in a case directly involving the issue, this Court held that assaultive behavior by a coemployee does limit the employee's immunity under Chapter 97. *Andrews v. Peters*, --- N.C. App. ---, 284 S.E. 2d 748 (1981). Such misconduct is outside the realm of industrial accidents which workers' compensation laws were designed to exclusively cover. We will not allow the assaultive employee to use a remedial statute as a shield against financial responsibility for his misconduct.

The present plaintiff, therefore, properly pursued her common law action against Swofford for the alleged assault.

In summary, we hold that the Workers' Compensation Act precludes plaintiff from asserting a cause of action against her corporate employer for the alleged assault of a supervisory employee. The Act does not, however, preclude her from pursuing recovery from the assaultive employee.

Affirmed as to defendant Dermox, Inc.

Reversed as to defendant Swofford.

Judges WEBB and HILL concur.

HORACE WELLS v. JERRY C. BAREFOOT AND WIFE SYBIL S. BAREFOOT

No. 8126DC405

(Filed 2 February 1982)

1. Uniform Commercial Code § 3— effective date of transactions covered by the U.C.C.

A 16 May 1966 transaction in which defendants gave plaintiff a promissory note and deed of trust was not covered by the Uniform Commercial Code as G.S. Chapter 25 applies only to transactions entered into after 30 June 1967.

2. Bills and Notes § 4— promissory note—seal—consideration

Where plaintiff presented evidence that a promissory note executed to plaintiff by defendants contained the seal of its two makers, plaintiff's evidence was sufficient to take the case to the jury on the issue of consideration, and the trial judge erred in directing a verdict for a defendant on the theory that "there was no consideration on the note."

3. Bills and Notes § 17— promissory note—under seal—partial payment on note—statute of limitations runs from partial payment

Where plaintiff presented evidence that defendants executed a note under seal in 1966; that in 1969 plaintiff made a demand on both defendants for payment on the note and that one defendant made a payment on the note, the evidence was sufficient to raise an inference that the payment was authorized or ratified by the other defendant. Further, the evidence was sufficient to raise an inference that defendants recognized the debt as existing when they made the partial payment and such payment started the running of the statute of limitations anew. G.S. 1-15, 1-46, 1-47(2), and 1-27(a).

APPEAL by plaintiff from *Bennett, Judge.* Judgment entered 8 December 1980 in District Court, MECKLENBURG County. Heard in the Court of Appeals on 7 December 1981.

This appeal arises from a civil action to recover the balance due on a promissory note. At trial, plaintiff presented evidence which tended to show the following:

In 1965, plaintiff loaned defendant Jerry Barefoot $5000 with the understanding that Mr. Barefoot would repay the loan within a year. Before a year had elapsed, Mr. Barefoot paid to plaintiff $2250 of the loan. In May of 1966, Mr. Barefoot approached plaintiff and asked for additional time to repay the loan and offered to give plaintiff a promissory note evidencing the debt and a deed of trust, on property allegedly owned by defendants Mr. and Mrs. Barefoot, securing the note. On 16 May 1966, defendants gave plaintiff the promissory note and deed of trust. The note was sealed, was signed by both defendants, was dated 16 May 1966, was in the amount of $2850 plus interest, and was due and payable on demand. Plaintiff "made demands on Mr. and Mrs. Barefoot on this note, and they made one payment on it, in the amount of $350.00" on 10 November 1969. No further payments were ever made by defendants.

On 29 November 1978, plaintiff instituted this action to recover the balance of the promissory note. At the close of plaintiff's evidence, defendants' motions for directed verdict were allowed.

Plaintiff appealed.

Warren D. Blair and Richard A. Cohan for plaintiff appellant.

Weinstein, Sturges, Odom, Groves, Bigger, Jonas & Campbell, by T. LaFontine Odom and L. Holmes Eleazer, Jr., for defendant appellees.

HEDRICK, Judge.

Plaintiff contends the trial court erred in allowing defendants' motions for directed verdict. A defendant's motion for directed verdict presents the question

> whether all the evidence, which supports the plaintiff's claim, when taken as true, considered in the light most favorable to the plaintiff and given the benefit of every reasonable inference in the plaintiff's favor which may legitimately be drawn therefrom is sufficient for submission to the jury. Contradictions, conflicts and inconsistencies in the evidence must be resolved in plaintiff's favor in determining the sufficiency of the evidence to withstand a motion for directed verdict.

Tripp v. Pate, 49 N.C. App. 329, 332-33, 271 S.E. 2d 407, 409 (1980). The record in the present case reveals that defendant Jerry Barefoot based his motion for directed verdict on the specific ground that he received no consideration for giving plaintiff the note dated 16 May 1966. Defendant Sybil Barefoot based her motion on the specific ground that the $350 payment made on 10 November 1969 did not toll the statute of limitations as to her. The record further discloses that in granting defendants' motions for directed verdict, the court adopted the grounds argued by defendants. Hence, in reviewing the propriety of the respective directed verdicts, the inquiry on appeal is limited to determining whether there was sufficient evidence of consideration and of a tolling of the statute of limitations.

[1] The 16 May 1966 transaction at issue in this case is not covered by the Uniform Commercial Code, the present G.S. Chapter 25, since that chapter applies only to transactions entered into after 30 June 1967. *See* G.S. § 25-10-101; *Yates v. Brown*, 275 N.C. 634, 642, 70 S.E. 2d 477, 483 (1969).

[2] Proof that a note was executed under seal raises a presumption of good and sufficient consideration; this rule applies whether

the instrument is non-negotiable, *Royster v. Hancock*, 235 N.C. 110, 112, 69 S.E. 2d 29, 30 (1952); *Honey Properties, Inc. v. City of Gastonia*, 252 N.C. 567, 571, 114 S.E. 2d 344, 347 (1960); *McGowan v. Beach*, 242 N.C. 73, 77, 86 S.E. 2d 763, 766 (1955); *Basketeria Stores, Inc. v. Public Indemnity Co.*, 204 N.C. 537, 538, 168 S.E. 822, 823 (1933), or is negotiable and governed, as would be the case here, by the law applicable to negotiable instruments executed before the 30 June 1967 effective date of the Uniform Commercial Code. *Wachovia Bank & Trust Co. v. Smith Crossroads, Inc.*, 258 N.C. 696, 697, 129 S.E. 2d 116, 116 (1963); *Mills v. Bonin*, 239 N.C. 498, 501, 80 S.E. 2d 365, 367 (1954); *see also* § G.S. 25-10-101; *Yates v. Brown, supra;* G.S. § 25-10-102(2), -1-103. When the presence of a seal raises such a presumption, the plaintiff has discharged his burden of producing evidence on the issue of consideration. *See State v. Williams*, 288 N.C. 680, 687, 220 S.E. 2d 558, 564-65 (1975); 2 Stansbury's N.C. Evidence § 218 (Brandis rev. 1973). The defendant may rebut this presumption of consideration, but has the burden to do so. *Little v. Grubb Oil Co.*, 12 N.C. App. 394, 395, 183 S.E. 2d 290, 291 (1971). "The question of whether a defendant has carried this burden is for the jury unless the plaintiff's own evidence establishes the defense of failure of consideration." *Little v. Grubb Oil Co., supra* at 395, 183 S.E. 2d at 291; *see also Chesson v. Gardner*, 32 N.C. App. 777, 778, 233 S.E. 2d 668, 668 (1977). A presumption not only discharges the proponent's burden of producing evidence, but also throws upon the other party the burden of producing evidence that the presumed fact does not exist. *State v. Williams, supra;* 2 Stansbury's, *supra.* If the other party produces no such evidence or proffers evidence insufficient for that purpose, the party against whom the presumption operates will be subject to an adverse ruling, by the judge, directing the jury to find in favor of the presumed fact if the basic fact is found to have been established. *State v. Williams, supra;* 2 Stansbury's, *supra.* A presumption merely fixes on the opponent the burden of producing evidence, and leaves the burden of the issue unaffected. *State v. Williams, supra;* 2 Stansbury's, *supra.*

In the present case, plaintiff presented evidence that the promissory note contained the seal of its two makers, Jerry and Sybil Barefoot. Thus, plaintiff's evidence was sufficient to take the case to the jury on the issue of consideration, and the trial

judge erred in directing a verdict for defendant Jerry Barefoot on the theory that "there was no consideration on the note."

[3] With respect to whether plaintiff's claim against defendants was barred by the statute of limitations, it is to be noted that the statute of limitations for an action upon a sealed instrument is ten years. G.S. §§ 1-15, -46, -47(2). The statute of limitations on an action on a promissory note payable on demand begins to run from the date of the execution of the note. *Caldwell v. Rodman*, 50 N.C. 139, 140-41 (1857); *Causey v. Snow*, 122 N.C. 326, 329, 29 S.E. 359, 360 (1898); *see also Shields v. Prendergast*, 36 N.C. App. 633, 634, 244 S.E. 2d 475, 476 (1978).

In *United States Steel Corp. v. Lassiter*, 28 N.C. App. 406, 408, 221 S.E. 2d 92, 94 (1976), Judge Britt, writing for this Court, said, "It is well-settled in this jurisdiction that each payment made on a current account starts the running of the statute of limitations anew as to all items not barred at the time of payment." The limitations period on an action on a promissory note will begin anew when a partial payment *nothing else appearing* is made by the debtor before the limitations period has expired. *See Whitley's Electric Service, Inc. v. Sherrod*, 293 N.C. 498, 507-08, 238 S.E. 2d 607, 613-14 (1977).

Although defendant Jerry Barefoot made no contention in the trial court that plaintiff's claim against him was barred by the statute of limitations, he does argue in this Court, citing *Bryant v. Kellum*, 209 N.C. 112, 182 S.E. 708 (1935), that the payment by him of $350 did not start the statute of limitations running anew. Defendant Sybil Barefoot, citing G.S. § 1-27(a), argues that the payment of $350 by her husband did not toll the running of the statute of limitations with respect to plaintiff's claim against her.

G.S. § 1-27(a) provides:

> After a cause of action has accrued on any obligation on which there is more than one obligor, any act, admission, or acknowledgment by any party to such obligation . . . , which removes the bar of the statute of limitations or causes the statute to begin running anew, has such effect only as to the party doing such act or making such admission or acknowledgment, and shall not renew, extend or in any manner impose liability of any kind against other parties to such obligation who have not authorized or ratified the same.

With respect to the payment of the $350, plaintiff testified, "I made demands on Mr. and Mrs. Barefoot on this note, and they made one payment on it, in the amount of $350.00. That payment was made on November 10, 1969." Although the evidence tends to show that the husband actually paid the $350 to the plaintiff, we believe that when all the evidence is considered in the light most favorable to the plaintiff, it is sufficient to raise an inference that the payment was authorized or ratified by the wife. Thus, the directed verdict for defendant Sybil Barefoot on the grounds that plaintiff's claim was barred by the statute of limitations must be reversed.

In *Bryant v. Kellum, supra* at 113-14, 182 S.E. at 709, our Supreme Court held that a debtor's payment of $10 on a $500 obligation well after the limitations period had expired would not prevent the bar of the statute of limitations absent evidence that the debtor made the payment "under such circumstances as will warrant the clear inference that the debtor recognizes the debt as then existing and his willingness or, at least, his obligation to pay the balance." *Bryant* has no application in the present case. In *Bryant*, the limitations period had already expired when the $10 payment was made. Here, plaintiff presented evidence that the $350 payment was made prior to the running of the statue of limitations, and such payment would have tolled the statute of limitations on 10 November 1969. Considering plaintiff's evidence in the light most favorable to him, his claim would not be barred by the statute of limitations, since his complaint was filed on 29 November 1978. Assuming arguendo that *Bryant* had application in the present case, we believe the evidence was sufficient to raise a clear inference that defendants recognized the debt as then existing and recognized their willingness, or at least, their obligation to pay the balance.

We hold that the trial court erred in directing a verdict for the defendants, and the cause must be remanded to the district court for a new trial.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. MITCHELL JOHN GRAY

No. 8112SC699

(Filed 2 February 1982)

1. **Arrest and Bail § 3.4; Searches and Seizures § 12— investigatory stop—probable cause for arrest—search incident to arrest**

An officer had a reasonable suspicion that defendant was involved in criminal activity so as to justify his investigatory stop and detention of defendant where the officer had received a report from a fellow officer that defendant was driving a vehicle with expired temporary license tags. The officer then had probable cause to arrest defendant when he observed that the temporary license tags on defendant's vehicle had been expired for over a month, and the officer could lawfully search defendant's person as an incident to the lawful arrest.

2. **Criminal Law § 75.7; Searches and Seizures § 9— no custodial interrogation—Miranda warnings not required—seizure of pills found on defendant—use of defendant's statement to show probable cause**

Where a police officer searched defendant as an incident to his lawful arrest and discovered a plastic bag containing 50 blue-green pills in defendant's coat pocket, there was no custodial interrogation requiring the officer to give defendant the *Miranda* warnings when the officer asked defendant what the pills were and defendant stated that they were LSD; therefore, defendant's statement was not the product of any illegality on the part of the officer, the officer could rely on defendant's statement in determining that there was probable cause to believe that the bag of pills was contraband, and the officer could thus lawfully seize the pills.

3. **Criminal Law § 73.3— testimony not hearsay**

An officer's voir dire testimony that he was told by another officer that defendant was driving a vehicle with expired license tags was not inadmissible hearsay since the testimony was not offered to prove that defendant was driving with expired tags but was offered to prove that the officer was told by another that defendant was driving with expired tags.

APPEAL by defendant from *Lee, Judge.* Judgment entered 2 April 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals on 9 December 1981.

Defendant was charged in a proper bill of indictment with the felonious possession of Lysergic Acid Diethylamide (LSD) in violation of G.S. § 90-95(a)(3). Upon defendant's motion to suppress any evidence relating to his possession of LSD, the trial court conducted a hearing at which the State presented evidence which tended to show the following:

On 12 November 1980, defendant was observed operating a black and brown Monte Carlo automobile by Joseph Herman, a deputy sheriff. Shortly thereafter, Deputy Herman was advised by Lonnie Sanders, another deputy sheriff on duty, that the black and brown Monte Carlo had just passed Sanders and was being operated with expired temporary license tags about which defendant had been warned two weeks earlier. Deputy Herman stopped defendant and observed that the temporary tags on the vehicle had expired on 5 October 1980. Deputy Herman then arrested defendant for operating a motor vehicle with expired license tags. Thereafter, Deputy Herman searched defendant and found, in defendant's left front coat pocket, a small plastic bag containing fifty blueish green pills. When Deputy Herman pulled the package out, he asked defendant what it was and defendant stated it was LSD. Deputy Herman then placed the pills in his vehicle and asked defendant what he was going to do with them. Defendant stated that he was going to sell them.

Defendant presented no evidence at the hearing, and the court entered findings of fact and conclusions of law. The court concluded the pills were seized pursuant to a lawful arrest, and denied defendant's motion to suppress insofar as it related to the admission of the pills into evidence. The court allowed the defendant's motion to suppress the defendant's statements that the pills were "LSD" and that he intended to sell them.

Upon the court's denial of the defendant's motion to suppress the pills as evidence, the defendant entered the plea of guilty, and appeals to this Court from a judgment imposing a prison sentence of not less than three years nor more than five years.

Attorney General Rufus L. Edmisten, by Assistant Attorney General David Gordon, for the State.

Assistant Public Defender Orlando F. Hudson, Jr., for the defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the trial court's finding and conclusion that the search of the defendant and the seizure of the pills from defendant were pursuant to a lawful arrest. This

assignment of error may be resolved by an inquiry into the propriety of each stage in the chain of events beginning with the original detention of defendant by Deputy Herman and including the subsequent arrest of defendant, the search of defendant after the arrest, and Deputy Herman's seizure of the pills found upon searching defendant.

[1] A police officer's limited investigatory detention of an individual may, consistent with the Fourth Amendment, be made when the officer has a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. *State v. Tillett*, 50 N.C. App. 520, 274 S.E. 2d 361, *appeal dismissed*, 302 N.C. 633, 280 S.E. 2d 448 (1981); *State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776, *cert. denied*, 444 U.S. 907, 62 L.Ed. 2d 143, 100 S.Ct. 220 (1979). The standard required of mere investigatory detentions is less exacting than the traditional notion of probable cause, which is the applicable standard for arrests. *State v. Thompson*, *supra*. In determining whether a police officer had a reasonable suspicion warranting an investigatory detention, the circumstances should be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training. *State v. Thompson*, *supra*.

In the present case, the State presented evidence that Deputy Herman stopped defendant's vehicle only after having heard a report from a fellow deputy sheriff that defendant was driving with expired temporary license tags in violation of G.S. §§ 20-79.1, -111. Since Deputy Herman had been so informed by a fellow officer, he was cognizant of objective and articulable facts which would support a reasonable suspicion that defendant was involved in criminal activity. Hence, Deputy Herman's detention of defendant was proper.

"An arrest is *constitutionally* valid whenever there exists probable cause to make it." *State v. Wooten*, 34 N.C. App. 85, 88, 237 S.E. 2d 301, 304 (1977). Probable cause exists when the facts and circumstances known to the arresting officer at the time of arrest were sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense. *State v. Mangum*, 30 N.C. App. 311, 226 S.E. 2d 852 (1976). Furthermore, "[a]n officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal

offense in the officer's presence." G.S. § 15A-401(b)(1); *State v. Wooten, supra.* Any incriminating evidence which comes to the officer's attention during a valid investigatory detention may establish a reasonable basis for finding the probable cause necessary for effecting a warrantless arrest. *State v. Rudolph,* 39 N.C. App. 293, 250 S.E. 2d 318, *disc. rev. denied, appeal dismissed,* 297 N.C. 179, 254 S.E. 2d 40 (1979).

In the present case, Deputy Herman had lawfully detained defendant and observed that defendant's temporary license tags had been expired for over a month, in violation of G.S. §§ 20-79.1, -111. Deputy Herman thereupon had reasonable grounds to believe that defendant was committing an offense in his presence. Deputy Herman's arrest of defendant, therefore, was proper. Furthermore, since an arresting officer may, consistent with the Fourth Amendment, conduct a warrantless search of the person lawfully arrested, *State v. Nesmith,* 40 N.C. App. 748, 253 S.E. 2d 594 (1979), Deputy Herman's search of defendant incident to the lawful arrest was proper.

[2] The remaining question to be resolved under this assignment of error is the propriety of the seizure, by Deputy Herman, of the pills found on defendant's person. That an officer is within constitutional bounds in discovering the presence of an item on the person of one whom he searches is not alone sufficient to justify the officer's seizure of that item. *State v. Beaver,* 37 N.C. App. 513, 246 S.E. 2d 535 (1978). "Any inquiry into the lawfulness of the seizure must go further, as the limits of reasonableness which are placed upon searches are equally applicable to seizures." *State v. Beaver, supra,* at 517, 246 S.E. 2d at 538. An item may be seized in a constitutional manner only when the officer seizing it has probable cause to believe that the object constitutes contraband or evidence of a crime. *State v. Beaver, supra.*

In the present case, Deputy Herman, upon finding the plastic bag of pills on defendant asked defendant what it was, and defendant stated that it was LSD. It was only then that Deputy Herman seized the pills, but at that point he had been apprised of sufficient information to warrant a reasonable belief that the bag of pills was contraband and evidence of a crime.

Defendant contends, however, that "[t]he pills were seized as a controlled substance solely by the exploitation of an illegality,

i.e. . . . the officer gained knowledge that they were a controlled substance by improperly interrogating the defendant," without first instructing defendant of his rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). We hold, however, that the statement by defendant that the pills were "LSD" was not procured by a custodial interrogation requiring the safeguards of *Miranda*.

State v. Ratliff, 281 N.C. 397, 189 S.E. 2d 179 (1972), involved a defendant's appeal from a conviction for murder. Defendant had been arrested by a police officer for carrying a concealed weapon. At the time of the arrest, the officer had no knowledge that a murder had been committed and did not suspect defendant of murder or any capital felony. He informed defendant of his *Miranda* rights and noticed that three chambers in defendant's gun were empty. The officer then asked defendant, without securing any waiver of his *Miranda* rights, where defendant had been and what defendant had been shooting. Defendant replied that he had just shot a woman. The court, on appeal, refused to suppress defendant's inculpatory statement, holding that *Miranda* was inapplicable, and that the conversation between the officer and the defendant was not an in-custody interrogation of a murder suspect and pointing out that "[i]t was no incommunicado interrogation of an individual in a police dominated atmosphere." *State v. Ratliff, supra* at 407, 189 S.E. 2d at 185.

The atmosphere in the present case was similarly not police dominated, and defendant was not held incommunicado. The focus and arrest of defendant was for driving with expired temporary license tags, not possession of LSD. "[T]he holding in *Miranda* was designed to protect an accused from *coercive* police practices." *State v. Porter*, 303 N.C. 680, 694, 281 S.E. 2d 377, 386 (1981). "[T]o constitute an 'interrogation' within the meaning of *Miranda*, the conduct of the police must involve a measure of compulsion." *State v. Porter, supra* at 692, 281 S.E. 2d at 385-86. In the present case, there were no circumstances of compulsion nor of coercive police practices, and the question asked of defendant pertained to items totally unrelated to anything with which he was charged at the time of questioning. Under these circumstances, there was no custodial interrogation of defendant, and Deputy Herman was not required to advise defendant of his rights under *Miranda*. Defendant's statement that the pills were "LSD" was therefore not the

product of any illegality on the part of Deputy Herman, and Deputy Herman could therefore rely on defendant's statement in determining whether there was probable cause to believe that the bag of pills was contraband. Even if Deputy Herman were not allowed to rely on the defendant's statements, the mere sighting by Deputy Herman of a plastic bag of fifty blueish green pills was sufficient to enable Deputy Herman to form a reasonable belief that the pills were contraband. *See State v. Beaver, supra.* Hence, Deputy Herman's seizure of the pills was proper and this assignment of error is overruled.

[3] Finally, defendant makes two assignments of error regarding the court's admission at *voir dire* of testimony by Deputy Herman that he was told by Deputy Sanders that defendant was driving with expired tags. Defendant argues that this testimony was inadmissible hearsay and that it violated his constitutional rights to confront witnesses against him.

The assertion of any person, other than that of the witness himself in his present testimony, is not hearsay when offered into evidence for some purpose other than to prove the truth of the matter asserted. *State v. Hood,* 294 N.C. 30, 239 S.E. 2d 802 (1978). Furthermore, " '[t]he declarations of one person are frequently admitted to evidence a particular state of mind of another person who heard or read them . . . to explain his subsequent conduct.' 1 Stansbury's N.C. Evidence § 141 (Brandis rev. 1973) at 467-71." *State v. Irick,* 291 N.C. 480, 498, 231 S.E. 2d 833, 844-45 (1977).

The challenged evidence in the present case was not offered to prove that defendant was driving with expired tags, but to prove that Deputy Herman *was told* by a fellow officer that defendant was driving with expired tags. The evidence tended to show that Deputy Herman had received information which would justify his forming a reasonable suspicion that defendant was involved in criminal activity. As such, the evidence was not hearsay. Similarly, admission of the testimony in no way deprived defendant of an opportunity to confront the evidence that Deputy Herman had received such information. Defendant had ample opportunity to cross-examine Deputy Herman on the veracity of his statement that he had received information from another officer about defendant's offense. These two assignments of error are without merit.

We hold that the evidence adduced at *voir dire* supports the court's critical findings of fact, which in turn support the order denying defendant's motion to suppress.

Affirmed.

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

HORACE M. DUBOSE, III, TRUSTEE, AND ROBERT J. BERNHARDT, TRUSTEE, AS THEIR INTERESTS MAY APPEAR v. GASTONIA MUTUAL SAVINGS AND LOAN ASSOCIATION AND L. B. HOLLOWELL, JR., TRUSTEE

No. 8127SC298

(Filed 2 February 1982)

1. **Mortgages and Deeds of Trust § 19— foreclosure—dissolution of temporary restraining order proper**

In an action filed to enjoin the exercise of a power of sale in a deed of trust, the trial court did not err in denying plaintiffs' motion for a preliminary injunction as plaintiffs had a hearing contemplated by G.S. 45-21.34 and (1) failed to establish probable cause showing that they could ultimately prevail in a final determination, and (2) failed to establish a reasonable apprehension of irreparable loss to them unless injunctive relief was granted. Plaintiffs did not allege that the deed of trust contained no foreclosure provision or that the deed of trust was not in default nor did they present any evidence of what they contended was the balance due on the note. It was incumbent upon plaintiffs to present such testimony or other evidence as would persuade the court that they would have been irreparably harmed by the pending foreclosure.

2. **Mortgages and Deeds of Trust § 31— foreclosure sale—failure to obtain stay of execution—questions on appeal moot**

Where an order denying plaintiffs' motion for a preliminary injunction was entered and since that time the defendants have completed their foreclosure sale; the property has been conveyed; and the sale has been confirmed by the clerk and the superior court, and because plaintiffs obtained neither a stay of execution from the trial court pursuant to Rule 62 nor a temporary stay or a writ of supersedeas from the appellate court pursuant to Appellate Rules 8 and 23, the sale of the property rendered questions raised by plaintiffs on appeal moot.

APPEAL by plaintiffs from *Ferrell, Judge*. Judgment signed 14 November 1980 in Superior Court, GASTON County. Heard in the Court of Appeals 21 October 1981.

Plaintiffs filed this action to enjoin the exercise of the power of sale in a 1978 deed of trust, alleging that the property described in the deed of trust had been conveyed to them in 1979. The trial court denied plaintiffs' motion for a preliminary injunction.

Horace M. DuBose, III, for plaintiff appellants.

Hollowell, Stott, Hollowell, Palmer & Windham, by James C. Windham, Jr., for defendant appellees.

BECTON, Judge.

PROCEDURAL AND FACTUAL HISTORY

The resolution of this appeal, though simple, requires a painstaking review of transactions that have spawned several other lawsuits, some of which have reached the appellate courts.[1]

On 30 May 1978, A. C. Burgess, Jr. gave a promissory note to defendants in the amount of $56,000.00. The promissory note was secured by a deed of trust encumbering five residential lots that Burgess personally owned. Burgess ultimately defaulted on the obligation and a foreclosure proceeding was initiated by defendants by the filing on 12 October 1979 of a Notice of Hearing before the Clerk of Court of Gaston County. Significantly, at the time of the 7 November 1979 hearing in this matter, the plaintiffs had received and recorded a sheriff's deed dated 14 February 1979 to the five lots that are the subject of this lawsuit.

1. *Questor Corp. v. DuBose*, 46 N.C. App. 612, 265 S.E. 2d 501, *cert. denied* 300 N.C. 375, 267 S.E. 2d 678 (1980) (action to declare an execution sale and sheriff's deed void because defendants did not pay their bid in cash but merely cancelled judgments against the property owners).

In Re Foreclosure of Burgess, 47 N.C. App. 600, 267 S.E. 2d 915 (1980) (application of G.S. 45-21.16 to a petition to foreclose pursuant to power of sale in a deed of trust).

Southern Athletic/Bike v. House of Sports, Inc., 53 N.C. App. 804, 281 S.E. 2d 698 (1981) (order, pursuant to Rule 60 of the North Carolina Rules of Civil Procedure, vacating a default judgment against A. C. Burgess was affirmed on the basis of defective service of process).

In Re Execution Sale of Burgess, No. 8127SC223 (trial court's order setting aside sheriff's deed conveying five lots to judgment creditors affirmed in an opinion filed this day by the North Carolina Court of Appeals).

Following the 7 November 1979 hearing, the Gaston County Clerk entered an order authorizing defendants to foreclose in accordance with their deed of trust. That order was subsequently affirmed by the Gaston County Superior Court and by this Court in *In Re Foreclosure of Burgess*, 47 N.C. App. 600, 267 S.E. 2d 915 (1980). Although the dispositive issue in *In Re Foreclosure of Burgess* involved "the scope of the procedures under G.S. 45-21.16 for hearing prior to the exercise of a power of sale under a deed of trust," *id.* at 602, 267 S.E. 2d at 917, we suggested in that case that plaintiffs might have been entitled to injunctive relief. Specifically, we said:

> Having received the notice and hearing intended by the statute, [plaintiffs] are now able to utilize the procedure of G.S. 45-21.34 to enjoin the mortgage sale "upon [any] legal or equitable ground which the court may deem sufficient." If and when [plaintiffs] choose to apply for injunctive relief, the dispute over the balance due on the note and deed of trust and the manner in which the balance was computed will certainly be relevant to the issue of [plaintiffs'] right to relief. As to the title dispute, we note that the 12 October 1979 order of superior court declaring the sheriff's deed to DuBose and Bernhardt null and void was reversed by this Court in *Questor Corp. v. DuBose*, 46 N.C. App. 612, 265 S.E. 2d 501 (1980) and the cause was remanded with direction to dismiss the action challenging the validity of that deed.[2]

Id. at 600, 267 S.E. 2d at 918.

On 9 September 1980, defendants filed another Notice of Foreclosure. On 2 October 1980, the plaintiffs, following this Court's suggestion in *In re Foreclosure of Burgess*, filed their complaint seeking injunctive relief pursuant to G.S. 45-21.34. Plaintiffs contended that the defendants' 9 September 1980 renewed notice of sale should be enjoined and alleged (1) that there was a dispute over the title to the property, over the

2. Following the remand in *Questor Corp. v. DuBose*, the Gaston County Clerk of Court vacated his order of confirmation pursuant to which the Sheriff's deed to the five lots in question was delivered to plaintiff and rescinded and set aside the conveyance of the five lots to the plaintiff. This action by the Gaston County Clerk was affirmed by the Gaston County Superior Court and has this day been affirmed by this Court. *In re Execution Sale of A. C. Burgess*, No. 8127SC223.

balance due under the note, and over the monthly payments due under the note; (2) that the interest rate on the amount owed of 9% compounded monthly was usurious; and (3) that they would suffer irreparable harm if defendants were not enjoined from exercising the power of sale.

Plaintiffs were initially granted a temporary restraining order on 2 October 1980. However, when the motion for injunctive relief was heard on 3 November 1980, Judge Ferrell entered an Order dissolving the temporary restraining order and denying plaintiffs' motion for a preliminary injunction. From this order, plaintiffs appeal to this Court. Significantly, following plaintiffs' notice of appeal, the foreclosure sale was completed on 27 February 1981, at which time a trustee's deed conveyed the subject property to Billy Cline.

ISSUE

The issue: Did the trial court err in dissolving the temporary restraining order and in denying plaintiffs' motion for a preliminary injunction thereby allowing defendant to consummate the sale of the land under a power of sale contained in a deed of trust?

The answer: No.

Although plaintiffs argue that the "gravamen of this case is the irreparable harm to plaintiffs by permitting the exercise of a power of sale while the title and the balance due are in controversy," we are not persuaded that plaintiffs have established that they are entitled to the injunctive relief they request. We reach this conclusion after having considered the scope of our review and having balanced plaintiffs' right, based on case law and statute, to enjoin the sale of land in which they claim an interest, against defendant's contractual right to foreclose in accordance with the terms of a note and deed of trust.

ANALYSIS

Ordinarily, the granting of injunctive relief lies in the sound discretion of the court. *Huggins v. Board of Education*, 272 N.C. 33, 157 S.E. 2d 703 (1967); *Conference v. Creech and Teasley v. Creech and Miles*, 256 N.C. 128, 123 S.E. 2d 619 (1962); *Lance v. Cogdill*, 238 N.C. 500, 78 S.E. 2d 319 (1953). And "[w]hile this

Court, upon an appeal from the granting or denial of a temporary injunction, is not bound by the findings of fact in the court below, and may review the evidence and make its own findings of fact, the burden is upon the appellant to show error by the lower court." 272 N.C. at 41, 157 S.E. 2d at 708.

Even absent a statute, our courts have "the power to restrain the exercise of the power of sale under a mortgage or a deed of trust where a sale thereunder would work an injustice to the rights of [those] interested in the property [if] there should be some equitable element involved, as fraud, mistake, or the like." *Sineath v. Katzis*, 219 N.C. 434, 440, 14 S.E. 2d 418, 421 (1941). *See also Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E. 2d 566 (1977). And, by statute, any person having a legal or equitable interest in land may, prior to the confirmation of any sale of the land by a mortgagee or trustee, enjoin such sale "upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, *or upon any other legal or equitable ground* which the Court may deem sufficient. . . ." G.S. 45-21.34 (emphasis added).

In this case, plaintiffs seek to utilize the procedures of G.S. 45-21.34 to enjoin the foreclosure sale. Plaintiffs have had the hearing contemplated by statute and have, in our view, (1) failed to establish probable cause showing that they could ultimately prevail in a final determination, and (2) failed to establish a reasonable apprehension of irreparable loss to them unless injunctive relief is granted. *See Waff Bros. v. Bank*, 289 N.C. 198, 221 S.E. 2d 273 (1976); *Service Co. v. Shelby*, 252 N.C. 816, 115 S.E. 2d 12 (1960).

Significantly, plaintiffs did not allege that the deed of trust contained no foreclosure provision or that the deed of trust was not in default. Upon allegations relating primarily to an alleged controversy affecting title to the property, plaintiffs prayed for injunctive relief only. When the sole purpose of the action is to obtain injunctive relief, the trial court properly may dissolve the temporary restraining order and dismiss the action when the movant fails to present facts entitling him to relief. *Compare Rheinhardt v. Yancey*, 241 N.C. 184, 84 S.E. 2d 655 (1954) (court properly dissolved restraining order and dismissed the action

upon demurrer when the Complaint failed to state facts sufficient to constitute a cause of action). (We note, parenthetically, that the title dispute in this case was created not by the defendant but rather by the plaintiffs who purchased the land months after defendants had recorded their deed of trust to the property.) In this factual context, we consider the extraordinary relief requested by the plaintiffs—that is, almost one year after the foreclosure process was initiated, plaintiffs requested the restraint of the contractual rights of the defendants to foreclose upon property in accordance with the terms of a note and deed of trust which encumbered the property.

Injunctive relief is not a matter of right but is granted sparingly and cautiously. "In other words, the relief should be awarded only in clear cases, reasonably free from doubt, and when necessary to prevent great and irreparable injury. The complainant has the burden of proving the facts which entitle him to relief." 42 Am. Jur. 2d, Injunctions, § 26, p. 760.

Although the plaintiffs at the hearing offered certain exhibits and a modicum of testimony, none of the evidence offered supports the relief they requested. Plaintiffs claim title to the property in question, but they did not show that their title was obtained free and clear of the earlier recorded deed of trust held by defendants. Moreover, the trial court, by separate order affirming a prior order of the Gaston County Clerk of Court, set aside the deed transferring the land in controversy to the plaintiffs and thus resolved the dispute as to title. Further, plaintiffs presented no evidence to support their allegations of usury and collusion. Although plaintiffs did, by way of stipulation, get their unsupported contention in the record that the balance on the note was not in excess of $37,794.76 as compared to a contended balance of $43,495.02 by defendants, we cannot say, upon this record, that the trial court abused its discretion in denying the injunctive relief requested.

Significantly, plaintiffs had more than a hearing on the pleadings. They presented evidence; they called a witness. And, although present at the hearing, plaintiffs rested on their "contention" in a stipulation; they did not testify or present any evidence of what they contended was the balance due on the note. The plaintiffs alleged, but presented no evidence showing, that they

could not bid at the sale and maintain their title by securing a foreclosure deed. We believe it was incumbent upon plaintiffs to present such testimony or other evidence as would persuade the court that they would have been irreparably harmed by the pending foreclosure. This they failed to do.

[2] Separate and apart from our holding that plaintiffs failed to establish probable cause showing they would ultimately prevail on the merits and further failed to establish a reasonable apprehension of irreparable loss, this case is subject to dismissal. The Order appealed from was entered on 14 November 1980. Since that time the defendants have completed their foreclosure sale; the property has been conveyed to Billy Cline, the highest bidder; and the sale has been confirmed by the Clerk *and* the Superior Court. Because plaintiffs obtained neither a stay of execution from the trial court pursuant to Rule 62 of the North Carolina Rules of Civil Procedure nor a temporary stay or a writ of supersedeas from this Court pursuant to Rules 8 and 23 of the North Carolina Rules of Appellate Procedure, the sale of the property to Billy Cline rendered the questions raised by plaintiffs moot.

For the foregoing reason, the Order of the trial court is

Affirmed.

Judge CLARK and Judge ARNOLD concur.

IN RE EXECUTION SALE OF A. C. BURGESS, JR. REAL ESTATE; PREMIER ATHLETIC PRODUCTS, TENNESSEE AMERICAN, INC., VITTER SPORTS, INC., THERMOS DIVISION OF KING SEELY THERMOS COMPANY, WINNING WAYS, INC., WILLIAM ISELIN & CO., VANCO DIVISION OF VANDERVOORT HARDWARE COMPANY, FIRST FACTORS CORP., MEDALIST INDUSTRIES, INC., AND SOUTHERN ATHLETIC/BIKE v. A. C. BURGESS, JR. AND HOUSE OF SPORTS, INC.

No. 8127SC223

(Filed 2 February 1982)

Mortgages and Deeds of Trust § 31— resale of foreclosed property confirmed by clerk and judge of superior court—appeal from order moot

Where property involved in a case had been sold pursuant to a foreclosure of a deed of trust, any legal questions presented by the appeal from the order of the judge of superior court affirming the order of the clerk declaring the execution sale null and void and setting aside the sheriff's deed of the property became moot, and the appeal was subject to dismissal.

APPEAL by Respondents Horace M. DuBose, III and Robert J. Bernhardt, Trustees, from *Ferrell, Judge.* Judgment entered 7 November 1980 in Superior Court, GASTON County. Heard in the Court of Appeals 13 October 1981.

Horace M. DuBose, III, for respondent appellants.

Michael David Bland, for petitioner appellee W. R. Mathis.

HEDRICK, Judge.

The record before us discloses that the identical property which is the subject of this proceeding was conveyed in a deed of trust by A. C. Burgess, Jr., to L. B. Hollowell, Jr., trustee for Gastonia Mutual Savings and Loan Association on 30 May 1978; that a foreclosure proceeding was instituted by Hollowell and Gastonia Mutual on 12 October 1979 in Gaston County and that the property in question was sold under foreclosure on 6 February 1981 and that the property in question was conveyed to Billie Cline by the trustee's deed on 27 February 1981; and that this re-sale was confirmed by the clerk of Superior Court on 27 February 1981. The confirmation of re-sale was ratified by an order of the judge of Superior Court on 14 April 1981.

The records of this Court further disclose that Horace M. DuBose and Robert Bernhardt, who are trustees for various creditors of A. C. Burgess, Jr., instituted a proceeding in the Superior Court of Gaston County to enjoin the foreclosure hereinbefore described, and that said injunction was denied by order of the judge of Superior Court dated 3 November 1980. Our records further disclose that Horace DuBose and Robert Bernhardt appealed to this Court from Judge Ferrell's order denying injunctive relief and that this Court affirmed the order denying the injunctive relief in an opinion filed 2 February 1982.

Because the identical property involved in the present case has been sold pursuant to the foreclosure of a deed of trust executed on 30 May 1978, any legal questions presented by the appeal in this case from the order of the judge of Superior Court affirming the order of the clerk declaring the execution sale null and void and setting aside the sheriff's deed of the property have become moot, and the appeal is subject to dismissal. What was said in *Davis v. Zoning Board of Adjustment of Union County,* 41 N.C. App. 579, 582, 255 S.E. 2d 444, 446 (1979) we believe to be appropriate:

> When, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court. [Citations omitted.]

Nevertheless, we have examined the record in light of the many matters discussed in the briefs, and conclude that Judge Ferrell, in affirming the order of the clerk, correctly held that the critical findings made by the clerk were supported by the record and that she correctly and properly declared the execution sale null and void and properly set aside the sheriff's deed.

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. DENNIS HANNAH

No. 8127SC800

(Filed 2 February 1982)

Burglary and Unlawful Breakings § 7— felonious breaking or entering—instruction on misdemeanor not required

In a prosecution for felonious breaking or entering of a house and larceny of guns therefrom, the trial court was not required to instruct the jury on the lesser included offense of misdemeanor breaking or entering on the ground that the jury could find that defendant did not have the intent to commit the felony of larceny at the time he entered the house where the uncontradicted evidence tended to show that defendant and an accomplice went to the house in question looking for the owner's nephew; when they arrived, no one was at home; nevertheless, defendant and the accomplice went inside, went upstairs, and found two shotguns which they took with them; and defendant and the accomplice later sold the shotguns and divided the profits.

Judge BECTON dissenting.

APPEAL by defendant from *Burroughs, Judge.* Judgment entered 1 April 1981 in Superior Court, GASTON County. Heard in the Court of Appeals 12 January 1982.

Defendant was indicted and convicted of felonious breaking or entering and felonious larceny. He appeals from a judgment of imprisonment.

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

Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant-appellant.

HILL, Judge.

Defendant and Albert James Weldon came to Jerry Howie's house on North Central Avenue in Belmont looking for Howie's wife's nephew, Jimmy West. When they arrived, no one was at home. Nevertheless, defendant and Weldon went inside. They went upstairs, looked around, and found two shotguns. Defendant and Weldon took both guns across the street to Sacred Heart College where they hid them in the woods. Later, defendant and Weldon sold the guns for one hundred dollars, which they divided

"fifty-fifty." Weldon testified that he and defendant "had drunk about a gallon of vodka the night before." Weldon was still drunk when he entered Howie's house. Defendant presented no evidence.

Defendant's sole argument is that the trial judge erred in failing to instruct the jury on the lesser included offense of misdemeanor breaking or entering. Specifically, defendant contends that there is no evidence that he broke into or entered Howie's house with the intent to commit a felony therein to support his conviction of felonious breaking or entering. We do not agree.

> The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor.

State v. Hicks, 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954) (emphasis original). "However, it is not necessary to submit the lesser included offense if the evidence discloses no conflicting evidence relating to the essential elements of the greater crime." *State v. Brown*, 300 N.C. 41, 50, 265 S.E. 2d 191, 197 (1980).

Of course, in order to convict defendant as charged, the jury must find beyond a reasonable doubt that at the time defendant entered the building, he had the *intent* to perform the wrongdoing charged in the indictment. *State v. Faircloth*, 297 N.C. 388, 255 S.E. 2d 366 (1979); *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27 (1965). "The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the house." *State v. Tippett*, 270 N.C. 588, 594, 155 S.E. 2d 269, 274 (1967).

In the case *sub judice*, defendant entered Howie's house after discovering that no one was there. While inside the house, he and Weldon looked around, found, and took two shotguns. Thereafter, they hid the guns, sold them, and split the profit. This evidence is sufficient from which the jury reasonably could infer that defendant *intended* to commit a felony, larceny, at the time he entered Howie's house. There being no conflict in the evidence of the greater offense, felonious breaking or entering, the trial judge did not err in failing to instruct the jury on the lesser included offense, misdemeanor breaking or entering.

No error.

Judge HEDRICK concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Without applying the relevant principles of law to the facts in this case, the majority concludes that there is "no conflict in the evidence of . . . felonious breaking or entering, [and further concludes that] the trial judge did not err in failing to instruct the jury on the lesser included offense, misdemeanor breaking or entering," ante, p. 584. I disagree, and I respectfully dissent.

The majority correctly states the applicable law as follows:

> The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. *State v. Hicks*, 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954) (emphasis in original).

Ante, p. 584. The majority then seeks to show that there was sufficient evidence "from which the jury reasonably could infer that defendant *intended* to commit a felony, larceny, at the time he entered Howie's house," ante, p. 584. With this there is no quarrel. The crucial and dispositive analysis, however, should answer the following question: Was there *any* evidence that the breaking or entering was done *without* the intent to commit a felony?

When the breaking or entering is without the intent to commit a felony, the defendant is guilty of a misdemeanor. *State v. Dozier*, 19 N.C. App. 740, 200 S.E. 2d 348 (1973), *cert. denied* 284 N.C. 618, 201 S.E. 2d 690 (1974). In order to convict a defendant of felonious breaking or entering, the jury must find that *at the time he entered the building* he had the intent to commit larceny. As our Supreme Court said in *State v. Tippett*, 270 N.C. 588, 594, 155 S.E. 2d 269, 274 (1967):

> The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the

> house. [Citation omitted.] *However, the fact that a felony was actually committed after the house was entered is not necessarily proof of the intent requisite for [felonious breaking or entering].* It is only evidence from which such intent at the time of the breaking and entering may be found. [Emphasis added.]

In this case the State produced only one witness connecting the defendant to the crime charged. That was Albert James Weldon, an alleged accomplice to the break-in. Weldon testified that he and the defendant went to the Howie house looking for Jimmy West, a friend of theirs. West is a nephew of Mrs. Howie. Weldon continued: "We went to the back door of Mr. Howie's house and knocked on the door. The back door is the door we always use when I go over there. That's the one everybody uses." When no one answered, Weldon testified that "the wild idea came up to go inside and look around." (Weldon's prior custodial statement, admitted for corroboration, *quoted the defendant as saying* "let's go in and take a look.") Weldon and the defendant broke into and entered the house and, after discovering two shotguns, decided to take them.

From defendant's action once inside the house, the jury can legitimately infer that he entered the house with the intent to commit larceny. That, however, is not the only legitimate inference that can be drawn from the evidence. There is also evidence from which the jury might infer that the defendant did not enter the house with the intent to commit a felony. The uncontradicted evidence is that defendant went to the house because he thought a friend of his, Jimmy West, might be at his aunt's house, and not to steal. Again, "[a] breaking and an entry without the intent to commit a felony in the building is not converted into a burglary [or felonious breaking or entering] by the subsequent commission therein of a felony subsequently conceived." 270 N.C. at 594, 155 S.E. 2d at 274.

The jury may accept or reject Weldon's or the defendant's aimless reason of "looking around" as a basis for the breaking or entering. It is because a jury is not required to accept all of the testimony and may believe any part or none of the testimony that I believe the lesser offense should have been submitted. Indeed, this Court upheld the submission of a lesser offense instruction on

facts that may have been more unbelieveable than Weldon's testimony. In *State v. Dozier*, police officers testified that after entering Carolina Rim and Wheel Company to investigate an apparent break-in, they found and arrested defendant and a companion, Simmons, who were inside the building.

> Testifying in his own behalf, defendant maintained that while he and Simmons were walking in the vicinity of Carolina Rim and Wheel Company, Officer Boothe stopped them to ask if they knew anything about the broken window at Carolina Rim and Wheel Company. Defendant stated that when he and Simmons denied knowing anything about the window, Officer Boothe forced them to enter Carolina Rim and Wheel Company through the broken window and insisted that they "call out" unnamed companions whom the officer apparently believed were participating in the break-in. Defendant testified that while in the building he and Simmons were handcuffed and that it was not long before other policemen arrived on the scene.

19 N.C. App. at 741, 200 S.E. 2d at 349.

In the face of this amazingly conflicting account of what happened, we held in *State v. Dozier* that when "evidence as to defendant's alleged felonious intent [is] circumstantial[,] [i]t [is] not only proper to instruct as to the lesser included offense, it [is] prejudicial error to fail to so instruct." 19 N.C. App. 740, 742, 200 S.E. 2d 348, 350.

I believe that the testimony in the case *sub judice* that the defendant went in to "look around" was the only direct evidence of intent and that it constitutes positive evidence conflicting with other legitimately drawn inferences of felonious intent. The defendant was, therefore, "entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts." *State v. Drumgold*, 297 N.C. 267, 271, 254 S.E. 2d 531, 533 (1979) *quoting State v. Palmer*, 293 N.C. 633, 643-44, 239 S.E. 2d 406, 413 (1977). The factual issue that separates the greater offense from the lesser is the defendant's intent. Proof of intent is seldom susceptible of proof by direct evidence and must ordinarily be proven by circumstantial evidence from which intent may be inferred. *State v. Petry*, 226 N.C. 78, 80-81, 36 S.E. 2d 653, 654 (1946). If the issue of intent "is

not susceptible to clear cut resolution" it is error to fail to submit the lesser included offense to the jury. *State v. Banks*, 295 N.C. 399, 416, 245 S.E. 2d 743, 754 (1978).

Believing that the issue of defendant's intent at the time of his entry into the house is not clear cut—that is, there is conflicting evidence on this element of the criminal offense—I dissent and vote for a new trial.

SIDNEY RONALD STANLEY v. RETIREMENT AND HEALTH BENEFITS DIVISION, DEPT. OF STATE TREASURER, STATE OF NORTH CAROLINA

No. 8110SC468

(Filed 2 February 1982)

Retirement Systems § 5— teacher—beneficiary entitled to death benefits

Where a leave of absence was granted to a public school teacher on 25 June 1974 due to health problems but was terminated the next day, 26 June 1974, by the school board's assigning her to teaching duties, and where the school board approved her resignation from this assignment on 27 August 1974, and where the teacher did not thereafter request a further leave of absence, nor did the board thereafter approve any subsequent leave of absence, the teacher was not on leave of absence at the time of her death and the provisions of N.C.G.S. 135-5(l)(2)(a), (b) and N.C.G.S. 135-4(h) and -8(b)(5) were not applicable. At her death on 9 October 1974, the teacher was a public school teacher under a career contract and was a teacher in service as defined by statute; therefore, her beneficiary was entitled to receive statutory death benefits.

APPEAL by petitioner from *Preston, Judge.* Judgment entered 13 February 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 6 January 1982.

Petitioner, the husband of a deceased employee of the Moore County public schools, appeals the denial of death benefits under N.C.G.S. 135-5(l).

Petitioner's wife was enrolled as a member of the Teachers' and State Employees' Retirment System of North Carolina in February 1966. She had subsequently executed a form designating the petitioner as her beneficiary for the death benefit provided for by statute.

Mrs. Stanley taught in the classroom through 7 June 1974. She had applied for a year's leave of absence, believing that she needed time to recover from treatment she had undergone for cancer. By the end of June 1974 her health had improved and she was assigned to an interim teaching position to commence 14 September 1974. However, her condition worsened and she resigned this position on 12 August 1974. No further duty assignments were made to her. She died 9 October 1974.

At the time of her death, Mrs. Stanley was employed under a career contract. The record discloses that at no time was this contract terminated. She neither requested, nor was she granted, a leave of absence subsequent to the resignation of her interim position. She did, however, execute a disability retirement application on 8 October 1974, which was cancelled because she did not live to the earliest possible effective date.

Moretz & Moore, by J. Douglas Moretz, for petitioner appellant.

Attorney General Edmisten, by Assistant Attorneys General Norma S. Harrell and Lucien Capone, III, for respondent appellee.

MARTIN (Harry C.), Judge.

We are concerned here with a comprehensive statutory scheme encompassing retirement, disability, and death benefits for state employees. Petitioner challenges the constitutionality of this scheme on equal protection grounds. The death benefit provision reads in pertinent part as follows:

> (l) Death Benefit. — Upon receipt of proof, satisfactory to the Board of Trustees, of the death, in service, of a member who had completed at least one full calendar year of membership in the System, there shall be paid to such person . . . if such person is living at the time of the member's death, otherwise to the member's legal representatives, a death benefit.

N.C. Gen. Stat. § 135-5(l) (1974) (amended 1981 & Supp. 1981).[1] N.C. G.S. 135-1(23) defines "service" as "service as a teacher." N.C. G.S. 135-1(25) defines "teacher" as

> any teacher, helping teacher, librarian, principal, supervisor, superintendent of public schools or any full-time employee, city or county, superintendent of public instruction, or any full-time employee of Department of Public Instruction, president, dean or teacher, or any full-time employee in any educational institution supported by and under the control of the State: Provided, that the term "teacher" shall not include any part-time, temporary, or substitute teacher or employee . . ..

Thus, under this portion of the statute, Mrs. Stanley was in service as a teacher at the time of her death. Her career contract was still in force; her leave of absence status had not been reinstated; she simply had not been assigned to a classroom.

N.C.G.S. 135-5(l)(2) goes on to state, however, that:

> For the purposes of this subsection (l), a member shall be deemed to be in service at the date of his death if his last day of actual service occurred not more than 90 days before the date of his death.
>
> . . . .
>
> (2) Last day of actual service shall be:
>
> a. When employment has been terminated, the last day the member actually worked.
>
> b. When employment has not been terminated, the date on which an absent member's sick and annual leave expire, unless he is on approved leave of absence and is in service under the provisions of G.S. 135-4(h).

It is respondent's contention that the "90 day deemed" rule precludes petitioner's recovery of a death benefit inasmuch as a

1. Petitioner, through his attorney, formally demanded a death benefit by letter dated 10 October 1978. We are thus deciding this case under the 1974 statute. N.C.G.S. 135-5(l) was amended effective 1 July 1979. N.C. Gen. Stat. § 135-5 (1981). For the current version of the statute, see N.C. Gen. Stat. § 135-5 (Supp. 1981).

period exceeding ninety days elapsed between 8 June 1974[2] and 9 October 1974, the date of Mrs. Stanley's death. We do not agree.

We adopt petitioner's position that the "90 day deemed" rule is an inclusionary provision, not an exclusionary provision. We do not view it as an arbitrary cut-off point applicable to employees who, although still under contract, due to lingering illness fail to die within ninety days. Rather, the provision was inserted to extend death benefit coverage to teachers whose work schedule may be interrupted during the summer months. This is particularly necessary when a teacher is employed on a year-to-year contract. Further, the ninety-day provision would apply when a career teacher was granted a nonacademic leave of absence and died within ninety days thereafter.

We have reviewed the statutory provisions in N.C.G.S. 135 in their entirety and conclude that this interpretation is consistent with the overall policies of the retirement, disability and death benefit scheme. The intent of the statute is not to exclude, but to include state employees under an umbrella of protections designed to provide maximum security in their work environment and to afford "a measure of freedom from apprehension of old age and disability." *Bridges v. Charlotte*, 221 N.C. 472, 477, 20 S.E. 2d 825, 829 (1942). *Accord, Powell v. State Retirement System*, 3 N.C. App. 39, 164 S.E. 2d 80 (1968). To this end, employees who have been granted a leave of absence for educational purposes may remain in service. N.C. Gen. Stat. §§ 135-4(h), -8(b)(5) (1974). Also deemed in service are members whose "last day of actual service occurred not more than 366 days before the date of his death if such member during said one-year period had applied for and was entitled to receive a disability retirement allowance under the System." N.C. Gen. Stat. § 135-5(l) (Supp. 1981). Respondent's interpretation of the statute not only contravenes these policies but, to the detriment of the public school system, would force terminally ill teachers to continue teaching well beyond their physical and emotional capacity to do so, in order to ensure their families the death benefit.

We are further persuaded by the reasoning in *Meachan v. Board of Education*, 47 N.C. App. 271, 267 S.E. 2d 349 (1980). In

2. Mrs. Stanley had remaining only one-half day of sick leave.

that case plaintiff, a career teacher, while on a medical leave of absence applied for and was granted disability retirement benefits. The Court held that the implicit finding that her disability was likely to be permanent rendered "her status as a disabled retiree wholly inconsistent with her former status as a 'career teacher.' " *Id.* at 276, 267 S.E. 2d at 352. Thus, plaintiff's status as a career teacher terminated by operation of law. In the case sub judice, Mrs. Stanley did not apply for disability benefits until one day prior to her death. Her status as a career teacher would only have been terminated by the approval of her application for disability benefits. Thus, her contract was in full force until her death.

The leave of absence granted Mrs. Stanley on 25 June 1974 was terminated the next day, 26 June 1974, by the school board's assigning her to teaching duties. The school board approved her resignation from this assignment on 27 August 1974. Mrs. Stanley did not thereafter request a further leave of absence, nor did the board thereafter approve any subsequent leave of absence. We hold that Mrs. Stanley was not on leave of absence at the time of her death. Therefore, under the facts of this case, the provisions of N.C.G.S. 135-5(l)(2)(a), (b) (the ninety-day provision) and N.C.G.S. 135-4(h) and -8(b)(5) are not applicable.

We note that in spite of our construction of the statute in question, a teacher who is forced to take a leave of absence because of illness is faced with a dilemma. By failing to apply for disability benefits, the teacher may forego these benefits, as well as death benefits, should she die. By accepting disability benefits, although ensuring her right to death benefits should she die within a year, the teacher foregoes her right to return to the classroom should she recover. We also note that at the time of Mrs. Stanley's death, a decision to take a leave of absence and/or apply for disability would have been considerably more harsh as the 366-day rule was not in effect at that time.

We hold that N.C.G.S. 135-5(l) is constitutional on its face and, consistent with the interpretation set forth above, is constitutional as applied. At her death Mrs. Stanley was a public school teacher under a career contract. She was a teacher in service as defined by the statute and her beneficiary is entitled to receive the statutory death benefits.

Reversed.

Judges ARNOLD and WELLS concur.

JAMES L. MILLER v. TRIANGLE VOLKSWAGEN, INC., PM DISTRIBUTORS, INC., D/B/A PHIL'S AUTO SALES, AND DONALD D. HARMON

No. 8114SC422

(Filed 2 February 1982)

1. **Automobiles § 6.5; Fraud § 12— sale of automobile—misrepresentation of mileage—sufficient evidence of fraud**

Plaintiff's evidence on motion for summary judgment presented a material issue of fact for the jury on the issue of fraud by defendant car dealer in the sale of a used car to plaintiff where it tended to show that defendant sold a used car to plaintiff for $1600; plaintiff had told defendant's agent that he wanted a low mileage car; defendant represented that the car had been bought at an auction and was worth $1635 when in fact defendant had bought the car at a private sale for $850; defendant gave plaintiff an odometer statement indicating that the car had been driven approximately 24,000 miles when defendant knew that the actual mileage on the car was 124,000 miles; and plaintiff paid defendant $45 for an inspection and minor repairs which were not made.

2. **Conspiracy § 2.1— insufficient evidence of conspiracy**

Summary judgment was properly entered for defendants in plaintiff's action to recover damages for conspiracy to violate federal and state odometer statutes, 15 U.S.C. § 1988 and G.S. 20-347, where plaintiff's forecast of evidence showed only that the first defendant represented that a car it sold plaintiff had been driven 24,000 miles when it knew that the car had been driven 124,000 miles and that the first defendant had purchased the car from the second defendant, and where the second defendant's forecast of evidence tended to show that its president had told the first defendant that the actual mileage on the car was over 124,000.

APPEAL by plaintiff from *Herring, Judge*. Judgment entered 19 January 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 9 December 1981.

Plaintiff sued defendants alleging violations of the federal and state odometer statutes, 15 U.S.C. § 1988 and N.C. Gen. Stat. § 20-340, *et seq.*, and common law fraud. The case arises out of the purchase by the plaintiff of a 1971 Monte Carlo automobile from the defendant Triangle Volkswagen on 26 May 1978. On 17

May 1978, the plaintiff, a Pennsylvania resident, contacted Triangle Volkswagen and spoke with defendant Donald Harmon. The plaintiff advised Mr. Harmon that he wished to purchase a late model Volkswagen bus and a mid-sized car for his wife costing less than $2000.00. Plaintiff had several more conversations with Mr. Harmon and was advised that there would be two Volkswagen vans for him to inspect at Triangle Volkswagen on 26 May 1978.

When the plaintiff arrived at Triangle Volkswagen, he was advised by Harmon that the vans had not arrived because of transportation problems. The plaintiff still wanted to purchase an older, mid-sized car with low mileage for his wife.

Plaintiff went to lunch and when he returned, the 1971 Monte Carlo had been brought to Triangle Volkswagen's used car lot. Defendant Harmon told plaintiff that he was familiar with the car, that it was a low mileage car, that the owner of the car, defendant Phil's Auto Sales, had outbid him by $50 for the car at an auction, Phil's bid being $1635.00, and that he would sell the car to plaintiff for $1600.00. The plaintiff agreed to purchase the car and defendant Harmon delivered to him an odometer statement indicating that the car had been driven approximately 24,000 miles.

Harmon agreed to clean up the car, perform a safety inspection, check the oil and grease the car for the sum of $45.00 before plaintiff accepted the car. The plaintiff's evidence tended to show that the tire pressure was too low, the lubrication was not done, and that the defroster and one taillight did not work.

In addition plaintiff's evidence tended to show that defendant Phil's bought the car at a private sale, not an auction, for $850.00, not $1635.00. At the time Triangle Volkswagen purchased the car from Phil's Auto Sales, the car had an actual mileage in excess of 124,000 miles.

The trial court granted summary judgment in favor of defendant Triangle Volkswagen with respect to defendant's claim alleging common law fraud and his claim alleging a conspiracy to violate the State and federal odometer statutes, from which plaintiff appealed.

Richard N. Weintraub for the plaintiff-appellant.

Newsom, Graham, Hedrick, Murray, Bryson & Kennon by William P. Daniell for defendant-appellee, Triangle Volkswagen, Inc.

MARTIN (Robert M.), Judge.

[1] The plaintiff's first argument on appeal concerns the trial judge's granting of summary judgment in favor of defendant, Triangle Volkswagen, on plaintiff's allegation of common law fraud.

In order to prove that defendant was guilty of fraud the plaintiff at trial must prove: (1) that a defendant made a representation relating to some material fact; (2) that the representation was false; (3) that the defendant knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that the defendant made the representation with the intention that it should be acted upon by the plaintiff; (5) that the plaintiff reasonably relied upon the misrepresentation and acted upon it; and (6) that the plaintiff suffered injury. *Odom v. Little Rock & I-85 Corp.*, 299 N.C. 86, 261 S.E. 2d 99 (1980).

In this case plaintiff presented evidence on each element of fraud sufficient to withstand a motion for summary judgment. Plaintiff's evidence tended to show that the defendant through its agent, Harmon, made the material representations to the plaintiff that the car was a low mileage vehicle, with a wholesale value of $1635.00 and that Triangle had performed a safety inspection and minor repairs on the car worth $45.00. Harmon gave to plaintiff an odometer statement which verified the mileage as approximately 24,000 miles.

The plaintiff further presented evidence that these representations were false and that defendant knew they were false or made them recklessly. Phil McLamb, in his deposition, stated that he told Harmon that the car had travelled approximately 124,000 miles, not 24,000 miles. Plaintiff also presented evidence that the automobile was worth less than $1635.00, and that the safety inspection and minor repairs were not performed by defendant.

Plaintiff's evidence tended to show that defendant made these misrepresentations with the intention that they should be

acted on by the plaintiff. The statements were made in a business context for the purpose of selling the car to plaintiff and the salesman Harmon took plaintiff's money on the basis of those representations.

The plaintiff purchased the automobile and drove it to Pennsylvania. This tends to show that plaintiff relied and acted upon defendant Harmon's representations.

Finally, the plaintiff's evidence indicates that he suffered injury. Defendant knew that plaintiff wanted a low mileage car. Plaintiff paid for a car that he believed had 24,000 miles, not 124,000 miles, and he paid for minor repairs and inspection of the car in the amount of $45. Plaintiff got less than he bargained for because of the misrepresentations about the car.

This case is similar to *Garland v. Penegar*, 235 N.C. 517, 70 S.E. 2d 486 (1952) in which the court held that evidence tending to show that a dealer represented a car to be in good condition and that it was a "new demonstrator" driven only 1,000 miles, but that in fact the car had been sold to a person who drove it 8,000 miles and then turned it back to the dealer, and that it was not in good condition, was sufficient for submission to the jury on the issue of actionable fraud and deceit in the sale of the car.

In a similar fraud case, *Roberts v. Buffaloe*, 43 N.C. App. 368, 258 S.E. 2d 861 (1979), the plaintiff alleged that defendant car dealer sold him a car with an odometer reading of 32,821 miles but knew that the true mileage was in excess of 77,000 miles. The Court held that the trial court erred in directing a verdict for defendant where plaintiff's evidence tended to show that defendant knew that the odometer had been replaced but failed to affix the notice required by N.C. Gen. Stat. § 20-346. The evidence also tended to show that defendant failed to deliver to plaintiff the statements concerning unknown mileage and alterations to the odometer reading required by N.C. Gen. Stat. § 20-347(a)(5) and (6). If such evidence were believed, it should have been determined by the jury whether defendant's violations of the statute were made with the intent to defraud.

The trial court erred in granting summary judgment for the defendant. Principles applicable to summary judgment under Rule 56 are detailed in *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180

S.E. 2d 823 (1971). Our Supreme Court in *Yount v. Lowe*, 288 N.C. 90, 94, 215 S.E. 2d 563, 565-66 (1975) explained these principles as follows:

> The party moving for summary judgment under Rule 56 has the burden of "clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded." 6 Moore's Federal Practice § 56.15[8], at 2439-40 (1974). The rule itself conditions rendition of summary judgment on a showing by the movant (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c) (1969); *Kessing v. Mortgage Corp.*, supra.

In this case the defendant could not clearly establish the lack of any genuine issue of material fact. Consequently summary judgment on this issue was improvidently granted.

[2] In his remaining assignment of error, plaintiff alleges that the trial court erred in granting summary judgment for defendant on plaintiff's allegation of conspiracy. Plaintiff asserts that defendant Triangle Volkswagen, Inc., and defendant Phil's Auto Sales, did with the intent to defraud, conspire to violate 15 U.S.C. § 1988 and N.C. Gen. Stat. § 20-347.

In order to prevail on the question of conspiracy, the plaintiff must prove an agreement between two or more individuals to do an unlawful act, or to do a lawful act in an unlawful manner, resulting in injury inflicted by one or more of the conspirators pursuant to a common scheme. *Complex, Inc. v. Furst and Furst v. Camilco, Inc., and Camilco, Inc. v. Furst*, 43 N.C. App. 95, 258 S.E. 2d 379 (1979), *disc. rev. denied*, 299 N.C. 120, 261 S.E. 2d 923 (1980).

The undisputed testimony of Phil McLamb was that Don Harmon called him on May 26th to inquire about purchasing a used car. After some discussion, Phil McLamb told Don Harmon that he had a Monte Carlo available which had an odometer reading of 124,167 miles. He subsequently sold that car to Triangle Volkswagen for $1,065.00. If the plaintiff's conspiracy theory were well founded, he would have to demonstrate that Phil McLamb

and Triangle Volkswagen had conspired to sell him a car with an improper odometer reading. The sworn testimony of Phil McLamb is to the contrary, and the remaining portions of the record fail to demonstrate the existence of the conspiracy.

This case is controlled by *Jacobson v. Penney Co.*, 40 N.C. App. 551, 553, 253 S.E. 2d 293, 295, *disc. rev. denied*, 297 N.C. 454, 256 S.E. 2d 807 (1979), in which our Court stated the following rule:

> Until the defending party has established his right to judgment as a matter of law, the claimant is not required to present any evidence to support his claim for relief. However, once the defending party establishes his right to judgment as a matter of law, the claimant must present a forecast of the evidence which will be available for presentation at trial to support his claim for relief. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); 2 McIntosh, N.C. Practice and Procedure § 1660.5 (2d ed. Phillips Supp. 1970). If the claimant does not respond at that time with a forecast of evidence sufficient to show that the defending party is not entitled to judgment as a matter of law, then summary judgment should be entered in favor of the defending party.

Because of the plaintiff's failure to present additional evidence sufficient to support his allegation of conspiracy, summary judgment was properly granted by the trial judge.

For the foregoing reasons the judgment of the trial court is affirmed in part, and reversed in part.

Chief Judge MORRIS and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. ROBERT LOUIS ADAMS AND MICHAEL ANTHONY SWANN

No. 8115SC740

(Filed 2 February 1982)

Searches and Seizures § 11— warrantless search, seizure and arrest—probable cause

An officer did not violate defendant's constitutional rights when he stopped and detained defendant, searched the car, and eventually arrested him where the evidence tended to show that moments after a convenience store was robbed by two men, a witness saw an older model car leave a nearby parking lot and stop; that shortly thereafter a police officer arrived and the witness described the car he had seen; that the witness pointed in the direction that the car had gone; that the witness and officer viewed the car lights coming on approximately 300 feet away; and that the officer pursued the car, stopped it, and asked both occupants to get out.

APPEAL by defendant Robert Louis Adams[1] from *Bailey, Judge.* Judgment entered 8 October 1980 in Superior Court, ORANGE County. Defendant's petition for a writ of certiorari was allowed on 9 July 1981. Heard in the Court of Appeals 5 January 1982.

Defendant appeals from a conviction of robbery with a firearm in violation of G.S. 14-87 for which he was sentenced to prison for a term of not less than fifteen years nor more than forty years. The issues on appeal are whether the trial court erred in denying defendant's motion to suppress certain evidence, in allowing what defendant contends to be hearsay testimony into evidence, in denying defendant's motion to dismiss, and in overruling defendant's objection to certain evidence offered by the State on rebuttal.

Attorney General Edmisten, by Associate Attorney James W. Lea III, for the State.

Winston, Blue, Larimer & Rooks, by Barry T. Winston, for defendant Robert Louis Adams.

1. Defendant Michael Anthony Swann's conviction was affirmed on 17 November 1981 in an unpublished opinion.

BECTON, Judge.

I

At approximately 1:30 a.m. on 15 April 1980, Angia Joyce Davis was working as a cashier at Pantry Store Number 386 in Carrboro, North Carolina when two men entered the store, pointed a gun at her, and asked her for money. She put the money in a paper bag, and the two men put her in a walk-in refrigerator and left. Based on information supplied by Thomas Watson who was near the Pantry at the time it was robbed, Police Officer Charles Ashworth pursued, and subsequently stopped, a car with two men in it. One of the men was the defendant; the other was Michael Anthony Swann, the co-defendant.

After police officers found a shotgun and a handgun in the car and a paper bag containing money outside the car, defendant was placed under arrest. Although Ms. Davis was later unable positively to identify the defendant or Michael Swann, one latent print found at the scene corresponded to the left thumb print of Michael Swann.

The defendant denied committing the crime. He testified that he had ridden with Michael Swann to Chapel Hill looking for a friend. When defendant and Swann became lost and drove beyond their turn, they picked up two men wearing long black overcoats. The two men told them to make a left turn, take the underpass and turn left, the result being a U-turn. The two men were then let out. Immediately thereafter, the car in which defendant was a passenger was stopped by Officer Ashworth.

II

The defendant first argues that Officer Ashworth had no probable cause to detain or arrest him and that, therefore, the admission into evidence of the guns and money obtained at the site of his arrest was in violation of his rights under the Fourth Amendment to the United States Constitution. Based on our review of the record, we are convinced that Officer Ashworth acted well within the confines of constitutional mandates when he detained the defendant, searched the car, and eventually arrested him.

Our case law and statutory law is clear. A police officer may, without an arrest warrant, lawfully detain a person when there is need for immediate action, if upon personal observation or reliable information the officer has an honest and reasonable suspicion that the person detained has committed or is preparing to commit a crime. *State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201 (1975), *death sentence vacated* 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3210 (1976); *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973); *State v. Williams*, 32 N.C. App. 204, 231 S.E. 2d 282, *appeal dismissed* 292 N.C. 470, 233 S.E. 2d 924 (1977); G.S. 15A-401(b)(2) (Cum. Supp. 1981). This standard, which our courts uniformly apply, is no different than the standard required by the United States Constitution. *State v. Mathis*, 295 N.C. 623, 247 S.E. 2d 919 (1978). *See also Beck v. Ohio*, 379 U.S. 89, 13 L.Ed. 2d 142, 85 S.Ct. 223 (1964).

Separate and apart from this principle that a suspect may be detained or arrested in the absence of a warrant under certain circumstances, it is also a well-settled principle in this State that a police officer may conduct a warrantless search of a vehicle capable of movement when the officer has probable cause to do so and when exigent circumstances make it impractical to secure a warrant. *State v. Jones*, 295 N.C. 345, 245 S.E. 2d 711 (1978); *State v. Legette*, 292 N.C. 44, 231 S.E. 2d 896 (1977); *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973). The test of probable cause in this instance is whether the police officer had reasonable grounds to believe that the suspect had committed a crime and that the vehicle in which he was riding contained evidence relating to the crime. *State v. Johnson*, 29 N.C. App. 534, 225 S.E. 2d 113 (1976).

With these principles in mind, we turn to the facts of this case to determine if Officer Ashworth acted reasonably in detaining the defendant, in conducting a search of the car, and in eventually arresting defendant.

Within moments after the Pantry was robbed by two men, Thomas Watson stepped outside the Pantry, looked across the street, "and saw a white, older model Ford coming out of Old Well Apartments onto the street with the lights off." It was approximately 1:30 a.m., and two people were in the car. The car stopped and did not move again while Watson was outside the Pantry. During this time, the cashier of the Pantry, Angia Joyce

Davis, was talking to a police dispatcher on the telephone. Watson went inside the Pantry to tell the dispatcher what he had seen and then went back outside the Pantry and flagged down a police car that was approaching the Pantry. Watson described the car he had seen to Charles Ashworth, the police officer. As Watson pointed toward Highway 54 by-pass, the direction the car had gone, car lights came on at the by-pass. (The by-pass is approximately 300 feet from the Pantry.) Officer Ashworth pursued the car. At that time, there was no other traffic on the road. While pursuing the car, Officer Ashworth radioed for assistance. When Officer Ashworth got close enough to see that the car was a white older-model car occupied by two people, he stopped the car, and asked both occupants to get out.

As it turned out, the car was a 1966 white Plymouth. That is of little consequence, however, since Watson told Officer Ashworth that the car "looked like a white [older] Ford" and specifically identified the car whose lights came on at the by-pass to Officer Ashworth. It was this car containing defendant that Officer Ashworth later stopped. "It is well recognized that a description of either a person or an automobile may furnish reasonable grounds for arresting and detaining a criminal suspect." *State v. Jacobs*, 277 N.C. 151, 154, 176 S.E. 2d 744, 746 (1970). In this case, Officer Ashworth had ample justification for pursuing and stopping the car which contained defendant. No arrest warrant was required under the circumstances. Moreover, Officer Ashworth, having reasonable grounds for suspecting that defendant was involved in a crime, had the probable cause necessary to justify a warrantless search of the car. The stopping of this car at 1:30 a.m., only moments after a robbery and after it had been identified as being near the scene of the robbery, is representative of the type of exigent circumstances that make it impractical to secure a search warrant.

Were it necessary to further justify the seizure, the State could do so by relying on the "plain view doctrine." *See State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976). Officer Ashworth saw the shotgun protruding from the back seat of the car. Lieutenant Turner of the Chapel Hill Police Department who answered the radio call for back-up assistance found a bag containing $153.76 on the ground in the right front tire impression of the car. The other

gun, a loaded .22 calibre revolver, was seen under the edge of a paper bag in the front seat of the car.

We hold that Officer Ashworth did not violate defendant's constitutional rights when he stopped and detained defendant, searched the car, and eventually arrested him.

We have considered defendant's other assignments of error relating to (a) the admission of what defendant contends to be hearsay evidence; (b) the denial of defendant's motion to dismiss; and (c) the admission of certain rebuttal evidence by the State. We find no error in these assignments.

No error.

Judge CLARK and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. DIANE WILHELMINA CHERRY

No. 813SC777

(Filed 2 February 1982)

1. Constitutional Law § 33— no ex post facto law or punishment

A defendant convicted of trafficking in heroin by possessing and transporting 4.6 grams of heroin on 3 October 1980 in violation of G.S. 90-95(h)(4) was not the victim of an *ex post facto* law or punishment where the punishment imposed on her was the minimum provided by the statute at the time of the offense, and an amendment to the statute which increased the punishment after the date of the offense was not applied to defendant.

2. Criminal Law § 128.2— denial of mistrial—no abuse of discretion

The trial court did not abuse its discretion in denying defendant's motion for a mistrial when a law officer testified that cigarettes handed to him by defendant "contained marijuana" where (1) an expert chemist subsequently testified without objection that an envelope submitted to him for analysis by the officer contained marijuana, and (2) defendant was charged with trafficking in heroin, not possession of marijuana.

3. Constitutional Law § 67— confidential informant—disclosure of identity not required

The trial court did not err in refusing to order the State to reveal the identity of a confidential informant where the informant did not participate in the particular transaction in question and there was no suggestion that the identity of the informant would have been relevant or helpful to the defense of the accused.

4. Criminal Law § 96— objection sustained—failure to instruct jury to disregard question

Although it would be the better practice for trial courts, upon request, to tell jurors to disregard questions and the suggestions in questions to which objections were sustained, the defendant in this case was not prejudiced by the trial court's failure to instruct the jury to disregard a question to which defendant's objection had been sustained when defendant's counsel said, "Request instruction."

APPEAL by defendant from *Brown, Judge.* Judgment entered 4 March 1981 in Superior Court, PITT County. Heard in the Court of Appeals 7 January 1982.

Based upon information received from a confidential informant, Greenville City Police Officers looked for, and found, the defendant Diane Wilhelmina Cherry in a car described by the confidential informant. At that time, three other people were in the car with the defendant. Twenty-three glassline envelopes containing white powder were found under the front seat in which the defendant had been sitting. Thirteen additional envelopes containing white powder were found under the back seat.[1]

Defendant was charged and convicted of feloniously trafficking in heroin. From a verdict of guilty and a judgment imposing "a maximum term of six years" and a fine of $50,000.00, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

Robert L. White for defendant appellant.

BECTON, Judge.

I

[1] Defendant first argues that the trial court should have allowed her motion to dismiss the bill of indictment. Defendant was originally charged in a Magistrate's Order with feloniously possessing with intent to sell and deliver four grams, but less than fourteen grams, of heroin. Defendant was subsequently indicted for feloniously trafficking in heroin by possessing and transporting 4.6 grams of heroin in violation of G.S. 90-95(h)(4).

1. No questions concerning the search are raised on this appeal.

The "trafficking" offense carries a greater punishment than the offense with which defendant had been originally charged. Defendant contends that the effective date of G.S. 90-95(h)(4) was 1 March 1981, and that, since she is alleged to have committed the crime charged on 3 October 1980, G.S. 90-95(h)(4) "was *ex post facto* as to her because it expose[d] her to greater punishment and its effective date had not come into being on the date that the crime is alleged to have been committed."

We do not agree. Defendant has misread the applicable statute. As of 3 October 1980, G.S. 90-95(h)(4) provided in pertinent part that

> [a]ny person who sells . . . transports or possesses four grams or more of . . . heroin . . . shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if a quantity . . . involved:
>
> (a) is four grams or more, but less than 14 grams, such person shall, upon conviction, be punished . . . for not less than six years nor more than fifteen years . . . and shall be fined not less than fifty thousand dollars ($50,000.00).

As of the date of defendant's conviction, 4 March 1981, G.S. 90-95(h)(4) had been amended so that the maximum punishment was a minimum sentence of fourteen years. However, the amendment was applicable only to acts committed on or after 15 April 1981. *See* G.S. 90-95(h)(4), Editor's notes. Therefore, defendant was not the victim of any *ex post facto* law or punishment. We also hold that there was no error in superseding the original warrant with the bill of indictment. "The actions of the grand jury are not limited by the charges presented or determined at a probable cause hearing in the district court." *State v. McGee*, 47 N.C. App. 280, 283, 267 S.E. 2d 67, 70, *disc. review denied* 301 N.C. 101, 273 S.E. 2d 306 (1980).

II

[2] Defendant next contends that the trial court erred in denying her motion for a mistrial made when Officer C. E. Weatherington testified, over objection, that the green vegetable material in the cigarettes which the defendant handed to him "contained marijuana." It is not necessary to determine whether Officer

Weatherington's formal training with regard to identifying marijuana or his practical experience which resulted in at least 500 first-hand observations of marijuana were sufficient to qualify him as an expert witness because the standard for mistrials under G.S. 15A-1061 is whether the testimony objected to resulted in "substantial and irreparable" prejudice. There was no prejudice in this case to the defendant since (1) the chemist, N. C. Evans, subsequently testified, without objection, that one of the small envelopes submitted to him for analysis by Weatherington contained marijuana, and (2) defendant was charged with trafficking in heroin, not possession of marijuana. Defendant has failed to show that the trial court abused its discretion in denying her motion for a mistrial. *See State v. Mills*, 39 N.C. App. 47, 249 S.E. 2d 446 (1978), *disc. review denied* 296 N.C. 588, 254 S.E. 2d 33 (1979).

III

[3] We find no merit in defendant's next contention that the trial court erred in refusing to order the State to reveal the identity of its confidential informant. The right of a defendant to ascertain the name of an informant is discussed in detail in *State v. Ketchie*, 286 N.C. 387, 211 S.E. 2d 207 (1975) and is further codified in G.S. 15A-978(b). Two things are readily apparent from our case law and statutory law: (1) ordinarily, a defendant is not necessarily entitled to elicit the name of a confidential informant; (2) however, when "the disclosure of the informer's identity, or of the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to fair determination of a cause. . ." disclosure is required. *State v. Moore*, 275 N.C. 141, 154, 166 S.E. 2d 53, 62-3 (1969) *quoting Roviaro v. United States*, 353 U.S. 53, 60-61, 1 L.Ed. 2d 639, 645, 77 S.Ct. 623, 628 (1957). *See also State v. Cameron*, 17 N.C. App. 229, 193 S.E. 2d 485 (1972), *aff'd.* 283 N.C. 191, 195 S.E. 2d 481 (1973); *State v. Johnson*, 13 N.C. App. 323, 185 S.E. 2d 423 (1971), *appeal dismissed* 281 N.C. 761, 191 S.E. 2d 364 (1972).

In the case before us there is no suggestion that the confidential informant participated in the particular transaction in question. There is no suggestion that the identity of the confidential informant would have in any way been relevant or helpful to the defendant. This assignment of error is overruled.

IV

Defendant also contends that the trial court erred by failing to instruct the jury to disregard a question to which defendant's objection had been sustained.

On cross examination by the district attorney, the following transpired:

> Q. And do you know why it is that you have had this reputation all over Greenville for selling dope up and down West Fifth Street?
>
> MR. WHITE: Objection.
>
> THE COURT: Sustained.
>
> MR. WHITE: Request instructions.
>
> THE COURT: Ask your next question.

It would be the better practice for trial courts, upon request, to tell jurors to disregard questions and the suggestions in questions to which objections were sustained. Indeed, as part of its instructions to the jury, either before the evidence or after the evidence, our trial courts may consider giving the following type instruction:

> It is the right of counsel to object when testimony or other evidence is offered which he or she believes is not admissible.
>
> When the court sustains an objection to a question, you, the jury, must disregard the question and the answer if one has been given, and draw no inference from the question or answer or speculate as to what the witness would have said if permitted to answer. Evidence stricken from the record must likewise be disregarded. When the Court sustains an objection to any evidence, you, the jury, must disregard such evidence.
>
> When the Court overrules an objection to any evidence, you, the jury, must not give such evidence any more weight than if the objection had not been made.

In this case, however, the trial court's failure to give further elaborating instructions after it had sustained the objection to the

question when defendant's counsel said "Request instructions" was not prejudicial error.

V

We have considered defendant's remaining assignments of error relating to the trial court's failure (1) to instruct on the meaning of "transporting" and (2) to grant defendant's motion for a directed verdict, to set the verdict aside, and for a new trial. Simply put, we find no error.

In our view, defendant has been accorded a fair trial, free from prejudicial error.

No error.

Judge CLARK and Judge WHICHARD concur.

FOSTER LEE LOWE AND WIFE, PATRICIA C. LOWE, PLAINTIFFS v. ERNEST WELDON BRYANT AND WIFE, SADIE J. BRYANT; AND BERNIE A. FOWLER (WIDOW), DEFENDANTS

FOSTER LEE LOWE AND WIFE, PATRICIA C. LOWE, PLAINTIFFS v. ERNEST WELDON BRYANT AND WIFE, SADIE J. BRYANT; AND H. V. HOLDER, DEFENDANTS

No. 8117SC51

(Filed 2 February 1982)

Rules of Civil Procedure § 41.1 — voluntary dismissal following motion for involuntary dismissal — involuntary dismissal not proper

Where, after defendants filed motions to dismiss plaintiffs' cases with prejudice due to the plaintiffs' failure to comply with a court's order of compulsory reference, but before the judge ruled on defendants' motions for involuntary dismissal, plaintiffs filed a notice of voluntary dismissal of both actions pursuant to Rule 41(a), the trial court erred in refusing to recognize plaintiffs' notice of voluntary dismissal. G.S. 1A-1, Rule 41(a)(1) provides that a voluntary dismissal may be taken by a claimant as to any one or more of his claims by simply filing a notice of dismissal at any time before he rests his case. Plaintiffs had not "rested their case" and could, as a matter of right, dismiss the action by the filing of a notice of dismissal. The order dismissing the case with prejudice, entered after plaintiffs' voluntary dismissal, was invalid and had no effect upon plaintiffs' rights.

Lowe v. Bryant and Lowe v. Bryant

APPEAL by plaintiffs from *Kivett, Judge.* Judgments entered 22 and 23 October 1980 in Superior Court, SURRY County. Heard in the Court of Appeals 5 June 1981. On petition of plaintiffs to reconsider our former decision filed 7 July 1981, the appeal was reheard on 14 October 1981.

This appeal involves two actions concerning a boundary dispute and property damages. In their first complaint, plaintiffs asserted their rights to certain real property claimed by defendants Ernest Weldon and Sadie J. Bryant [hereafter "the Bryants"], requesting establishment of a boundary between the property of plaintiffs and the Bryants. Plaintiffs alleged in the alternative that defendant Bernie A. Fowler owed them damages for breach of warranty in the deed from Fowler to plaintiffs. In their second complaint, plaintiffs alleged defendants Bryants and H. V. Holder had damaged plaintiffs' property by wrongfully cutting timber on the acreage in dispute and requested $100,000 in damages. The defendants in both actions filed answers denying the allegations in plaintiffs' complaints and requesting dismissal of plaintiffs' complaints, taxation of costs against plaintiffs and other proper relief.

Judge Albright found that the pleadings in both cases raised complicated issues involving disputed boundaries and long accounts. He ordered both cases to compulsory reference and ordered each party in the first action to deposit $1,500 to cover expected costs of the reference and each party in the second action to deposit $500.

A show cause order was issued when the plaintiffs failed to pay their $2,000 deposit. Judge Walker found plaintiff Foster Lowe in wilful contempt of court and fined him $200. Plaintiff Foster Lowe gave notice of appeal from the order holding him in contempt of court but later withdrew his appeal.

The defendants in both actions filed motions pursuant to Rule 41(b), N.C. Rules Civ. Proc., to dismiss the cases with prejudice due to plaintiffs' failure to comply with the court's order of compulsory reference. Judge Kivett conducted a hearing on these motions to dismiss on 1 October 1980. On 1 October 1980, before Judge Kivett ruled on defendants' motions for involuntary dismissals, plaintiffs filed a notice of voluntary dismissal of both actions pursuant to Rule 41(a), N.C. Rules Civ. Proc. Judge Kivett

filed judgments on 22 and 23 October 1980, dismissing plaintiffs' causes of action with prejudice pursuant to Rule 41(b), N.C. Rules Civ. Proc., and disallowing plaintiffs' notice of voluntary dismissal in the causes. From these judgments, plaintiffs appealed.

Folger, Folger and Bowman by Larry Bowman, for the plaintiffs-appellants.

Gardner, Gardner, Johnson, Etringer & Donnelly by Fred L. Johnson, for the defendant-appellee Fowler.

Hiatt & Hiatt by V. Talmage Hiatt, for the defendants-appellees Bryants and Holder.

MARTIN (Robert M.), Judge.

The sole issue on appeal is whether the trial judge erred in disallowing the plaintiffs' notice of voluntary dismissal, which they attempted to file pursuant to Rule 41(a)(1), N.C. Rules Civ. Proc.

Rule 41(a)(1), N.C. Rules Civ. Proc. provides that a voluntary dismissal may be taken by a claimant as to any one or more of his claims by simply filing a notice of dismissal at any time before he rests his case. Except in a class action pursuant to Rule 23 or where otherwise provided by a specific statute, no order or other approval of the court is necessary. W. Shuford, N.C. Civil Practice and Procedure § 41-4 (2d ed. 1981); *Danielson v. Cummings*, 300 N.C. 175, 265 S.E. 2d 161 (1980). In this case the defendants had not by way of answer, counterclaim, or crossclaim, asserted a demand for affirmative relief arising out of the same factual situation upon which the plaintiffs are proceeding. In fact, the defendants had filed motions to dismiss the cases. Therefore, the plaintiffs as a matter of right could voluntarily dismiss the actions by filing a notice of dismissal prior to resting their case. *Maurice v. Motel Corp.*, 38 N.C. App. 588, 248 S.E. 2d 430 (1978).

In this action defendants had filed a motion to dismiss pursuant to Rule 41(b), N.C. Rules Civ. Proc. which was pending before the court. No order on the motion had been rendered prior to the time plaintiffs attempted to file their motion for voluntary dismissal with the clerk. The hearings on the defendants' motion to dismiss dealt with the factual basis for their motion, not with

the factual allegations upon which the plaintiffs based their action against the defendants.

This factual situation is distinguishable from that in *Maurice v. Motel Corp., supra.* There, defendant had filed a motion for summary judgment and a full evidentiary hearing had been held. The motion was allowed by the trial judge; but, prior to the actual filing of the order with the clerk, the plaintiff gave a notice of voluntary dismissal pursuant to Rule 41(a)1. On appeal, the court held that the evidentiary hearing on the motion for summary judgment was, in fact, a trial of the case. After the plaintiff had presented his case and submitted the issue to the judge, he had "rested his case" and, therefore, a dismissal pursuant to Rule 41(a)(1) was no longer available to him.

In the instant case, plaintiffs had not presented any evidence upon which they based their claims against defendants. The issue raised by defendants' motion to dismiss pursuant to Rule 41(b) was whether plaintiffs had failed to comply with an order of the court. The evidence presented at the hearings on the motion dealt only with that issue. As such, plaintiffs had not "rested their case" as contemplated by Rule 41(a)(1) and, therefore, could as a matter of right dismiss the action by the filing of a notice of dismissal.

Upon the filing of the notice of dismissal by the plaintiffs herein, the action terminated. The case was closed and nothing further could be done regarding it. The case having been voluntarily dismissed, there was no pending action upon which a valid order could be rendered. As the Supreme Court has recently held in *Danielson v. Cummings,* 300 N.C. 175, 265 S.E. 2d 161 (1980), the plaintiffs' dismissal was effective upon its announcement. As such, the order dismissing the case with prejudice entered after plaintiffs' voluntary dismissal, was invalid and had no effect upon plaintiffs' rights.

In *Caroon v. Eubank,* 30 N.C. App. 244, 226 S.E. 2d 691 (1976), this Court held that at the moment plaintiff filed his notice for voluntary dismissal, the action ended. Because the action was no longer pending, nothing further could validly be done by the court involving the merits of the case. In that case, the plaintiff had tendered a sum of money to a trustee in an attempt to purchase some property at a foreclosure sale. Prior to the plaintiff's receiv-

ing the property, the debtor had paid the obligation in full and had received a deed for the property. The trustee placed the plaintiff's money with the clerk of court pending the determination by the court of who should be the rightful owner of the property. The plaintiff then filed a notice of voluntary dismissal of his action and sought the return of his money. The trial court refused to allow plaintiff to recover his money without a final determination of the matters in controversy between the parties in the action. However, since the action had already been dismissed, the Court of Appeals held that the trial court erred in refusing the release of plaintiff's funds. After the case was closed, the trial court had no authority to rule on the merits of the case.

In the present case the trial court erred in refusing to recognize plaintiffs' notice of voluntary dismissal. The judgment of the trial court is reversed and our former decision filed 7 July 1981 is withdrawn.

Judges CLARK and HILL concur.

STATE OF NORTH CAROLINA v. GARY BOST

No. 8122SC609

(Filed 2 February 1982)

1. Burglary and Unlawful Breakings § 1— breaking or entering a building—trailer at construction site

A 40 or 50 foot trailer which was "blocked up" and used for the storage of tools and equipment at a bridge construction site constituted a "building" within the meaning of the statute prohibiting the breaking and entering of buildings, G.S. 14-54, rather than a "trailer" within the purview of G.S. 14-56 since it has lost its character of mobility.

2. Larceny § 7.3— proof of ownership of stolen property

The evidence in a larceny case was sufficient to show that tools and equipment stolen from a trailer at a bridge construction site were owned by a construction company as alleged in the indictment where a job supervisor for the company identified the stolen items and testified that they were being used by company employees in constructing a bridge and were stored on the construction site in a trailer with the doors latched.

State v. Bost

APPEAL by defendant from *Cornelius, Judge.* Judgment entered 15 January 1981 in Superior Court, IREDELL County. Heard in the Court of Appeals 17 November 1981.

Defendant was convicted, as charged, of (1) breaking or entering a building in violation of G.S. 14-54(a) and (2) larceny after breaking or entering in violation of G.S. 14-72(b)(2). He appeals from the judgments imposing a prison term of 5 to 10 years for the breaking or entering and a consecutive prison term of 2 to 4 years for the larceny.

Howard Campbell, a witness for the State, testified that he was with defendant and defendant's brother on 20 June 1979. On their return from a fishing trip they stopped at a bridge construction site. He kicked down a door to a trailer, and defendant entered and handed out to him some pumps, motors, shovels, welding gauges, and a jackhammer. They put the items in a car and took them to defendant's house.

Campbell made a confession to Deputy Sheriff Guy Griffin on 30 March 1980.

The trailer was owned by Hickory Construction Company and contained items used in constructing a bridge. The trailer had two doors. A hinge was broken on one door. Both doors were in place and the latches closed when the workers left the site on 20 June 1979. The following morning one of the doors was lying on the ground. The trailer was described by the job supervisor as a "tool trailer . . . a forty or fifty-foot van, a tractor-trailer, with no tractor." Deputy Griffin testified the trailer was "just blocked up, with steps placed at the rear of it."

The defendant offered no evidence.

Attorney General Edmisten by Associate Attorney William H. Borden for the State.

Appellate Defender Adam Stein by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant appellant.

CLARK, Judge.

[1] The first question for determination is whether the trailer located on the construction site was a "building" within the meaning of G.S. 14-54(a). Section (c) of the statute provides:

"As used in this section, 'building' shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property."

We would have little difficulty in determining that the storage trailer was a structure designed to house or secure property within it and was thus a building under G.S. 14-54(a) if it were not for the provisions of G.S. 14-56 which make it a crime to break or enter "any railroad car, motor vehicle, *trailer*, aircraft, boat, or other watercraft of any kind, containing any goods, wares, freight, or other thing of value . . . ." (Emphasis added.)

The crime defined by G.S. 14-54(a) carries a maximum penalty of imprisonment for ten years under G.S. 14-2, and G.S. 14-56 proscribes a maximum penalty of imprisonment for five years.

So we are confronted with determining the more difficult question of whether the storage trailer on the construction site was a "building," as charged in the indictment, or a "trailer." If not a "building" as charged in the indictment, there would be a fatal variance between the indictment and the proof. The evidence would not support a conviction under G.S. 14-54, though it might be sufficient to support a conviction of breaking or entering with felonious intent a "trailer" in violation of G.S. 14-56.

A defendant must be convicted, if convicted at all, of the particular offenses charged in the bill of indictment. The allegations and the proof must correspond. A fatal variance may be taken advantage of by motion to dismiss. *State v. Muskelly*, 6 N.C. App. 174, 169 S.E. 2d 530 (1969); 4 Strong's N.C. Index 3d *Criminal Law* § 107 (1976).

The trailer was used for storage of tools and equipment of Hickory Construction Company on the construction site during the building of a bridge. It is a reasonable inference from the evidence that the trailer was mobile in the sense that it could be and probably was pulled from one construction site to another as the construction jobs were completed. While on the construction site for the bridge building job the trailer was "blocked up." The term is not otherwise explained by the evidence, but we interpret it to mean that cement or cinder blocks were stacked under the four corners of the trailer to give it stability.

We think it is clear that a trailer is a structure designed to secure property within and thus could be a "building" within the meaning of G.S. 14-54. It is also clear that the specific use of the word "trailer" in G.S. 14-56 could serve to remove it from G.S. 14-54. Where there are two provisions in a statute, one of which is special or particular and the other general, which if standing alone, would conflict with the particular provision, the special provision will be taken as intended to constitute an exception to the general provision, since the General Assembly is presumed to have intended a conflict. 12 Strong's N.C. Index 3d *Statutes* § 5.8 (1978). But the controlling factor in statutory interpretation is legislative intent. *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978); *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978); 12 Strong's N.C. Index 3d *Statutes* § 5.1 (1978).

Applying the rule of legislative intent to G.S. 14-54 and G.S. 14-56 we find that "trailer" and other property specifically named in G.S. 14-56 applies to the specifically named property when being primarily used for its intended purpose. G.S. 20-4.01(31)e defines trailers as "[v]ehicles . . . designed for carrying property or persons wholly on their own structure and to be drawn by a motor vehicle . . . ."

In *State v. Douglas*, 54 N.C. App. 85, 88, 282 S.E. 2d 832, 834 (1981), this Court, in ruling that a mobile home was a building under G.S. 14-54, commented that "The chief distinction between the categories of items enumerated in each statute is the property of permanence. . . . The items listed in G.S. 14-54 denote the qualities of permanence and immobility while those listed in G.S. 14-56 are characterized by a high degree of mobility. A mobile home as used in the sense of a residence distinctly differs in terms of mobility from a 'trailer' which is used to haul goods and personal property from place to place or for camping or vacation purposes."

In the case before us the trailer was not being used and not intended to be used by the owner primarily to haul goods and personal property from place to place. It was "blocked up" and not characterized by mobility. Under the circumstances the trailer lost its characteristics of mobility and became a structure used primarily for storage of property so that it attained the status of a building within the meaning of G.S. 14-54 as charged in

the indictment. Whether other "trailers," or "railroad cars" or other items specifically named in G.S. 14-56 qualify as "buildings" under G.S. 14-54 depends upon the circumstances in each case. They may qualify as "buildings" if under the circumstances of their use and location at the time in question they have lost their character of mobility and have attained a character of permanence. There was no error in the trial court's denial of the motion to dismiss for variance.

[2] Defendant makes the argument that the evidence was insufficient to support the allegation that the property taken belonged to Hickory Construction Company. We find no merit in this argument.

The job supervisor for the Company testified that the tools and equipment taken were used by company employees in building and constructing the bridge, were stored on the site in a trailer with the doors latched. He also identified the property taken. An essential element of larceny is that the property taken must belong to another person.

It is sufficient if the person alleged in the indictment to be the owner has a special property interest, such as that of a bailee or a custodian, or otherwise has possession and control of it. *State v. Schultz*, 294 N.C. 281, 240 S.E. 2d 451 (1978); *State v. Carr*, 21 N.C. App. 470, 204 S.E. 2d 892 (1974).

We find the evidence sufficient for a rational trier of the facts to find proof of the ownership element beyond a reasonable doubt.

We find, after carefully considering all assignments of error and arguments, that the defendant had a fair trial, free from harmful error.

No error.

Judges WHICHARD and BECTON concur.

AMOS F. DAVIS v. CHARLES N. GAMBLE AND FRANKLIN OLIVER

No. 818SC467

(Filed 2 February 1982)

1. **Automobiles § 90.14— farm tractor accident—instructions—prejudicial error**

An instruction in an automobile accident case which imparted that a farm tractor and trailer on a highway presents a special hazard *per se* was erroneous as the Motor Vehicles Act expressly defines a "farm tractor" as a "motor vehicle," G.S. 20-4.01(11), and thus subjects farm tractors to the "rules of the road" provisions of that act. The instruction rendered a motorist who collided with a farm tractor and trailer on a highway negligent *per se*, regardless of the circumstances or the conduct of the tractor trailer operator, and such is not the law.

2. **Automobiles § 88.1— contributory negligence in passing turning vehicle**

The trial court properly denied defendants' motions for directed verdict where the evidence permitted an inference that plaintiff did all that the law required in the exercise of due care for his own safety and that of others when he passed a farm tractor with trailer which was turning left and which had not given a left turn signal.

APPEAL by plaintiff from *Bruce, Judge.* Judgment entered 17 December 1980 in Superior Court, LENOIR County. Heard in the Court of Appeals 5 January 1982.

Plaintiff sought recovery for damages to his truck from a collision with a farm tractor and trailer operated by defendant Gamble as agent and employee of defendant Oliver. The jury answered the negligence issue in favor of plaintiff, but answered the contributory negligence issue against him. Plaintiff appeals from a judgment on the verdict dismissing the action with prejudice.

White, Allen, Hooten, Hodges & Hines, P.A. by John C. Archie, for plaintiff.

Barnes, Braswell & Haithcock, P.A., by W. Timothy Haithcock, for defendants.

WHICHARD, Judge.

The following evidence was uncontroverted:

Plaintiff's agent and employee, Roy Dexter Mozingo, was operating plaintiff's tractor-trailer truck (hereinafter "truck") in a

southerly direction on N.C. Highway 903. Defendant Oliver's agent and employee, defendant Gamble, was operating defendant Oliver's farm tractor and tobacco trailer in the same direction at the same time, some distance in front of Mozingo. As Mozingo approached the tractor-trailer driven by Gamble, he moved into the passing lane for the purpose of going around it. Gamble also moved the tractor and trailer into the passing lane. When the tractor and trailer were partially in the passing lane, Gamble perceived the presence of plaintiff's truck driven by Mozingo; and he "cut right back to the right." As Gamble cut back to the right, plaintiff's truck hit the tobacco trailer which was attached to the farm tractor. Plaintiff's truck was damaged in the collision.

Other pertinent evidence was as follows:

The investigating patrolman testified that Gamble told him he had started to make a left turn from the highway into a private drive; that he heard a horn blow and attempted to turn back to his right; and that there was a collision. He reiterated, on redirect examination, that Gamble told him he had heard a horn sound prior to the collision.

Mozingo testified that he saw the farm tractor and trailer in front of him; that he sounded his horn three or four times and proceeded on; that he "got straightened up in the passing lane and blew [his] horn a couple of more times and proceeded to pass"; that when he was within a truck length of Gamble, Gamble, without signalling, attempted to make a left-hand turn; that he blew his horn again, and Gamble "cut to the right, throwing the tobacco trailer at an angle"; and that plaintiff's truck then hit the side of the trailer. He testified that at no time did he observe any mechanical signals on the tractor, and that Gamble gave no warnings that he was going to make a left turn. Mozingo observed nothing unusual about the operation of the tractor except that Gamble did not look behind him.

Defendant Oliver's wife testified that on the day of the collision she was in her house "about 100 feet off the highway." She heard plaintiff's truck go by, but did not hear a horn sound.

Defendant Gamble testified that he looked back and did not see anything. He started to turn, saw plaintiff's truck, and tried to get back on the right side. He did not hear anything and did

not see the truck until he "got ready to make the turn and . . . looked back the second time." He stated that he did not give a signal.

Defendant Oliver testified that at the time of the collision he was about one-tenth of a mile from the drive into which defendant Gamble attempted to turn. He observed plaintiff's truck in the road, and he heard the collision. He did not hear a horn blow. In his opinion plaintiff's truck was travelling in excess of fifty-five miles per hour.

PLAINTIFF'S APPEAL

[1] Plaintiff assigns error to the following portion of the jury instructions.

> The motor vehicle law also provides that a person who is driving his vehicle within the speed limit, or the fact that a person is driving his vehicle within the speed limit does not relieve that person of the duty and exercise of due care to decrease his speed when some special hazard exists with respect to other traffic on the highway, such as the existence of a farm tractor and trailer riding up and down the highway. Under such circumstances a person must reduce his speed as is necessary to avoid colliding with the farm tractor that is on the highway and avoid causing injury to any person or property on the highway. A violation of this duty is negligence.

The assignment is meritorious.

The Motor Vehicles Act expressly defines a "farm tractor" as a "motor vehicle." G.S. 20-4.01(11) (Cum. Supp. 1981). Unless expressly exempted, operators of farm tractors are thus, like other motorists, subject to the "rules of the road" provisions of that act. G.S. 20-138 *et seq.* No such exemption appears. Consequently, defendant Gamble, while operating defendant Oliver's farm tractor, with trailer attached, was required to see that his turning movement could be made in safety. G.S. 20-154(a) (Cum. Supp. 1981). He was further required to give a signal, plainly visible to drivers of other affected vehicles, of his intention to make such a movement. *Id.* Finally, he was required to "give way to the right in favor of the overtaking vehicle on audible signal." G.S. 20-149(b). Other motorists affected, including plaintiff's agent Mo-

zingo, had the right to assume that Gamble would delay his movement until it could be made in safety. *Brown v. Brown*, 38 N.C. App. 607, 609, 248 S.E. 2d 397, 398 (1978). "A motorist is not bound to anticipate negligent acts or omissions on the part of other[s]." *Williams v. Tucker*, 259 N.C. 214, 218, 130 S.E. 2d 306, 308 (1963).

The evidence that defendant Gamble did not give a turn signal was uncontroverted. While evidence as to whether plaintiff's agent Mozingo gave an audible signal was conflicting, there was substantial evidence from which the jury could have found that he did. The evidence thus presented permissible inferences that defendant Gamble was negligent in that he failed (1) to see that his turning movement could be made in safety, (2) to give the requisite signal of his intention to make such a movement, and (3) to give way to the right on audible signal from an overtaking vehicle; and that such negligence was a proximate cause of the collision.

The instruction complained of effectively rendered these inferences impermissible. It imparted to a farm tractor and trailer on a highway special hazard status *per se*. It rendered a motorist who collides with a farm tractor and trailer on a highway negligent *per se*, regardless of the circumstances or the conduct of the tractor-trailer operator. Such is not the law; and the error in so instructing was prejudicial, entitling plaintiff to a new trial.

The other errors assigned by plaintiffs are unlikely to arise upon re-trial, and we thus do not discuss them.

DEFENDANTS' APPEAL

[2] Defendants cross assign error to the denial of their motions for directed verdict. They contend plaintiff's agent Mozingo was contributorily negligent as a matter of law in that he increased his speed and attempted to pass without first ascertaining that defendant Gamble was aware of his presence on the highway. The primary basis of their contention is the following from Mozingo's testimony: "I'm not saying it [*i.e.*, blowing of Mozingo's horn] got [Gamble's] attention. I'm saying I blew the horn. When he whipped back over to the right-hand side, that was the first time he had any knowledge that I was in the vicinity."

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, 468-469, 279 S.E. 2d 559, 563 (1981); *Rappaport v. Days Inn*, 296 N.C. 382, 384, 250 S.E. 2d 245, 247 (1979); *Ridge v. Grimes*, 53 N.C. App. 619, 621, 281 S.E. 2d 448, 450 (1981); *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 644-645, 272 S.E. 2d 357, 360 (1980). The evidence here permitted the inference for which defendant contends. It also, however, permitted an inference that Mozingo's testimony as to defendant Gamble's obliviousness to Mozingo's presence prior to Gamble's "cut back" to the right, reflected Mozingo's post-collision perception, not his perception when he attempted to pass Gamble. It further permitted an inference that Mozingo did all that the law required in the exercise of due care for his own safety and that of others. It thus precluded a conclusion of contributory negligence as a matter of law and rendered directed verdict on the basis of contributory negligence improper.

RESULT

In plaintiff's appeal, new trial.

In defendants' appeal, no error.

Judges CLARK and BECTON concur.

ALLEN WILLIS, SR. AND WIFE, LUCY G. WILLIS v. JACKIE JOHNS AND WIFE, MRS. JACKIE (LILA) JOHNS

No. 8110SC411

(Filed 2 February 1982)

1. Adverse Possession § 17.2— color of title—commissioner's deed—sufficiency of description

A commissioner's deed which described the land conveyed as being bounded on the east by Montague Street, on the north and south by lands described in certain deed books at specified pages, and on the west by the land of a named person contained a description capable of being made certain by testimony at the trial so that it was sufficient to constitute color of title.

2. Adverse Possession § 18— color of title—presumptive possession to outer bounds of deed

Where one enters upon land and asserts ownership of the whole under an instrument constituting color of title, the law will extend his occupation of a portion thereof to the outer bounds of his deed, provided no part of the premises is held adversely by another.

APPEAL by plaintiffs from *Farmer, Judge.* Judgment entered 4 December 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 8 December 1981.

Plaintiffs appeal from a judgment dismissing their complaint to recover possession of real property on the ground that defendants had possessed the property adversely under color of title for more than seven years preceding institution of this action.

Vaughan S. Winborne for plaintiff-appellants.

Harrell & Titus, by Bernard A. Harrell and Richard C. Titus, for defendant-appellees.

WHICHARD, Judge.

Plaintiffs instituted this action in June 1977 to recover possession of real property, alleging fee simple title in themselves and wrongful and unlawful possession by defendants. Defendants answered, alleging they purchased the property in 1964 from Wake County at a public sale for delinquent taxes and claiming that the judgment of Superior Court and the Commissioner's Deed pursuant thereto constituted color of title. The Commissioner's Deed indicated that Wake County had obtained the property upon failure of the owners, heirs at law of one Henry Sanders, to pay taxes; and that defendant Jackie Johns had been the last and highest bidder at the sale. As a further defense, defendants asserted that since acquiring the property they had erected a dwelling house thereon, and that plaintiffs' recovery thereof thus would constitute unjust enrichment. Defendants sought a judgment declaring the property described in their deed free and clear of plaintiffs' claims.

The court appointed a referee-surveyor to survey and map the property. At trial, without a jury, the surveyor testified for plaintiffs that the residence occupied by defendants was situated on the Isom Cook tract which had been conveyed to plaintiffs. He

further stated that the boundary description found in defendants' deed did not coincide precisely with the property in question and that the name of Henry Sanders, predecessor in title to the delinquent taxpayers through whom defendants claimed, did not appear in the files on the Isom Cook tract.

Plaintiff Allen Willis, Sr. testified that before he purchased the tract he had walked over it, had had the title searched, and had been satisfied with the title. Until the year of trial, he had paid taxes on the property. When he discovered that defendants were building a home on his property, he tried several times to contact defendant Jackie Johns and did, in fact, discuss the problem with him. Plaintiff Lucy G. Willis offered corroborative testimony.

Defendants' evidence tended to show that, in 1964, defendant Jackie Johns had purchased his tract of land, which included the property claimed by plaintiffs; that he had had it surveyed and marked; and that he had paid property taxes on it ever since. In October 1968, he had the basement of his house excavated on the disputed portion of his property, and he had a driveway constructed from the location of the house to the street. Johns could not recall talking to Allen Willis about the disputed portion until after his home had been completed and he had lived in it for approximately ten years.

The court found as facts that, in 1963, Wake County commenced a foreclosure action against the heirs at law of Henry Sanders for delinquent taxes on lands described in plaintiffs' complaint; that, in 1964, defendant Jackie Johns received a deed to lands completely encompassing plaintiffs' tract; that, in 1968, defendants commenced construction of their home by excavating for a basement; and that, while excavating, defendants received but ignored plaintiffs' warnings that defendants were on plaintiffs' property. It concluded that defendants acquired good and sufficient title only to that portion of the tract described in the tax deed which did not encompass plaintiffs' land; that, although the tax deed as to the portion embracing plaintiffs' land was defective and conveyed nothing to defendants, it did constitute color of title to plaintiffs' land; that defendants' possession of plaintiffs' land was for a period greater than seven years next preceding institution of this action; and that, by virtue of defend-

ants' adverse possession under color of title, fee simple title had vested in defendant Jackie Johns prior to filing of the lawsuit. The court decreed defendant Jackie Johns the fee simple owner and dismissed plaintiffs' complaint.

[1] Plaintiffs contend the Commissioner's Deed, and the judgment of Superior Court from which it originated, did not contain a description of the land either certain in itself or capable of being made certain so that the deed would constitute color of title. While a commissioner's deed in a judicial sale constitutes color of title, G.S. 1-38(a) (Cum. Supp. 1981), a party who uses a deed to establish color of title must prove that the boundaries in the deed cover the land in dispute, *Skipper v. Yow*, 238 N.C. 659, 78 S.E. 2d 600 (1953). When the description leaves uncertain what property is embraced, parol evidence is admissible to fit the description to the land. *Id.*

The description in defendants' deed referred to land "situated in Raleigh Township, Wake County," and read:

> Bounded on the east by Montague Street
> Bounded on the north by its land described in Book 289, Page 359; Book 1264, Page 342; Book 1112, Page 284 and Book 1112, Page 285.
> Bounded on the west by the land of Graham Morgan.
> Bounded on the south by land described in Book 1196, Page 96; Book 912, Page 301; Book 1238, Page 513.

Defendants concede that the deed "is not artfully drawn." In light of other evidence at trial, however, it was sufficient to permit an accurate determination of the tract conveyed.

The description begins by setting forth the eastern boundary as Montague Street, which the evidence showed to be in St. Mary's Township in Garner. Some of the deeds mentioned in the description refer to St. Mary's Township in Garner, and since the description otherwise places the property in that township, error in describing the township was not fatal. The description continues by setting forth the northern boundary as identifiable lands deeded to Mary Stewart (Book 289, page 359) and C. G. Irving, Jr. (Book 1264, Page 342). The northern boundary is also described by reference to two other parcels which lie too far west to form a boundary with the disputed property but which do aid

in defining its northwest corner. On the west, the property is bounded by property of Graham Morgan, which was established not only by testimony of the surveyor but also by testimony of a woman who lived in the vicinity, knew Morgan, and knew the location of the branch forming Morgan's eastern boundary, which was defendants' western boundary. By reference to one deed (Book 1196, Page 96), the commissioner's conveyance established the southwestern corner. Finally, the southern boundary is defined by two deeds, the first to property of the Sallie Whitaker subdivision (Book 912, Page 301) and the second to a lot in the Sallie Whitaker Land Subdivision deeded to Bernice Walton (Book 1238, Page 513).

Additionally, the surveyor testified that, as to defendants' tax deed, he was "satisfied that part of the land is described in the deed which is outlined in blue." A blue line demarcated the land defendants claimed on the survey by which the surveyor illustrated his testimony. Although White expressed reservations about the deeds establishing the northwest and southwest corners because they defined no boundary, the map he prepared otherwise clearly showed the boundaries of defendants' property.

The court was able from the foregoing to establish with sufficient certainty the boundaries of the property defendants claimed. The evidence supports its findings establishing the boundaries. This assignment of error is, therefore, overruled.

[2] Plaintiffs also contend the court erred in determining that defendants, whose home occupied only a portion of the disputed property, adversely possessed the entire tract. Where, as here, one enters upon land and asserts ownership of the whole under an instrument constituting color of title, the law will extend his occupation of a portion thereof to the outer bounds of his deed, provided no part of the premises is held adversely by another. *See Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E. 2d 766 (1969); *Price v. Whisnant*, 232 N.C. 653, 62 S.E. 2d 56 (1950); *J. Webster, Real Estate Law in North Carolina* § 264 (1971 & Supp. 1977). Exclusive possession of a portion, if continued without interruption for seven years, will ripen title to all the land embraced in the deed. *Id.* It is undisputed here that defendants' exclusive adverse possession of a part of the disputed property continued well beyond seven years. Their title by adverse possession under color

of title, therefore, extended to all the property described in the Commissioner's Deed, which embraced all of plaintiffs' tract.

Plaintiffs' final assignment of error attacking the judgment as a whole depends upon their first two assignments, and is therefore without merit.

Affirmed.

Judges CLARK and BECTON concur.

CUDAHY FOODS COMPANY v. PEGGY HOLLOWAY

No. 8114SC497

(Filed 2 February 1982)

Uniform Commercial Code § 8— sales contract— not between merchants—writing requirement violated

Defendant, a real estate broker, did not qualify under the merchant exception of N.C.G.S. 25-2-201(2) as the contract, if any, between plaintiff and defendant was for $11,083.63 worth of mozzarella cheese and the purchase did not relate to the business or occupation of defendant. As defendant did not qualify as a merchant and the sale involved an amount greater than $500 the contract was required to be in writing. N.C.G.S. 25-2-201(1).

APPEAL by defendant from *Martin, Judge.* Judgment signed 30 December 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 11 January 1982.

On 2 June 1978, plaintiff shipped to Pizza Pride, Inc., of Jamestown, North Carolina, an order of two hundred sixty-two 2/20 inch Rex mozzarella cheese, having a contract price of $11,083.63. That same day plaintiff mailed defendant an invoice for the order, based on plaintiff's understanding that an oral contract existed between the parties whereby defendant had agreed to pay for the cheese. Defendant was engaged in the real estate business at this time and had earlier been approached by Pizza Pride, Inc. to discuss that company's real estate investment potential. Defendant denied ever guaranteeing payment for the cheese and raised, as an affirmative defense, the provisions of N.C.G.S. 25-2-201, the statute of frauds. After hearing the

evidence, the court concluded as a matter of law that defendant did agree to pay for the cheese and was liable to the plaintiff in the amount of $11,083.63. Defendant appealed.

Pulley, Wainio, Stephens & Lambe, by John C. Wainio, for plaintiff appellee.

Powe, Porter and Alphin, by Edward L. Embree, III, for defendant appellant.

MARTIN (Harry C.), Judge.

The sale in question brings the case within the statute of frauds provision of the Uniform Commercial Code, which reads in pertinent part:

> (1) Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars ($500.00) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

N.C. Gen. Stat. § 25-2-201(1) (1965).

Plaintiff, however, contends that under the facts of the case the sale was one between merchants, thus invoking subsection (2):

> Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

Id. § 25-2-201(2).

At issue, then, is whether defendant, a real estate broker who allegedly guaranteed payment for a shipment of cheese to a third party, comes within the definition of "merchant" as contemplated under the statute of frauds provision of the Uniform Commercial Code. We answer in the negative.

N.C.G.S. 25-2-104(1) defines "merchant" as "a person who deals in goods of the kind or otherwise by his occupation holds

himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction . . .." " 'Between merchants' means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants." N.C. Gen. Stat. § 25-2-104(3) (1965).

Defendant, at the time of the alleged sale, was a real estate broker. She did not deal in cheese, pizza, or in goods relating to the restaurant business. Nor by her occupation did she hold herself out as having knowledge or skill peculiar to the goods involved in the transaction. In fact, the nature of defendant's occupation precluded her dealing in goods at all. Real estate does not fall under the U.C.C.'s definition of "goods." *See* N.C. Gen. Stat. § 25-2-105 (1965).

It is plaintiff's contention that because the defendant was in the business of buying and selling real estate, she possessed the knowledge or skill peculiar to the *practices* involved in the transaction. Plaintiff relies on the official comment to N.C.G.S. 25-2-104 in support of this contention. The comment reads: "For purposes of [§ 25-2-201] almost every person in business would, therefore, be deemed to be a 'merchant' . . . since the practices involved in the transaction are non-specialized business practices such as answering mail." The comment goes on to state, however, that "even these sections only apply to a merchant in his mercantile capacity."

Familiarity with trade practices has, under certain circumstances, acted to confer merchant status. *See Nelson v. Union Equity Co-Op Exchange*, 548 S.W. 2d 352 (Tex. 1977) (farmer dealing in sales of his own products held familiar with the product and practice); *County of Milwaukee v. Northrop Data Systems*, 602 F. 2d 767 (7th Cir. 1979) (operation of a hospital sufficiently related to the purchase of a laboratory systems computer to find merchant status); *Cement Asbestos Products v. Hartford Acc. & Indem.*, 592 F. 2d 1144 (10th Cir. 1979) (building contractor with specialized knowledge of the goods held to be within the Code definition of merchant). *See also Currituck Grain, Inc. v. Powell*, 28 N.C. App. 563, 222 S.E. 2d 1 (1976) (farmer raising corn and soybeans held himself out as having knowledge or skill peculiar to the practice of dealing in corn and soybeans). However, the familiarity with trade customs test is not so broad as to extend to

the isolated purchase of a type of goods unrelated and unnecessary to the business or occupation of the buyer. The mere fact that one is "in business" does not, without more, give rise to the conclusive presumption that by his occupation, the businessman holds himself out as having knowledge peculiar to the practices involved in the transaction. The focus remains on the occupation or type of business as it relates to the subject matter of the transaction.

Whether a person is a merchant is a question of law. *County of Milwaukee, supra.* By applying the definition of merchant to the facts of this case, we hold that defendant was not a merchant in the present transaction. Her skill and knowledge as a real estate broker did not qualify her as a skilled or knowledgeable purchaser of mozzarella cheese. Nor was defendant among the class of persons upon whom the provisions of N.C.G.S. 25-2-201(2) were designed to impose liability.

> The purpose of the subsection of the Code is to rectify an abuse that had developed in the law of commerce. The custom arose among business people of confirming oral contracts by sending a letter of confirmation. This letter was binding as a memorandum on the sender, but not on the recipient, because he had not signed it. The abuse was that the recipient, not being bound, could perform or not, according to his whim and the market, whereas the seller had to perform.

Azevedo v. Minister, 86 Nev. 576, 582-83, 471 P. 2d 661, 665 (1970).

As defendant does not qualify under the merchant exception of N.C.G.S. 25-2-201(2), the contract, if any, between plaintiff and defendant was required to be in writing: the sale involved an amount greater than $500. Defendant signed no written contract or other memorandum. It follows that defendant cannot be held liable for the price of the cheese.

In light of our holding, it is not necessary to discuss defendant's additional assignments of error.

Reversed.

Chief Judge MORRIS and Judge VAUGHN concur.

MARVIN D. RIDINGS v. CORNELIA A. RIDINGS

No. 8121DC296

(Filed 2 February 1982)

1. **Rules of Civil Procedure § 56— unpleaded defenses raised by evidence—consideration on summary judgment motion**

Unpleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment; however, it is the better practice to require a formal amendment to the pleadings.

2. **Cancellation and Rescission of Instruments § 3; Husband and Wife § 12.1—separation agreement—undue influence—ratification**

Plaintiff ratified a separation agreement and was thus foreclosed from attempting to set it aside on the ground of undue influence where the undue influence allegedly occurred prior to the execution of the agreement and there was no evidence of undue influence after the date the agreement was signed; for some months after the agreement was signed, plaintiff accepted and retained benefits growing out of the agreement in that defendant made tax, mortgage and insurance premium payments on the dwelling owned by the parties as tenants in common, defendant contributed to its general maintenance, and defendant transferred to plaintiff certain property listed in the separation agreement, including title to a Cadillac automobile; and plaintiff made alimony payments for some months and conveyed to defendant the title to a Chevrolet automobile.

3. **Cancellation and Rescission of Instruments § 3.1; Husband and Wife § 12.1—separation agreement—mental incompetency—ratification**

Even though plaintiff presented some evidence that he was incompetent at the time he signed a separation agreement, summary judgment was properly entered for defendant in plaintiff's action to set aside the agreement where there was plenary evidence that plaintiff ratified the agreement and plaintiff offered no evidence that he continued to suffer from the alleged mental illness when his acts of ratification occurred.

APPEAL by plaintiff from *Alexander, Judge.* Judgment entered 6 February 1981 Session of FORSYTH County District Court. Heard in the Court of Appeals 21 October 1981.

Plaintiff sought to set aside a separation agreement entered into with defendant. Plaintiff's complaint, filed 29 November 1978, alleged mental incompetency on his part, and undue influence at the time of execution of the agreement.

Plaintiff's evidence showed that he had been under the care of several physicians, was depressed, and had been taking medications prior to the couple's separation on 8 June 1978, the same

day the agreement was signed. Plaintiff presented the affidavit of Dr. Thomas Cannon, in which Dr. Cannon expressed the opinion that plaintiff may have suffered from impaired judgment, affecting his ability intelligently to negotiate for the division of property at the time he signed the agreement.

Plaintiff also offered evidence that defendant exercised undue influence by asking him to leave home, by telling plaintiff, family and friends that he needed psychiatric help and that he was "crazy", and by breaking his glasses.

The separation agreement was largely honored by both sides, the only breach thereof being plaintiff's nonpayment of alimony after October 1978.

Defendant filed a motion for summary judgment. The trial court found no issue of fact and granted defendant's motion. Plaintiff appeals.

Pettyjohn and Molitoris, by Theodore M. Molitoris, for plaintiff appellant.

White and Crumpler, by Robert B. Womble, for defendant appellee.

MORRIS, Chief Judge.

Rule 56 does not require the movant to set forth the grounds upon which he bases a motion for summary judgment, *Conover v. Newton*, 297 N.C. 506, 256 S.E. 2d 216 (1979), and, of course, the very nature of the motion obviates the necessity for findings of fact. We assume that the trial judge determined defendant's evidence of ratification sufficient to meet her burden of persuasion on the affirmative defense, negating the existence of any genuine issue of material fact on the allegations of incompetency and undue influence. These grounds, which we find sufficient, are dispositive. Hence, we choose only to outline the basis of our determination that evidence of plaintiff's ratification of the separation agreement resulted in a lack of triable issue of fact.

[1] G.S. 1A-1, Rule 8(c) requires that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." We note that defendants' answer did not contain the defense of ratification. Rule 56, however, does not limit consideration of a motion for

summary judgment to the pleadings. The court may consider depositions, answers to interrogatories, admissions on file and affidavits. Indeed,

> [T]he nature of summary judgment procedure (G.S. 1A-1, Rule 56), coupled with our generally liberal rules relating to amendment of pleadings, require that unpleaded affirmative defenses be deemed part of the pleadings where such defenses are raised in a hearing on motion for summary judgment. *Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976). See also 6 Moore, Federal Practice (2d ed. 1976) § 56-736.

Cooke v. Cooke, 34 N.C. App. 124, 125, 237 S.E. 2d 323, 324, *cert. denied*, 293 N.C. 740, 241 S.E. 2d 513 (1977). Thus, although it is better practice to require a formal amendment to the pleadings, unpleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment. *Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976).

[2] A transaction procured by undue influence may be ratified by the victim, foreclosing a subsequent suit to vitiate the contract. *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971). The pleadings, answers to interrogatories and affidavits clearly show that plaintiff acceded to the separation agreement. Plaintiff maintains that the acts constituting defendant's exercise of undue influence occurred prior to execution of the agreement, and he does not allege, nor does the record reveal, any undue influence after 8 June 1978, the date the agreement was signed. Plaintiff, between 8 June 1978 and the filing of his action on 29 November 1978, accepted and retained all benefit growing out of the agreement. Defendant made all the tax, mortgage, and insurance premium payments on the dwelling owned by defendant and plaintiff as tenants in common. She also contributed to its general maintenance. She transferred to plaintiff certain property listed in the separation agreement, including title to and possession of a 1974 Cadillac automobile. Plaintiff recognized the legitimacy of the agreement by continued performance thereunder after any purported duress had terminated. He made alimony payments from July until November of 1978. He further acknowledged the validity of the agreement by conveying full possession and title to the parties' 1967 Chevrolet automobile. Plaintiff thus acquiesced for months in the separation agreement which he would now

avoid. He has shown no ground for rescission based upon the exercise of undue influence.

[3] Plaintiff, in addition, was unable to show that he could support his position on incompetency by the offer of proof at trial. With regard to the standard of competency required validly to enter a contract,

> [w]e have said . . . that . . . a person has mental capacity sufficient to contract if he knows what he is about [*Moffit v. Witherspoon*, 32 N.C., 185; *Paine v. Roberts*, 82 N.C., 451], and that the measure of capacity is the ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences, not that he should be able to act wisely or discreetly, nor to drive a good bargain, but that he should be in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly.

Sprinkle v. Wellborn, 140 N.C. 163, 181, 52 S.E. 666, 672 (1905). Plaintiff's evidence shows that he suffered headaches, anxiety and mild to moderate depression prior to signing the agreement, and he submitted the affidavit of a physician who treated him. Dr. Thomas B. Cannon stated under oath that, in his opinion, plaintiff's judgment may have been impaired, affecting his ability "to negotiate or understand the nature and extent of the property that he owned and to reasonably, intelligently and voluntarily dispose of the property by a Separation Agreement or any other rational exchange of properties, all due to his depressed state, medication and general health condition." This information, if taken alone, perhaps would be sufficient to raise a genuine issue of plaintiff's ability to grasp the nature and consequences of his actions. Plaintiff failed, however, to make a showing sufficient to indicate continued incompetence in the face of the evidence of ratification.

The party seeking to exercise the privilege of avoidance has the burden of proof on the question of whether he was mentally ill. Everyone is presumed to be sane until the contrary appears. 2 Stansbury's N.C. Evidence § 238 (Brandis rev. 1973). Also, when the movant has satisfied his burden on a motion for summary judgment, the respondent may not simply rely on the allegations in the pleadings, but must reply by submitting contrary informa-

tion showing that a genuine issue of fact exists. *Hotel Corp. v. Taylor* and *Fletcher v. Foremans, Inc.*, 301 N.C. 200, 271 S.E. 2d 54 (1980).

Though there is some evidence of incompetency at the time the agreement was signed, the record contains no information as to how long plaintiff continued to suffer the allegedly debilitating mental illness. Plaintiff could not have ratified the separation agreement as long as his condition remained unchanged. *See Walker v. McLaurin*, 227 N.C. 53, 40 S.E. 2d 455 (1946). Yet there is plenary evidence of ratification. We deem it incumbent upon plaintiff, in the face of the presumption of competence, the evidence of ratification, and defendant's motion for summary judgment, to offer evidence of his continued incapacity which would counter defendant's affirmative defense. This, plaintiff failed to do.

The court awarded summary judgment in favor of the party with the burden of proof. Such grant is appropriate if the movant's evidence is not self-contradictory and there is no question of witness credibility, as here. The evidence in this case is also direct, without gaps, and does not require application of any legal principle upon which reasonable minds could differ. See generally *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). We thus find that defendant met the burden of persuasion on the affirmative defense of ratification by the strength of her own evidence, even though her affidavits and supporting material were not challenged.

The order of summary judgment for defendant was appropriately entered. The court's judgment is, therefore,

Affirmed.

Judges ARNOLD and BECTON concur.

IN THE MATTER OF: JEFFREY CHAVIS, APPELLEE AND GUILFORD MILLS, INC., EMPLOYER AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, APPELLANT

No. 8118SC379

(Filed 2 February 1982)

Master and Servant § 108.1— unemployment compensation—misconduct affecting discharge—denial of benefits proper

Where an employee failed to report for work and upon questioning by his supervisor responded by raising his voice, saying "I am damn tired of being harassed" and where the employee continued to raise his voice at a meeting with his supervisor and other persons and was discharged, his behavior constituted "misconduct" within the meaning of G.S. 96-14(2), and the employee was not thereafter entitled to unemployment compensation.

Judge MARTIN (Robert M.) dissenting.

APPEAL by Employment Security Commission from *Collier, Judge*. Judgment entered 12 February 1981, Superior Court, GUILFORD County. Heard in the Court of Appeals 18 November 1981.

Jeffrey Chavis, employee of Guilford Mills, Inc., filed a claim for unemployment insurance benefits resulting from his having been discharged by his employer. A Claims Adjudicator for Employment Security Commission of North Carolina (hereinafter "the Commission") notified employee that "your being discharged from Guilford Mills, Inc., because your employer became dissatisfied with your attitude does not constitute misconduct in connection with the work." An Appeals Referee reversed this decision, and the reversal was affirmed by the Chief Deputy Commissioner. Employee appealed to the Superior Court which reversed the decision and remanded the matter to the Commission, finding that the Commission had not properly applied the law to the facts.

The pertinent finding of fact, accepted by employee on appeal, is as follows:

> 3. The claimant was discharged from his employment with Guilford Mills, because of his belligerent attitude toward his supervisors. On the claimant's last work day, he was asked by his supervisor why he had not been to work that previous

Saturday. Because the claimant had been excused the prior Saturday, the claimant had promised a supervisor that he would be in to work on Saturday, November 17, 1979. When the claimant's supervisor asked the claimant where he had been on Saturday, the claimant responded by raising his voice saying, "I am damn tired of being harassed. I want to talk to Chuck Hayes." The supervisor then brought the claimant into a meeting with the plant manager and assistant superintendent wherein the claimant continued to raise his voice at his supervisor and the other persons at the meeting when being talked to about his attitude at work. The claimant began accusing his supervisor and other employees of trying to pick up his girl friend who also worked at Guilford Mills. Considering the claimant's conduct and attitude on this morning, the claimant was discharged.

R. Horace Swiggett, Jr., for employee appellee.

Gail C. Arneke, C. Coleman Billingsley, Jr., and William H. Guy, Staff Attorneys for Employment Security Commission of North Carolina, appellant.

MORRIS, Chief Judge.

Appellant's sole assignment of error is that the Superior Court erred in finding that the Commission did not properly apply the law to the facts. The trial court concluded that upon the facts found, employee's behavior did not constitute "misconduct" within the meaning of G.S. 96-14(2), which provides that an individual shall not be entitled to unemployment compensation if his unemployment results from his having been "discharged for misconduct connected with his work."

This Court, in *In re Collingsworth*, 17 N.C. App. 340, 194 S.E. 2d 210 (1973), discussed at some length the meaning of "misconduct" as it relates to unemployment compensation. We quoted, with approval, the Wisconsin Court in *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941). There the Court defined "misconduct," as set out in the majority opinion, as "conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or *disregard of standards of behavior which the employer has the right to expect of his employee*, ..."

The evidence in this case indicates that the employee had been given the privilege of not reporting for work on a Saturday when he was supposed to work upon the condition that he work the next Saturday. He did not report the next Saturday but went to a ball game with no notification to his supervisor that he would not report for work. The supervisor approached him to determine why he had not reported for work as scheduled. Obviously, the supervisor had every right to make this inquiry. His responsibility to his employer required it. Rather than answering the perfectly legitimate question, the employee, in a loud voice, accused the supervisor of harassing him and demanded a conference with Chuck Hayes. The conduct continued in the conference, where the employee continued his accusations in a loud and belligerent voice, also accusing his supervisor and other employees of trying to pick up his girl friend, who also worked at Guilford Mills. It is clear to me that the conduct of this employee constituted complete disregard of standards of behavior which the employer has the right to expect of his employee. This is an intentional and substantial disregard of the employer's interest and is misconduct connected with his work within the meaning of the statute.

The Appeals Referee and the Commission, which adopted the Referee's decision, properly applied the law to the facts.

Reversed.

Judge HEDRICK concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.) dissenting.

"Misconduct" is not defined within N.C. Gen. Stat. § 96-14(2), but our Court in *In re Collingsworth*, 17 N.C. App. 340, 343-44, 194 S.E. 210, 212-13 (1973) quoted with approval the following definition:

> "[T]he term 'misconduct' [in connection with one's work] is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or

> negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer . . ."

I agree with the trial court that the appellee's action in saying that he was tired of being harassed, raising his voice at supervisory personnel, and accusing the supervisor of trying to pick up appellee's girl friend do not meet this definition of misconduct. This conduct falls far short of the misconduct found in *Yelverton v. Furniture Industries*, 51 N.C. App. 215, 220, 275 S.E. 2d 553, 556 (1981) wherein the Court found that:

> The claimant's actions in (1) threatening a fellow employee with bodily harm, (2) leaving his assigned work area for the avowed purpose of going to another work area to harass a fellow employee, and (3) picking up a wooden post in the course of an argument with the fellow employee, were sufficient to constitute "an intentional and substantial disregard of the employer's interests." They thus constituted "misconduct connected with his work" sufficient to disqualify him from receiving unemployment compensation benefits.

For these reasons, I hold that the judgment of the Superior Court should be affirmed.

CLAUDIA BARRINGTON AND MELVIN BARRINGTON, PARENTS OF DONALD H. BARRINGTON, DECEASED EMPLOYEE, PLAINTIFFS v. EMPLOYMENT SECURITY COMMISSION AND/OR ECONOMIC IMPROVEMENT COUNCIL, EMPLOYER, UNITED STATES FIRE INSURANCE COMPANY AND/OR SENTRY INSURANCE, A MUTUAL COMPANY, CARRIER, DEFENDANTS

No. 8110IC498

(Filed 2 February 1982)

1. Estoppel § 4.6; Master and Servant § 81— workers' compensation—insurer's acceptance of premiums—no estoppel to deny employment status

A workers' compensation insurer's acceptance of premiums from the Employment Security Commission on behalf of a C.E.T.A. worker hired by the Commission and assigned to work for a subcontractor did not estop the insurer from denying that the worker was an employee of the Commission and from

asserting that the subcontractor was the employer of such worker for workers' compensation purposes since there was no evidence that the subcontractor or its compensation insurance carrier altered its position in reliance on the fact that the Commission's insurer accepted premiums on behalf of the worker.

2. Master and Servant § 49.1— workers' compensation—determination of worker's employer

The Industrial Commission should have made findings and conclusions as to whether a C.E.T.A. worker hired by the Employment Security Commission and assigned to work for a subcontractor was the employee of the Commission or of the subcontractor at the time of an accident.

APPEAL by defendants Employment Security Commission and United States Fire Insurance Company from the North Carolina Industrial Commission opinion and award of 13 January 1981. Heard in the Court of Appeals 11 January 1982.

The facts are undisputed. In October of 1977, the Employment Security Commission (E.S.C.) entered into a contract with the Economic Improvement Council (E.I.C.) whereby the latter agreed to perform certain services for E.S.C., including operation of a program financed under the Comprehensive Employment and Training Act (C.E.T.A.) of 1973. The contract contained a provision stating that the subcontractor would maintain a workers' compensation policy on its employees. E.I.C. did not do so. For the next three years it was the parties' understanding that E.S.C. would insure all C.E.T.A. participants under its workers' compensation policy.

In the summer of 1978, Donald Barrington was hired by E.S.C. pursuant to the C.E.T.A. program. He was referred to E.I.C. which placed him in the Town of Beach Springs as a playground supervisor. E.S.C. determined Barrington's wages and paid him out of federal funds. E.I.C. was responsible for his daily supervision. Its staff assigned his working hours, trained him, and met with him regularly to discuss problems.

On 15 August 1978, Donald Barrington drowned. All parties have stipulated that his death was the result of an accident arising out of and in the course of employment. Testimony before the Industrial Commission focused on which of the two alleged employers was indeed decedent's employer and therefore obligated to pay the compensation award.

The Deputy Commissioner made the following conclusion of law:

> "5. The defendant, ESC and/or its insurance company, U.S. Fire Insurance Company, is estopped to deny workers' compensation protection for the deceased employee. [citations omitted]
>
> Since U.S. Fire Insurance Company accepted payment of premiums for the decedent, it is estopped to deny coverage of workers' compensation protection for the decedent."

He then ordered defendants to pay compensation benefits. The Full Commission affirmed the opinion and award, adopting as its own the Deputy Commissioner's findings of fact and conclusions of law.

Young, Moore, Henderson and Alvis, by B. T. Henderson II and William F. Lipscomb, for defendant appellants.

Johnson, Patterson, Dilthey and Clay, by Richard T. Boyette, for defendant appellees.

VAUGHN, Judge.

Defendants contend that the Commission erred in applying equitable estoppel and in failing to find that decedent's employer was E.I.C. rather than E.S.C. For reasons discussed herein, we reverse the Commission's order and remand the present record for further findings and conclusions of law.

[1] Defendants first argue that the Industrial Commission erred in concluding that they were estopped from denying the existence of an employment relationship between the decedent and E.S.C. We agree.

It is well established that the doctrine of equitable estoppel may be applied in workers' compensation cases. *Aldridge v. Motor Co.*, 262 N.C. 248, 136 S.E. 2d 591 (1964); *Britt v. Construction Co.*, 35 N.C. App. 23, 240 S.E. 2d 479 (1978). According to *Bourne v. Lay & Co.*, 264 N.C. 33, 37, 140 S.E. 2d 769, 772 (1965), "[i]t is essential to an equitable estoppel that the person asserting the estoppel shall have done or omitted some act or changed his position in reliance upon the representations or conduct of the person sought to be estopped." The person asserting estoppel

must also demonstrate that the reliance caused him detriment. *Thompson v. Soles*, 299 N.C. 484, 487, 263 S.E. 2d 599, 602 (1980).

The typical workers' compensation case in which equitable estoppel has been applied involves one insurance carrier. *See, e.g., Aldridge v. Motor Co., supra; Pearson v. Pearson, Inc.*, 222 N.C. 69, 21 S.E. 2d 879 (1942); *Garrett v. Garrett & Garrett Farms*, 39 N.C. App. 210, 249 S.E. 2d 808 (1978), *cert. denied*, 296 N.C. 736, 254 S.E. 2d 178 (1979). In these cases, the employee (or his employer) has relied on assertions of the insurance carrier that the employer's policy covers the employee. If the insurance carrier is later allowed to assert that the claimant is *not* an insured employee, the claimant will receive no benefits. Courts, therefore, have held that acceptance of premiums based on inclusion of an employee's salary precludes the insurance carrier from later denying the claimant's employee status. *Id.*

In the present action, one insurance carrier is asserting equitable estoppel against another insurance carrier. *Britt v. Construction Co.*, 35 N.C. App. 23, 33, 240 S.E. 2d 479, 485 (1978) held that equitable estoppel applies equally as well to this situation as it does to claims between an employee and a carrier. Between two insurance carriers, however, this Court recently held that acceptance of worker compensation premiums is *not* sufficient to estop the receiving carrier from denying employee status. *Godley v. County of Pitt*, 54 N.C. App. ---, 283 S.E. 2d 430 (1981).

The facts of *Godley v. County of Pitt, supra*, are virtually indistinguishable from the present claim. The injured employee had been hired by Pitt County (County) as a C.E.T.A. worker. He was assigned to the Town of Winterville (Town) which assumed control of his day-to-day supervision. Pursuant to its contract with the federal government, County paid workers' compensation premiums on Godley and all other C.E.T.A. employees. Town did not pay premiums to its carrier on behalf of Godley.

The hearing officer concluded that County and its insurance carrier were estopped from denying that County was Godley's employer because of payment and acceptance of insurance premiums which included Godley's salary. This Court reversed. Stating that detrimental reliance is an essential element of equitable estoppel, the Court failed to find any evidence of such reliance by Town:

> "While it is true that the County's insurer accepted premiums on behalf of the plaintiff, there is no evidence in the record to indicate that the Town or its insurer appreciably altered its position in reliance upon this fact. The only reliance asserted by the Town is its own failure to pay insurance premiums specifically on behalf of the plaintiff. We are not persuaded that this omission constitutes detrimental reliance."

54 N.C. App. at ---, 283 S.E. 2d at 432.

In the present case, we also fail to find evidence of detrimental reliance. E.I.C. argues it relied on the parties' understanding that E.S.C. would cover C.E.T.A. workers under its workers' compensation policy. It, therefore, never included the salary of C.E.T.A. workers in premiums to its own carrier. As the Court in *Godley* stated, however, failure to pay premiums does not constitute detrimental reliance. An insurer can recover unpaid premiums if liability is established. *See Williams v. Stone Co.*, 232 N.C. 88, 91, 59 S.E. 2d 193, 195 (1950). We, therefore, sustain appellants' first assignment of error.

[2] Appellants next argue the Commission erred in failing to find that E.I.C. was the employer of the deceased. Having found that E.S.C. was estopped from denying employer status, the Deputy Commissioner never made findings or conclusions as to who in reality was decedent's employer. In light of our foregoing holding, such determinations are now necessary.

Forgay v. State University, 1 N.C. App. 320, 161 S.E. 2d 602 (1968) and *Godley v. County of Pitt, supra*, provide guidelines. *Forgay* involved a PACE employee who was hired by N.C. State University and assigned to work for the Town of Madison. As discussed earlier, *Godley* involved a C.E.T.A. worker hired by the County of Pitt and assigned to work for the Town of Winterville.

In neither case was payment of the employee's salary or the right to hire and discharge sufficient to establish a defendant as the employee's employer. The determinative factor was supervisory control. *See Forgay*, 1 N.C. App. at 326, 161 S.E. 2d at 606; *Godley*, 54 N.C. App. at ---, 283 S.E. 2d at 432. Which entity had the power to set work hours, assign duties and establish the manner of performance? Which entity accepted the benefits of the employee's services?

In the present action, the Commission made findings of fact that E.S.C. hired decedent, determined his wages, and had the right to terminate his employment. Finding of Fact No. 10 is that E.I.C. decided where the decedent would work and provided him with day-to-day supervision. Missing, however, is any finding or conclusion of law as to which entity was decedent's employer. The test is "[f]or whom was the plaintiff working as an employee at the time of the accident?" *Suggs v. Truck Lines*, 253 N.C. 148, 155, 116 S.E. 2d 359, 364 (1960).

For the reasons stated, the opinion and award of the Commission is reversed, and the cause is remanded for further findings and conclusions based on the present record.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. LACY ALLEN PARKER

No. 8112SC518

(Filed 2 February 1982)

1. Criminal Law § 142.3— condition of probation appropriate

Where defendant was convicted of unlawfully, willfully and wantonly injuring personal property by sawing down a light pole, removing a transformer therefrom and burying the transformer, a condition of his probation that he refrain from possessing a firearm was one of the sixteen "appropriate conditions" of probation specifically authorized by the legislature, and it was unnecessary to find its "relatedness" to the crime. G.S. 15A-1343(b)(1)-(16).

2. Criminal Law § 99.7— court's admonition of witness concerning penalty for perjury—no prejudice

Defendant failed to show prejudice in the trial court's admonition of one of defendant's witnesses with regard to the penalty for perjury since the witness in no way altered his story and since the judge, not a jury, served as fact-finder.

APPEAL by defendant from *Davis, Judge*. Order entered 24 March 1981 in Superior Court, HOKE County. Heard in the Court of Appeals 11 November 1981.

A hearing was held on a report that defendant had violated the terms and conditions of his probation.

It was stipulated that defendant was convicted on 2 August 1979 of unlawfully, willfully and wantonly injuring personal property by sawing down a light pole, removing a transformer therefrom and burying the transformer. Defendant received a two-year, suspended sentence and was placed on probation for five years. One of the conditions of probation was that defendant "refrain from possessing a firearm or destructive devise [sic] or any other dangerous weapon unless granted written permission by the Court."

State's evidence at defendant's parole revocation hearing tended to show that a state wildlife enforcement officer saw defendant in early January 1981 standing in a field of broom straw, holding what appeared to be a shotgun. When defendant saw the officer, he threw the object down. A shotgun was found lying in the field. Defendant went to the officer's house a few weeks before trial and asked what kind of deal they could make since defendant did not want to go back to prison.

State's evidence also showed that defendant had requested the court's permission to have a weapon more than a year earlier.

Defendant testified that he had accompanied two men to the field where he was observed by the wildlife officer, but that he had carried no weapon. His companions carried shotguns. When the officer was seen approaching, one of the men dropped his gun and ran away. This was the gun later found lying in the field. Defendant's alleged companions corroborated his testimony.

Judge Davis found that defendant had willfully violated the conditions of his probation. His probation was revoked and his two-year suspended sentence activated.

Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

Moses, Diehl & Pate, by Philip A. Diehl, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first argues that the trial court erred in imposing as a condition of probation a restriction not reasonably related to the crime of which defendant had been convicted and, therefore, that violation of this condition could not serve as the basis for revocation of his probation. In support of this assignment of error, defendant cites *State v. Cooper*, 51 N.C. App. 233, 275 S.E. 2d 538 (1981), wherein this Court stated that "[c]onditions of probation must bear some reasonable relationship to the offense committed. . . ., G.S. 15A-1343(b)(17)." *Id.* at 234, 275 S.E. 2d 539. We find, however, that defendant's reliance upon *Cooper* is misplaced. Unlike the case at bar, *Cooper* involved a condition of probation devised entirely by the court. Such a condition clearly falls under subsection 17 of the statute and, indeed, must be "reasonably related" to the defendant's crime. Our Supreme Court recently reversed *Cooper* in an opinion filed 6 October 1981, indicating its willingness to find "relatedness" where the connection between the crime and the condition of probation eluded this Court. We find it unnecessary to establish such a connection in the case before us, however, because the challenged condition was not a creation of the trial court, but rather is one of the sixteen "appropriate conditions" of probation specifically authorized by the legislature. G.S. 15A-1343(b)(1)-(16).

A review of the statute reveals that while some conditions apparently are intended to relate to specific types of crimes, others are designed to aid in the general rehabilitation of convicted criminals. In the case at bar, for example, one of the conditions not challenged by defendant is that set forth in G.S. 15A-1343(b)(5), that he "support his dependents and meet other family responsibilities." There is nothing in the record to indicate a direct relationship between this condition and the defendant's crime, but its purpose is obvious. A criminal defendant who receives probation in lieu of an active sentence is the beneficiary of judicial largess. The restrictions under which he must live during the term of his probation are a small price to pay for the key to the prison door. Indeed, a defendant who is unwilling to live with such conditions can always opt to serve his sentence rather than accept probation.

We feel that the legislature intended the "reasonably related" language of G.S. 15A-1343(b)(17) to serve as a check on

the discretion of judges in devising conditions of probation. Where, as here, the judge elects to impose one of the conditions enumerated by the statute, no such check is needed since our legislature has deemed all of these conditions "appropriate" to the rehabilitation of criminals and their assimilation into law-abiding society.

[2] Defendant next argues that the trial court's admonition of one of defendant's witnesses with regard to the penalty for perjury was prejudicial error. While such admonitions should not be issued lightly, defendant has failed to show any prejudice since the witness in no way altered his story, but persisted in corroborating defendant's testimony, and since the judge, not a jury, served as fact-finder.

Defendant contends the court also erred in failing to state in its judgment that it considered alternatives to revoking defendant's probation. We find nothing in the wording of G.S. 15A-1344(d) to indicate that such a finding is required.

We have examined defendant's remaining assignment of error and find it to be wholly without merit.

The order revoking defendant's probation is

Affirmed.

Chief Judge MORRIS and Judge BECTON concur.

STATE OF NORTH CAROLINA v. CLIFTON REDDICK, JR.

No. 813SC705

(Filed 2 February 1982)

1. Narcotics § 4.3— constructive possession of marijuana—sufficiency of evidence

The State's evidence was sufficient to present a jury question as to whether defendant was in control of premises in which marijuana was found or was in such close juxtaposition to the marijuana as to justify a conclusion that it was in his possession where it tended to show that a confidential informant told Greenville law officers that, within 48 hours prior to the search, he had seen defendant at a certain residence with cocaine and marijuana; when the officers arrived at the residence with a search warrant, they found defendant

there sitting on a couch; the search disclosed slightly less than a pound of marijuana located in a back bedroom closet; a "temporary marriage certificate" of defendant and his wife was located on the hall wall; an Employment Security Commission card bearing defendant's name and an application for a driver's license bearing defendant's name and the address of the residence was located on a kitchen peg board; and a receipt and a motor vehicle registration card bearing defendant's name and the address of the residence were located on a dresser in the bedroom in which the marijuana was found.

2. Searches and Seizures §§ 23, 44— search warrant—sufficiency of affidavit—failure to make findings and conclusions

Allegations in an affidavit that a confidential informant had advised the affiant that while at the described premises during the past 48 hours he had observed defendant and that, *inter alia*, defendant "had a quantity of marijuana in the apartment which [he] was . . . selling" was sufficient to sustain issuance of a warrant to search the apartment; therefore, an averment that defendant lived at this residence was not material and, even if false, would not invalidate the search warrant. Furthermore, failure of the trial court to enter findings of fact and conclusions of law in support of its denial of a motion to suppress evidence seized pursuant to the warrant was not prejudicial error where the entire basis of defendant's motion was his challenge to the validity of the warrant based on his denial that he lived at the searched premises.

APPEAL by defendant from *Brown, Judge.* Judgment entered 4 March 1981 in Superior Court, PITT County. Heard in the Court of Appeals 10 December 1981.

Defendant appeals from a judgment of imprisonment entered upon his conviction of felonious possession of marijuana.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

Robert L. White for defendant appellant.

WHICHARD, Judge.

The State's evidence showed that on 3 December 1980 law enforcement officers, pursuant to a search warrant, searched a residence located at 507-B Darden Drive, Greenville, North Carolina. Defendant was in the residence at the time. The search disclosed slightly less than a pound of marijuana. As a consequence, defendant was indicted for felonious possession of marijuana in excess of one ounce. G.S. 90-94, -95(a)(3), -95(d)(4) (1981 & Supp. 1981).

Defendant contends the court erred in denying his motions (1) for nonsuit and (2) to set aside the verdict and order a new trial. We find no error.

"It is elementary that upon consideration of a motion for judgment of nonsuit the evidence for the State is deemed to be true and the State is entitled to all reasonable inferences which may be drawn therefrom." *State v. Baxter*, 285 N.C. 735, 737, 208 S.E. 2d 696, 698 (1974). Our Supreme Court has declared the following standard for evaluating evidence in cases of illegal possession of controlled substances:

> An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. Also, the State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.'

State v. Harvey, 281 N.C. 1, 12-13, 187 S.E. 2d 706, 714 (1972).

[1] The State's evidence here showed the following: A confidential source informed Greenville law enforcement officers that, within forty-eight hours prior to the search, the source had been at 507-B Darden Drive and had observed defendant there with cocaine and marijuana. When the officers arrived with a search warrant, they found defendant there sitting on a couch. Their search disclosed slightly less than a pound of marijuana located in a back bedroom closet. It also disclosed the following: (1) a "temporary marriage certificate" of defendant and his wife, which was located on the hall wall; (2) an Employment Security Commission card bearing defendant's name, which was located on a peg board in the kitchen; (3) an application for a North Carolina driver's license, bearing defendant's name and the address "507-B Darden Drive, Greenville, North Carolina," which was also located on the kitchen peg board; (4) a receipt dated 27 October 1980 bearing defendant's name and the address "507 Darden Drive," which was

located on top of a dresser or chest in the bedroom in which the marijuana was found; and (5) a North Carolina Division of Motor Vehicles registration card, apparently dated 8 October 1980, bearing defendant's name and the address "507 Darden Drive, Greenville, North Carolina," which was located on the same dresser or chest. This evidence sufficed, under the *Harvey* standard, to present a jury question as to whether defendant was in control of the premises or in such close juxtaposition to the narcotic drugs as to justify a conclusion that they were in his possession. *See also State v. Roseboro*, 55 N.C. App. 205, 284 S.E. 2d 725 (1981), *disc. rev. denied*, 305 N.C. 155, 289 S.E. 2d 566 (1982). The court thus properly denied the motions challenging the sufficiency of the evidence.

[2] Defendant further contends the court should have allowed his motion to suppress "any and all evidence gained . . . by means of a search of premises at 507-B Darden Drive" on the ground that "the search warrant and the affidavit in support thereof are invalid because the affiant misrepresented the facts to the magistrate." The sole basis for the contention is that defendant denied on voir dire that he lived at the premises searched.

"A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance." G.S. 15A-978(a). If, absent a statement demonstrated by a substantial preliminary showing to be false, the affidavit on the basis of which probable cause was found is insufficient therefor, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Franks v. Delaware*, 438 U.S. 154, 156, 57 L.Ed. 2d 667, 672, 98 S.Ct. 2674, 2676 (1978).

The affidavit here stated that a confidential source, who in the past had provided reliable information, had advised the affiant that while at the described premises during the past forty-eight hours he had observed defendant; and that, *inter alia*, defendant "had a quantity of marijuana in the apartment which [he] was . . . selling." The affidavit further averred that the source also had stated that defendant kept marijuana in the described premises. This information was sufficient under the *Harvey* standard, *supra*, to establish probable cause for the magistrate to issue

the search warrant. The validity of the warrant, then, did not depend upon the statement, allegedly false, that defendant was selling marijuana "from his residence." The court thus properly denied the motion to suppress.

Defendant finally contends the court erred in failing to enter findings of fact and conclusions of law in support of its denial of the motion to suppress.

> When the competency of evidence is challenged and the trial judge conducts a voir dire to determine admissibility, the general rule is that he should make findings of fact to show the bases of his ruling. (Citation omitted.) If there is a material conflict in the evidence on voir dire, he *must* do so in order to resolve the conflict. (Citation omitted.) If there is no material conflict in the evidence on voir dire, it is not error to admit the challenged evidence without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. (Citations omitted.) In that event, the necessary findings are implied from the admission of the challenged evidence.

State v. Phillips, 300 N.C. 678, 685, 268 S.E. 2d 452, 457 (1980). *See also State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976).

Here, the entire basis of defendant's motion was his challenge to the validity of the search warrant based on his denial that he lived at the searched premises. Because the averment that defendant "had a quantity of marijuana in the apartment which [he] was . . . selling" was sufficient to sustain issuance of the warrant under the *Harvey* standard, *supra*, the averment that defendant lived at this residence was not material. The failure to make specific findings of fact and conclusions of law supporting denial of the motion to suppress thus did not constitute prejudicial error.

No error.

Judges CLARK and BECTON concur.

JUDY CAROL PENDER SELF v. JOHN CARROLL SELF

No. 8115DC444

(Filed 2 February 1982)

1. **Trial § 3.2— motion for continuance—no abuse of discretion in denial**

Defendant failed to show the trial judge abused his discretion in denying his motion for continuance where defendant was at least $16,650 in arrears in his child support payments, an order was entered on 15 December 1980 requiring the defendant to appear on 6 January 1981 to show cause why he should not be adjudged in contempt for noncompliance with the support order, and where he moved for continuance on the basis that his attorney, whom he had contacted on the afternoon of 5 January 1981, would not be able to appear.

2. **Divorce and Alimony § 23.9— willful nonsupport of child—findings not supported by evidence**

There was no competent evidence in a contempt proceeding to support the findings that (1) defendant had the ability to comply with a child support order, and (2) he had willfully failed to exercise his capacity to earn as there was no evidence to counter the testimony by defendant that he had been unemployed, seeking work, and "unable to make those payments."

3. **Divorce and Alimony § 23.9— failure to produce financial records—supported by evidence**

A statement by defendant that financial information including income tax returns, cancelled checks, financial statements, etc., had been prepared but was not present in court was sufficient to support a conclusion that defendant was in contempt for failure to produce his financial records.

APPEAL by defendant from *Washburn, Judge.* Order entered 7 January 1981 in District Court, ALAMANCE County. Heard in the Court of Appeals 10 December 1981.

Defendant appeals from an order finding him in contempt for failure to comply with orders for (1) payment of child support and (2) production of financial records.

No brief filed by plaintiff appellee.

House, Blanco, Randolph & Osborn, P.A., by Clyde C. Randolph, Jr., and Reginald F. Combs, for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends denial of his motion for continuance of the show cause hearing abridged his constitutional right to

counsel. *Holt v. Virginia*, 381 U.S. 131, 14 L.Ed. 2d 290, 85 S.Ct. 1375 (1965); *In Re Oliver*, 333 U.S. 257, 92 L.Ed. 682, 68 S.Ct. 499 (1948).

> A motion for continuance is ordinarily addressed to the sound discretion of the trial judge and not subject to review on appeal absent an abuse of that discretion. However, when the motion is based on a right guaranteed by the United States or North Carolina Constitutions, the question presented is a reviewable question of law. (Citations omitted.) Implicit in the constitutional guarantees of the effective assistance of counsel and the right to confront witnesses is the right to a reasonable time in which to investigate and prepare a defense. However, no set length of time is guaranteed and whether a defendant is denied due process of law by a trial court's denial of his motion to continue must be determined after consideration of the circumstances in each case.

State v. Parton, 303 N.C. 55, 68, 277 S.E. 2d 410, 419 (1981).

The pertinent circumstances here were as follows:

Plaintiff obtained from defendant an absolute divorce and custody of two minor children born of the marriage. The court subsequently, on plaintiff's motion, ordered defendant to pay child support. An order was entered and served on 15 December 1980 requiring defendant to appear on 6 January 1981 at 9:30 a.m. to show cause why he should not be adjudged in contempt for non-compliance with the support order. Defendant appeared as ordered and advised the court that he had made arrangements to employ Clyde C. Randolph, Jr., as his attorney; that he had contacted Randolph during the afternoon of 5 January 1981; that Randolph had informed him that, because of a previous commitment, he would not be able to appear; and that Randolph had instructed him to request a continuance so that he might have opportunity to obtain counsel. B. F. Wood, Esq., informed the court that his partner, James F. Latham, Esq., had talked with Randolph, and that Randolph had requested that Latham "appear in his stead and move for continuance." Wood further informed the court "that Randolph was unable to appear because of previous commitment and had not had opportunity to prepare for Hearing due to the fact that he had not been contacted until the

afternoon of January 5, 1981." Following these representations, the court denied continuance.

"Due process is not denied every defendant who is refused the right to defend himself by means of his chosen retained counsel . . . particularly where defendant is inexcusably dilatory in securing legal representation." *People v. Brady*, 275 Cal. App. 2d 984, 993, 80 Cal. Rptr. 418, 423 (1969) (cited with approval in *State v. McFadden*, 292 N.C. 609, 612-613, 234 S.E. 2d 742, 745 (1977)). *See also People v. Simeone*, 132 Cal. App. 2d 593, 282 P. 2d 971 (1955) (also cited with approval in *McFadden*). As Justice (now Chief Justice) Branch noted in *McFadden*: "[A]n accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial." 292 N.C. at 616, 234 S.E. 2d at 747.

Defendant here was allegedly at least $16,650.00 in arrears in his payments. He was served on 15 December 1980 with an order directing him to appear on the morning of 6 January 1981. He made no effort to contact counsel of his choice until the afternoon of 5 January 1981, three weeks subsequent to service of the order and less than 24 hours prior to the scheduled time of hearing. Under these circumstances, we are unable to say, as a matter of law, that the trial judge abused his discretion in denying the motion. *See State v. Williams*, 51 N.C. App. 613, 277 S.E. 2d 546 (1981).

[2] Defendant further contends there was no competent evidence to support the findings that (1) he had the ability to comply with the child support order, and (2) he had wilfully failed to exercise his capacity to earn. A careful examination of the record constrains us to agree. While the evidence establishes that defendant was physically able to work, it does not establish that work was available to him. On the contrary, his testimony indicates that he was a draftsman who had moved from Massachusetts to North Carolina because of lack of employment opportunities resultant upon depression in the construction industry; that his efforts in North Carolina "to get a direction on who is doing what in construction business and what job possibilities there were ha[d] taken some . . . period of time"; and that he had a total of $24.00 in his bank account at the time of the hearing. There was no

evidence to counter the testimony by defendant that he had been unemployed, seeking work, and "unable to make those payments."

Absent evidence refuting testimony that failure to pay as ordered was due to lack of financial means, the record does not support a finding that the failure was wilful. *Lamm v. Lamm*, 229 N.C. 248, 49 S.E. 2d 403 (1948). *See also Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966). A finding, supported by competent evidence, that the alleged contemnor was capable of compliance, or of taking reasonable measures that would enable him to comply, is prerequisite to punishment for civil contempt for noncompliance with support orders. *See Jones v. Jones*, 52 N.C. App. 104, 278 S.E. 2d 260 (1981); *Frank v. Glanville*, 45 N.C. App. 313, 262 S.E. 2d 677 (1980). There was no competent evidence to support such a finding here.

[3] Defendant finally contends the conclusion that he was in contempt for failure to produce his financial records was not based on findings of fact supported by competent evidence. We disagree. The court found as facts that defendant (1) "failed to bring any of the requested documents to Court as ordered" and (2) "has the present ability to comply . . . with respect to production of documents." These findings are supported by the following testimony of defendant: "I do not have with me my 1979 State and Federal Income Tax Returns along with some bank accounts, cancelled checks, financial statements, a list of my tangible and intangible property. The information has been prepared, but is not present in court." Because they are supported by competent evidence, the findings are conclusive on appeal. *Worthington v. Worthington*, 27 N.C. App. 340, 219 S.E. 2d 260 (1975), *cert. denied*, 289 N.C. 142, 220 S.E. 2d 801 (1976).

These findings were sufficient to sustain the order adjudging defendant in contempt. When findings which are supported by competent evidence are sufficient to support a judgment, the judgment will not be disturbed on the ground that another finding, which does not affect the conclusion, is not supported by evidence. *Industries, Inc. v. Construction Co.*, 29 N.C. App. 270, 224 S.E. 2d 266, *cert. denied*, 290 N.C. 551, 226 S.E. 2d 509 (1976). *See also Bailey v. Light Co.*, 212 N.C. 768, 195 S.E. 64 (1938).

The order is thus modified to remove the findings, together with the conclusions and orders based thereon, that defendant

had the ability to comply with the child support order and wilfully failed to exercise his capacity to earn; and as modified, is affirmed.

Modified and affirmed.

Judges CLARK and BECTON concur.

PIE IN THE SKY, LTD. T/A P. B. SCOTT'S RESTAURANT AND MUSIC HALL, PETITIONER v. NORTH CAROLINA BOARD OF ALCOHOLIC CONTROL, RESPONDENT AND THE TOWN OF BLOWING ROCK, INTERVENOR-RESPONDENT

No. 8110SC280

(Filed 2 February 1982)

1. **Intoxicating Liquor § 2.4— malt beverage permits for restaurant—applicability of statute to Blowing Rock**

G.S. 18A-52 applied to an election on the sale of beer and wine in Blowing Rock on 14 July 1977, and the Board of Alcoholic Control could properly revoke permits previously issued to petitioner on the ground that the petitioner was not a "restaurant" as defined in G.S. 18A-52(j) and (k) and a 1976 malt beverage regulation.

2. **Administrative Law § 8; Intoxicating Liquor § 2.6— judicial review of administrative decision—striking allegations relating to matters not in evidence**

In reviewing a decision of the Board of Alcoholic Control revoking permits issued to petitioner, the court properly struck from the petition for judicial review allegations relating to the Board's decisions in other similar cases because the allegations related to matters not in evidence at petitioner's hearing and the court could not consider evidence not offered at that hearing. G.S. 150-43 *et seq.*

APPEAL by North Carolina Board of Alcoholic Control and the Town of Blowing Rock from *Farmer, Judge.* Order entered 9 December 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 20 October 1981.

Respondents appeal from an order reversing respondent Board of Alcoholic Control's revocation of permits issued to petitioner. Petitioner cross assigns error to an order granting respondent Board's motion to strike from the Petition for Judicial Review allegations relating to the Board's decisions in other cases involving businesses in Blowing Rock similar to petitioner's which were charged with violations of the same type as those charged to petitioner.

Attorney General Edmisten, by Special Deputy Attorney General David S. Crump, for respondent Board of Alcoholic Control.

Clement & Miller, by Charles E. Clement, for intervenor respondent Town of Blowing Rock.

Parker, Sink & Powers, by William H. Potter, Jr., for petitioner.

WHICHARD, Judge.

RESPONDENTS' APPEAL

[1] The 1965 General Assembly, by local act, authorized the Town of Blowing Rock to hold elections on the sale of beer and wine, by making then G.S. 18-127, the general law at that time, partially applicable to Blowing Rock. 1965 Sess. Laws, ch. 874, § 1. On 3 August 1965, in an election held pursuant to that act, the voters approved on-premise sale of beer and wine by Grade A hotels and restaurants, and off-premise sale of unrefrigerated wine and beer by qualified licensees.

The 1971 General Assembly repealed former General Statutes Chapter 18, the general law governing regulation of intoxicating liquors, and replaced it with a new Chapter 18A.[1] 1971 Sess. Laws, ch. 872. On 1 November 1976 the Board of Alcoholic Control, pursuant to its power to adopt rules and regulations to carry out the provisions of G.S. 18A,[2] amended Malt Beverage Regulation 4 NCAC 2E .0102 by defining the word "restaurant" as follows: "a regularly established place of business primarily and substantially engaged in the preparation and serving of meals, wherein food is kept, prepared and served to the public and which has and maintains tables and appropriate equipment and furnishings for serving of complete meals to customers." The 1977 General Assembly thereafter enacted G.S. 18A-52(k), which defined a "restaurant" as "a business having a kitchen facility and a seating capacity of 36 persons or greater and which is engaged

1. Chapter 18A, which applies in this appeal, was repealed and replaced by Chapter 18B effective 1 January 1982.

2. G.S. 18A-15(14) (Cum. Supp. 1977).

primarily and substantially in preparing and serving meals." 1977 Sess. Laws, ch. 149, § 1. The act applied "to those counties or municipalities wherein elections are held under G.S. 18A-52 subsequent to the ratification of this act [4 April 1977]." *Id.* § 2.

On 25 April 1977, subsequent to enactment of G.S. 18A-52(k), an election petition was circulated and notice was posted "pursuant to . . . G.S. 18A-52, Part 2(c)," seeking an election in Blowing Rock. In the election held pursuant thereto on 14 July 1977, the voters approved on-premise sale of malt beverages by Grade A hotels and restaurants and off-premise sale by other licensees.

Petitioner, operator of P. B. Scott's Restaurant and Music Hall in Blowing Rock, acquired on-premise malt beverage and unfortified wine permits on 1 October 1976. It acquired a "restaurant and related places" permit on 5 October 1976. On 5 June 1979 a Board of Alcoholic Control hearing officer recommended revocation of these permits on the ground that petitioner could "no longer be considered qualified to hold permits due to not being a 'bona fide restaurant' as defined in G.S. 18A-52(j)[3] and (k) and in Malt Beverage Regulation 4 NCAC 2 E .0102(5) as amended." The Board of Alcoholic Control then ordered the permits cancelled on the ground that petitioner was not a "bona fide restaurant" as defined in the statutes and regulation cited by the hearing officer.

On judicial review, pursuant to G.S. 150A-43 *et seq.* (Cum. Supp. 1977), the Superior Court reversed on the ground that "the 1965 General Law" was the basis for the 1965 *and 1977* elections, and the "1976 regulation and 1977 statutes" do not apply to the municipality of Blowing Rock. We disagree, and accordingly reverse.

By express legislative enactment, G.S. 18A-52(k) applies "to those . . . municipalities wherein elections are held under G.S. 18A-52 *subsequent to the ratification of this act.*" 1977 Sess. Laws, ch. 149, § 2 (emphasis supplied). The act was ratified 4 April 1977. 1977 Sess. Laws, ch. 149. Blowing Rock held an election pursuant to G.S. 18A-52 on 14 July 1977, a date subsequent to ratification of the act which established G.S. 18A-52(k). By so doing, it subjected establishments therein to regulation under that enactment.

3. G.S. 18A-52(j) relates to unfortified wine and malt beverage elections.

The avowed purpose and intent of the General Assembly in the enactment of G.S. 18A was "to establish a uniform system of control over the sale, purchase, . . . and possession of intoxicating liquors in North Carolina, and to provide administrative procedures to insure, as far as possible, the proper administration of [the] Chapter under a uniform system throughout the State." G.S. 18A-1. The legislature mandated that G.S. 18A "shall be liberally construed to the end that the sale, purchase, . . . and possession of intoxicating liquors shall be prohibited except as authorized in [that] Chapter." *Id.* Our interpretation of the applicability of G.S. 18A-52(k) accords with the foregoing purpose and mandate of the General Assembly. *See State v. Williams*, 283 N.C. 550, 196 S.E. 2d 756 (1973).

PETITIONER'S CROSS ASSIGNMENT

[2] Petitioner alleged, in its Petition for Judicial Review pursuant to G.S. 150A-43 *et seq.*, unreasonable and arbitrary action by respondent Board in the cancellation of its permits. The basis of these allegations was that the Board, on the same day it revoked petitioner's permits, dealt differently with other Blowing Rock businesses similar to petitioner's which were charged with the same types of violations. Petitioner, pursuant to App. R. 10(d), cross assigns error to the order granting respondent Board's motion to strike these allegations. We find no error.

The Board heard sequentially petitioner's case and the cases referred to in these allegations. Evidence from the other cases thus was not before the Board by virtue of consolidation of these cases with petitioner's case. Petitioner does not contend, nor does the record reveal, that evidence or arguments regarding the other cases had been placed before the Board in any way when it concluded that petitioner's permits should be revoked. On judicial review of agency decisions the court hears arguments and receives written briefs, but it "shall take no evidence not offered at the hearing . . . ." G.S. 150A-50 (Cum. Supp. 1977). Because the allegations regarding the Board's disposition of other cases related to matters not in evidence at petitioner's hearing, and because the court could not consider evidence not offered at that hearing, the allegations were properly stricken.

RESULT

In respondents' appeal, reversed and remanded for further proceedings consistent with this opinion.

As to petitioner's cross-assignment, affirmed.

Judges VAUGHN and HILL concur.

STATE OF NORTH CAROLINA v. RONNIE WAYNE ROBERTSON

No. 8114SC805

(Filed 2 February 1982)

1. Larceny § 7.5— larceny by trick—failure to instruct proper

In a prosecution for "larceny from the person," the trial court properly failed to instruct on "larceny by trick" as the State's evidence tended to show felonious larceny from the person and defendant's evidence tended to show that he obtained $100 from his victim by fraud or false pretense, neither of which would permit the jury to find him guilty of larceny by trick.

2. Criminal Law § 86.5— impeachment of defendant—questions concerning collateral matters proper

In a prosecution for larceny from the person, where defendant denied having stolen the money from the victim but instead asserted that the money was given him in exchange for a pound of marijuana, he failed to show questions by the district attorney on cross-examination asking defendant whether he had sold drugs and stolen a diamond ring were asked in bad faith.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 3 April 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals on 12 January 1982.

Defendant was charged in a proper bill of indictment with the larceny of "$100.00 in Currency, from the possession and from the person of Ralph McCoy without his consent." Upon the defendant's plea of not guilty the State offered evidence tending to show that defendant and his girlfriend got into a taxicab driven by McCoy at a bus station in Durham and McCoy drove them to Holloway Street. The defendant "jerked" $100 in currency from McCoy's hand and ran. McCoy testified: "When I pulled the money out, he took and jerked it out of my hand . . . . He grabbed the money and he ran into the store."

Defendant offered evidence tending to show that McCoy asked the defendant if he could get him a "pound of grass." The defendant agreed to sell McCoy a pound of marijuana for $100. After they got to Holloway Street, the defendant paid McCoy the taxi fare and McCoy left and returned in ten minutes, as instructed by defendant, to pick up the "grass." The defendant sold McCoy a pound of "yard grass." The defendant testified:

> [H]e came back and I had the grass in a bag. I gave it to him and he gave me the money. He gave me a hundred dollars. It was in tens. It was in a brown paper bag from Winn-Dixie. The exchange took place beside the produce stand. . . .
>
> Inside the paper bag was the yard grass and pot. Yard grass more or less. It wasn't really marijuana, to tell you the truth. It was yard grass.

The defendant was found guilty as charged and from a judgment imposing a prison sentence of eight years maximum, eight years minimum, defendant appealed.

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

Clayton & Myrick, by Jerry B. Clayton, Robert D. McClanahan, and Ronald G. Coulter, for the defendant appellant.

HEDRICK, Judge.

[1] Defendant contends in his first argument that

> [t]he Trial Court committed reversible error by instructing the Jury on larceny from the person, a felony, and failing to instruct on what is often called larceny "by trick," which is a misdemeanor when involving less than four hundred dollars ($400.00) under NC GS Section 14-72.

Citing *State v. Harris*, 35 N.C. App. 401, 241 S.E. 2d 370 (1978), defendant asserts that "larceny by trick" is not a separate and distinct offense from common law larceny. He further reasons, citing *State v. Bowers*, 273 N.C. 652, 161 S.E. 2d 11 (1968), that "larceny by trick" of property having a value of less than $400 is a misdemeanor and a lesser included offense of "larceny from the person."

> The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor.

State v. Hicks, 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954). Assuming arguendo that "larceny by trick" of property having a value of less than $400 is a misdemeanor, and a crime of lesser degree than "larceny from the person," the defendant's first argument must fail simply because there is no evidence in this record that the defendant was guilty of misdemeanor *larceny* by trick or otherwise. The State's evidence tended to show felonious larceny from the person, a felony. Defendant's evidence tended to show that the defendant sold McCoy a pound of "yard grass." In 50 Am. Jur. 2d Larceny § 29 (1970), we find the following:

> When, in addition to possession, the owner voluntarily passes title as well to the alleged thief, not expecting the property to be returned to him or to be disposed of in accordance with his directions, it is well established that the taking in such case involves no trespass and that the taker is not guilty of larceny, and this is true even where the owner is induced to part with the title through the fraud and misrepresentation of the alleged thief. Although the acts of the perpetrator of the fraud may be criminal in such a case, they constitute some other crime than common-law larceny, such as swindling or obtaining property by false pretenses . . . .

While the defendant's evidence may tend to show that he obtained $100 from his victim by fraud or false pretense, his evidence would not permit the jury to find him guilty of larceny because the defendant's evidence discloses no trespass, actual or constructive.

[2] The defendant next argues the court erred to his prejudice by allowing the district attorney to ask him on cross examination whether he had sold drugs and stolen a diamond ring. The applicable rule with respect to such cross examination of the defendant is set out in *State v. Williams*, 279 N.C. 663, 675, 185 S.E. 2d 174, 181 (1971) as follows:

> It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. [Citations omitted.] Such questions relate to matters *within the knowledge of the witness*, not to accusations of any kind made by others. We do not undertake here to mark the limits of such cross-examination except to say generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith.

In the present case three of the questions related to whether the defendant had sold marijuana. Defendant argues that these questions were asked in bad faith. The defendant testified in his own defense that he did not take the $100 from McCoy, but that he sold him what McCoy thought to be marijuana. Obviously the State had good reason to cross examine the defendant about his selling marijuana, and clearly these questions were not asked in bad faith. With respect to the one question as to whether the defendant had stolen a diamond ring, the record is silent as to whether the district attorney had any information about such an act. The burden is on the defendant on appeal to affirmatively show that the question was asked in bad faith, and this he has failed to do. This assignment of error has no merit.

We hold the defendant had a fair trial free of prejudicial error.

No error.

Judges HILL and BECTON concur.

Sparks v. Mountain Breeze Restaurant

KENNETH RAY SPARKS, EMPLOYEE, PLAINTIFF v. MOUNTAIN BREEZE RESTAURANT AND FISH HOUSE, INC. AND/OR ANCLE GREENE, JEANE GREENE, CAROLYN GREENE McKINNEY AND CLAUDE WAYNE McKINNEY D/B/A ANCLE GREENE RESTAURANT, NON-INSURED, DEFENDANTS

No. 8110IC483

(Filed 2 February 1982)

Master and Servant § 99— workers' compensation—attorney fees—defense of claim without reasonable grounds—erroneous award

The evidence provided ample basis for defending a workers' compensation claim on the ground of the credibility of plaintiff's assertions and did not support an award of attorney fees to plaintiff pursuant to G.S. 97-88.1 based on a finding that the claim was defended without reasonable grounds where plaintiff testified that, while carrying a bucket of grease down the steps in defendant's restaurant, his foot hit some grease on the steps and his body jerked, he felt a pain like a bee sting in the lower part of his back for just a minute, his pain was more severe on the following day, he consulted a physician two days later, and the physician's diagnosis was that plaintiff had suffered severe muscle strain; there were no eye witnesses to the alleged accident; plaintiff continued to work for the remainder of that day without telling his employers or fellow employees of his injury; plaintiff rode home with one of the employers that evening and did not mention any pain or soreness in his back at that time; plaintiff talked by telephone with one employer two evenings later but did not mention the accident; and none of the employers were given any notification regarding the alleged accident until receipt of a letter from the Industrial Commission some 19 days after the accident allegedly occurred.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission, by Ben A. Rich, Deputy Commissioner (Commissioner Robert S. Brown concurring, Commissioner William H. Stephenson dissenting), filed 19 November 1980. Heard in the Court of Appeals 7 January 1982.

G. D. Bailey for plaintiff-appellee.

Gum & Hillier, P.A., by David R. Hillier, for defendant-appellants.

WHICHARD, Judge.

Plaintiff (claimant) was a cook in defendants' restaurant. His duties included carrying buckets of grease down steps. On 11 August 1979, while so engaged, plaintiff's foot "hit some grease on the steps and . . . jerked." He did not fall, but "[i]t . . . gave [him] a quick jerk." At the time he "felt a pain like a bee sting in the lower part of [his] back for just a minute." He proceeded,

though, to empty the bucket and to work the remainder of the day.

On 12 August 1980 plaintiff's pain was more severe. He consulted a physician on 13 August 1980. The physician's diagnosis was that plaintiff had suffered severe muscle strain, probably permanent in nature.

The Industrial Commission concluded that plaintiff sustained an "injury by accident arising out of and in the course of [his] employment," G.S. 97-2(6) (Supp. 1981), and awarded compensation. Defendants do not except to that award. They except, rather, to an award of $2,500 to plaintiff's attorney, pursuant to G.S. 97-88.1, based on a finding that they defended the claim without reasonable grounds. We hold that the evidence does not support the finding, and we accordingly vacate the portions of the opinion and award relating to payment of a fee to plaintiff's attorney.

G.S. 97-88.1 provides: "If the Industrial Commission shall determine that any hearing has been . . . defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for . . . plaintiff's attorney upon the party who has . . . defended them." While the statute is of recent origin,[1] and there are no cases interpreting or applying it, its evident purpose is to deter stubborn, unfounded litigiousness, which is inharmonious with "[t]he primary consideration [of the Workers' Compensation Act, *viz.*,] . . . compensation for injured employees." *Barbour v. State Hospital*, 213 N.C. 515, 518, 196 S.E. 812, 814 (1938).

We do not, however, attribute to the General Assembly an intent to deter an employer with legitimate doubt regarding the employee's credibility, based on substantial evidence of conduct by the employee inconsistent with his alleged claim, from compelling the employee to sustain his burden of proof. Such deterrence would, in our view, emanate from application of the statute to the evidence here.

The pertinent facts relating to the credibility issue were these: There were no eyewitnesses to the alleged accident. Plain-

1. 1979 Sess. Laws, ch. 268.

tiff did not advise defendants thereof on the date of the occurrence. He continued to work for the remainder of that day without telling his employers or fellow employees of his injury. He rode home with one of the employers that evening, and the employer could not recall his mentioning any pain or soreness in his back at that time. Two evenings later plaintiff called this employer, indicated that he was at the Dollar Store where "they had Bic pens on sale," and inquired whether the employer wanted him to purchase some for the restaurant. He also told the employer to have him picked up the next morning. None of the employers could recall any notification regarding the alleged accident until receipt of a letter from the Industrial Commission about 30 August 1980, some nineteen days later.

These facts provided ample basis for defending the claim on the ground of the credibility of plaintiff's assertions. The defense was not rendered unreasonable or unfounded by the Commission's declination to accept it. The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness.

The evidence supported an award of compensation. There was, however, substantial evidence of conduct by plaintiff inconsistent with his alleged claim. Given this evidence, an award of compensation was not compelled; and defendants' concerns regarding plaintiff's credibility were not without reason. Under these circumstances we hold the evidence insufficient to support a finding that the claim was defended without reasonable grounds.

The opinion and award is vacated insofar as it relates to payment of a fee to plaintiff's attorney, and is otherwise affirmed.

Vacated in part, and affirmed.

Judges CLARK and BECTON concur.

STATE OF NORTH CAROLINA v. STANLEY CURTIS WHITAKER

No. 8110SC678

(Filed 2 February 1982)

Robbery § 5.4— common law robbery—failure to instruct on lesser offense of assault error

The trial court erred in failing to submit to the jury the charge of assault, a lesser included offense of attempted common law robbery, where the evidence showed the defendant approached the victim, put a hard object against her back, stated "this is a stick-up," rejected an offer of her valuables, and stated "we are going to go down to the bushes." After stating "this is a stick-up," defendant acted inconsistently with an intent to rob the victim.

APPEAL by defendant from *Britt, Judge.* Judgment entered 4 March 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 8 December 1981.

Defendant was indicted for attempted armed robbery and kidnapping. At the close of the State's evidence the court dismissed the charge of attempted armed robbery, and at the close of all the evidence it submitted to the jury the lesser included offense of attempted common law robbery, as well as the kidnapping charge. The jury acquitted on the kidnapping charge and convicted on the attempted common law robbery charge.

From a judgment of imprisonment, defendant appeals.

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

Malcolm R. Hunter, Jr., Assistant Appellate Defender, for defendant appellant.

WHICHARD, Judge.

Defendant contends the evidence supported submission to the jury of the charge of assault, a lesser included offense of attempted common law robbery. We agree, and accordingly award a new trial.

When a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of

> which could be proved by proof of the allegations in the indictment. Further, when there is some evidence supporting a lesser included offense, a defendant is entitled to a charge thereon even when there is no specific prayer for such instruction, and error in failing to do so will not be cured by a verdict finding defendant guilty of a higher degree of the same crime.

State v. Bell, 284 N.C. 416, 419, 200 S.E. 2d 601, 603 (1973); *see also State v. Chapman*, 49 N.C. App. 103, 270 S.E. 2d 524 (1980). Assault is a lesser included offense of attempted robbery. *State v. Duncan*, 14 N.C. App. 113, 187 S.E. 2d 353 (1972). The court must charge on the lesser included offense if the evidence is equivocal on the element or elements which would elevate the crime charged to the greater offense. *State v. Riera*, 276 N.C. 361, 368, 172 S.E. 2d 535, 540 (1970).

The State presented evidence that defendant approached the victim as she waited at the door of a friend's apartment, put a hard object against her back, and stated, "[T]his is a stick-up." He further told the victim not to say anything and not to fight. The victim offered defendant her car keys and told him they were all she had. Defendant did not take the keys. Rather, he stated, "We are going to go down to the bushes." He then took the victim down a flight of stairs. Before they reached the bushes, however, the victim began to scream. Defendant released her, struck her in the face, and ran.

To justify failure to charge on assault, the evidence had to establish 1) defendant's *specific intent* to commit the crime of common law robbery and 2) a direct but ineffectual act by him toward the commission thereof. *See State v. Bailey*, 4 N.C. App. 407, 167 S.E. 2d 24 (1969). The State relies on defendant's statement, "This is a stick-up," to prove the specific intent to commit the crime of robbery. Intent must, however, be determined from all the facts and circumstances. Absent direct evidence, specific intent is "ordinarily to be proved by facts and circumstances from which it may be inferred and . . . the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time . . . ." *State v. Norman*, 14 N.C. App. 394, 399, 188 S.E. 2d 667, 670 (1972). *See also State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971). The State's evidence indicated that after

stating "This is a stick-up," defendant acted inconsistently with an intent to rob the victim. He rejected the victim's offer of a valuable possession, her car, and did not attempt to obtain any money or other valuables the victim may have possessed. Defendant's conduct was consistent with intents other than to rob the victim, such as the intent to assault sexually or to kidnap her. The State's evidence thus presented a jury question as to defendant's specific intent. It did not establish as the only reasonable interpretation of his conduct an unsuccessful intent to rob. The court thus erred in failing to submit the lesser included offense of assault.

New trial.

Judges CLARK and BECTON concur.

EMDUR METAL PRODUCTS, INC. v. SUPER DOLLAR STORES, INC.

No. 8110SC490

(Filed 2 February 1982)

Judgments § 20; Rules of Civil Procedure § 60.2— setting aside only portion of default judgment

Where defendant moved to set aside a default judgment of $12,960 and showed excusable neglect, and the trial court ruled that a meritorious defense existed only as to $5,507.30 of the judgment, the trial court did not abuse its discretion in setting aside only that portion of the judgment for which there was both excusable neglect and a meritorious defense. G.S. 1A-1, Rule 60(b)(1).

APPEAL by defendant from *Smith, Judge.* Judgment entered 27 February 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 7 January 1982.

This appeal questions the propriety of the trial court's order setting aside a part of a default judgment upon a showing of excusable neglect and meritorious defense as to that amount of the claim and affirming the remaining part of the default judgment upon a finding that as to it the defendant presented no meritorious defense.

Smith, Debnam, Hibbert & Pahl, by Carl W. Hibbert, for plaintiff appellee.

Manning, Fulton & Skinner, by Howard E. Manning, Jr., for defendant appellant.

BECTON, Judge.

The plaintiff filed a Complaint seeking recovery on a contract for the sale and delivery of goods in the amount of $12,960.00. The Complaint was sent to the defendant's headquarters, where, by inadvertence on the part of an employee, it was not turned over to defendant's counsel. After the time for filing an answer had lapsed, the plaintiff obtained a default judgment for the amount of the claim. After being informed that a default judgment had been entered against it, the defendant, in apt time, moved to set aside the judgment. The defendant showed excusable neglect. The defendant also asserted that it had a meritorious defense, and tendered proof showing that some of the goods for which payment was demanded were defective and had been returned to the plaintiff. The trial court ruled that a meritorious defense existed only as to $5,507.30 of the judgment and entered an order setting aside that amount. As to the remaining $7,452.70 the trial court found no meritorious defense, and that amount was affirmed.

Rule 60(b)(1) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) [m]istake, inadvertence, surprise or excusable neglect." G.S. 1A-1, Rule 60(b)(1).

A party moving to set aside a judgment must show (1) excusable neglect and (2) a meritorious defense. *Stephens v. Childers*, 236 N.C. 348, 72 S.E. 2d 849 (1952); *Perkins v. Sykes*, 233 N.C. 147, 63 S.E. 2d 133 (1951); *Whaley v. Rhodes*, 10 N.C. App. 109, 111, 177 S.E. 2d 735, 737 (1970). It is not enough that excusable neglect is found. A meritorious defense must be found also for "[i]t would be idle to vacate a judgment where there is no real or substantial defense on the merits." *Cayton v. Clark*, 212 N.C. 374, 375, 193 S.E. 404, 404 (1937). Further, "the determination of whether an adequate basis exists for setting aside . . . the judgment by default rests in the sound discretion of the trial

judge." *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 510, 181 S.E. 2d 794, 798 (1971); *Whaley v. Rhodes.* In addition, our Supreme Court, long ago, in *Geer v. Reams*, 88 N.C. 197, 199 (1883), said that "[t]he court [is] vested with a full legal discretion over the matter . . . and [has] the right to annul or modify the judgment."

In the case before us, the trial court, after reviewing the pleadings and affidavits, made findings of fact which are supported by competent evidence and which are, therefore, binding on this Court. *See Perkins v. Sykes; Kirby v. Contracting Co.*, 11 N.C. App. 128, 180 S.E. 2d 407, *cert. denied* 278 N.C. 701, 181 S.E. 2d 602 (1971). We find no abuse of discretion in the setting aside only of that portion of the judgment for which there was both excusable neglect and a meritorious defense.

The trial court's order showed no abuse of discretion, and it is, therefore,

Affirmed.

Judge CLARK and Judge WHICHARD concur.

PAULA DAVIS BARNES v. SAMUEL LEAR BARNES

No. 8128DC470

(Filed 2 February 1982)

Divorce and Alimony § 25.10— custody—failure to show changed circumstances

The trial court did not err in dismissing plaintiff's motion for change of custody of the parties' minor child from defendant father to plaintiff mother where plaintiff presented evidence of her changed circumstances, but made no showing that the child's welfare was being affected adversely by her present environment. A showing of changed circumstances so as to adversely affect the child is required where the question of custody is determined pursuant to a consent judgment, just as it is required where the question of custody is litigated, as the terms of a consent judgment relative to child custody are adopted by the court in its finding of facts and conclusions of law. G.S. 50-13.7(a).

Barnes v. Barnes

APPEAL by plaintiff from *Styles, Judge.* Order entered 11 February 1981 in District Court, BUNCOMBE County. Heard in the Court of Appeals 6 January 1982.

This is an appeal from dismissal of plaintiff's motion for change of custody of the parties' minor child, Sarah Jane Barnes, from defendant father to plaintiff mother. Custody had been granted to the father pursuant to a consent judgment between the parties which was incorporated into the divorce decree. The mother previously had custody under the terms of a separation agreement.

The mother presented evidence at trial showing that she had remarried, that she and her second husband had a son, and that they could provide a stable home environment for Sarah Jane. She presented no evidence that the father was not a fit and loving parent.

At the close of plaintiff's evidence, the trial court granted a directed verdict in favor of the defendant father. Plaintiff's motion was dismissed on grounds that she had failed to present evidence that circumstances had so changed as to adversely affect Sarah Jane's welfare absent a change in custody. Plaintiff appeals.

George H. Johnson, Jr., for plaintiff appellant.

Sutton and Edmonds, by John R. Sutton, for defendant appellee.

ARNOLD, Judge.

Plaintiff's appeal is grounded on her contention that a showing of changed circumstances so as to adversely affect the child is not required where the question of custody never has been litigated. It is well-settled that a contractual agreement between the parents is not binding on the court in awarding custody of a minor child. *Spence v. Durham,* 283 N.C. 671, 198 S.E. 2d 537 (1973), *cert. denied,* 415 U.S. 918, 94 S.Ct. 1417, 39 L.Ed. 2d 473 (1974). However, it does not follow that the terms of a consent judgment regarding custody may be altered without a showing of changed circumstances.

At the time of the parties' divorce, the terms of their consent judgment relative to child custody were adopted by the court in

its findings of fact and conclusions of law. Custody was then awarded to defendant as part of the divorce judgment, not merely by agreement of the parties. Where custody has thus been awarded by court order any subsequent modification must be made in accordance with G.S. 50-13.7(a) which states:

> An order of a court of this state for custody or support, or both, of a minor child may be modified or vacated at any time, upon a motion in the cause and a showing of *changed circumstances* by either party or anyone interested. (Emphasis added.)

Case law construing this provision has clearly established that a showing of "substantial change of circumstances affecting the welfare of the child" is required before an order of custody is changed, *Daniels v. Hatcher*, 46 N.C. App. 481, 483, 265 S.E. 2d 429, 431 (1980), and that the burden of showing such changed circumstances is on the moving party. *Ebron v. Ebron*, 40 N.C. App. 270, 252 S.E. 2d 235 (1979). In the case at bar, the plaintiff presented evidence of her own changed circumstances, but made no showing that the child's welfare was being affected adversely by her present environment. Indeed, plaintiff's counsel stipulated that both parties were fit and proper persons to have custody of their child. We agree with the trial court, therefore, that the plaintiff failed to meet her burden of showing changed circumstances sufficient to justify a change of Sarah Jane's custody. Accordingly, the dismissal of plaintiff's motion is

Affirmed.

Judges MARTIN (Harry C.) and WELLS concur.

In re Coleman

IN THE MATTER OF: MITZI VALENCIA COLEMAN 2711-C PATIO PLACE GREENSBORO, NORTH CAROLINA

No. 8118DC835

(Filed 2 February 1982)

Infants § 16— juvenile hearing—failure to disclose record of juvenile witness—absence of document in record on appeal

A juvenile is not entitled to a new trial on the ground that the criminal record of a juvenile witness was not disclosed to respondent's counsel as required by G.S. 7A-618(b) where the document was not included in the record on appeal, and the appellate court is unable to determine whether the document contained information required by the statute to be disclosed and whether the information would be favorable or material to respondent's case.

APPEAL by respondent from *Foster, Judge.* Order signed 13 May 1981 in District Court, GUILFORD County. Heard in the Court of Appeals 13 January 1982.

Respondent appeals from an order placing her on probation, she having previously been adjudicated a delinquent child for the unlawful burning of a school building in violation of N.C.G.S. 14-60.

Attorney General Edmisten, by Associate Attorney Emily R. Copeland, for the State.

W. Steven Allen for respondent appellant.

MARTIN (Harry C.), Judge.

Couched in the language of respondent, we are asked to determine "whether the trial court's overruling of juvenile's objection and the petitioner's failure to disclose the juvenile record of Connie Swann, a co-defendant before trial as requested and ordered by the Court constitute reversible error entitling juvenile to a new trial?"

N.C.G.S. 7A-618(b) provides:

> Names of Witnesses.—Upon motion of the juvenile, the judge shall order the petitioner to furnish the names of persons to be called as witnesses. A copy of the record of witnesses under the age of 16 shall be provided by the peti-

tioner to the juvenile upon his motion if accessible to the petitioner.

At trial, Connie Swann testified as a witness for the state. Our reading of the record discloses that at one point during respondent's cross-examination of detective Brenda Bishop, the investigating officer, reference was made to a copy of an official Greensboro police report containing information which respondent alleges was not disclosed to her and about which she was entitled to know. This document is not included in the record before us. It is respondent's contention, however, that the substance of this document is not necessary to our determination, but that its mere non-disclosure violates the statute and entitles her to a new trial. We cannot agree.

We find nothing in the record except vague innuendos, circuitous comment, and unsupported allegations that the document to which respondent refers is a juvenile record as contemplated by the statute.

As we interpret the language in N.C.G.S. 7A-618(b), the state is required to disclose the record of juvenile witnesses for criminal convictions. Respondent herself supports this interpretation by arguing that a failure to disclose the juvenile record precluded an effective cross-examination of witness Swann by impeachment. Our rules of evidence bar cross-examination regarding an indictment or other charge of a crime, as distinguished from a conviction. *See* 1 Stansbury's N.C. Evidence § 112 (Brandis rev. 1973) (and cases cited therein).

Respondent admits that she is unaware of what the document reflects. While it is true that suppression of evidence favorable to an accused upon request violates due process where the evidence is material to guilt, *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215 (1963), we are unable to determine (1) whether the document contains information required by statute to be disclosed, and (2) whether the information would be favorable or material to respondent's case.

Affirmed.

Chief Judge MORRIS and Judge VAUGHN concur.

Hoyle v. Isenhour Brick & Tile Co.

ERNEST HOYLE, GUARDIAN AD LITEM FOR TOTISHA SHANNETTE MASON AND GERALD ALLEN MASON, JR., MINOR CHILDREN OF GERALD ALLEN HOYLE, DECEASED, EMPLOYEE, PLAINTIFF v. ISENHOUR BRICK & TILE COMPANY, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8110IC450

(Filed 16 February 1982)

Master and Servant § 60— workers' compensation—using forklift contrary to orders—uncompensable accident

The Industrial Commission did not err in determining decedent's accident did not arise out of and in the course of the deceased employee's employment as the decedent's fatal injury resulted after he abandoned his duty station, attempted to drive a forklift after being expressly prohibited from using it, and was removing culled bricks to an area where they were not supposed to be.

Judge MARTIN (Harry C.) dissenting.

APPEAL by plaintiff from the North Carolina Industrial Commission opinion and award of 8 January 1981. Heard in the Court of Appeals 11 December 1981.

This claim was filed on behalf of the 20-year-old decedent's two illegitimate children, one of whom was born after decedent was killed on the premises of defendant while he was attempting to drive one of defendant's forklifts. Decedent was not employed as a forklift operator and had twice been expressly forbidden to do so. An award denying compensation was entered and plaintiff appealed.

Decedent was employed in defendant's brickyard as a cull stacker at the No. 6 building. Broken bricks were culled from the quality bricks and taken by conveyors to plaintiff's duty station. His job was to stack the culls and then fasten a steel band around them "like a box." He did not have any overlapping duties. Others were employed and trained as forklift operators. The duties of a forklift operator included moving the stacked bricks to specific areas on defendant's premises. Forklift operators also helped transfer and clean the cars.

It was a violation of company rules for anyone other than a forklift operator to attempt to operate a forklift. About two weeks prior to the fatal accident, one of decedent's supervisors caught him driving a forklift in violation of the policy. Decedent

was told if he was caught again, disciplinary action would be taken, and he would either be suspended or terminated.

Decedent was last seen alive by a regular forklift operator, Wilkins, driving a forklift. As they drove along together, decedent talked about spending the night with Wilkins and painting a house decedent had rented. Decedent accompanied Wilkins to Wilkins' destination. The pair sat and talked about personal matters for awhile. Wilkins then deposited his load of bricks and left. This site was not where the cull bricks were supposed to be stored. Culls were supposed to be placed on the side of the building where decedent was employed to work. When Wilkins returned with another load, he discovered that the forklift had been overturned and that the body of decedent was underneath the empty forklift. There were skid marks on the pavement behind the forklift. The cull bricks had been left next to the quality bricks Wilkins had just deposited.

Another employee of defendant, Rollins, was employed as the forklift operator designated to take out the cull bricks stacked and banded by decedent. He testified that decedent stacked culls right outside the building. "There was not really any limit as to how many culls he could stack out there before I moved the culls." Rollins was also supposed to help transfer cars. He left his forklift for about thirty minutes to help transfer cars, and when he returned, the accident had occurred. Although he had no authority to do so, he had told decedent he could drive the forklift.

There was evidence that other unauthorized personnel had driven forklifts at defendant's plant. Defendant's supervisor testified, however, that he did not know of anyone who had persisted in the proscribed activity after being caught and warned one time. Sometime after the accident, an employee was fired on the spot for attempting to operate a forklift without authority. The principal reason people were employed and trained for the specific position of forklift operators was because forklifts are "unique and very dangerous due to the short turning radius, suspended load, poor visibility, narrow wheel base, the weight and it's by nature just a bad piece of equipment." The center of gravity is above the wheels when is is being operated without a load. There is a counterweight of about 1500 pounds located in

the rear of the lift above the steering wheel. When the forklift is being operated without a load on the forks, the forks should be lowered to about six inches from the ground to help offset the counterweight. When the lift is empty the wheels have a tendency to shimmy. If the forks are close to the ground, they can be dropped and the machine stabilized. When defendant's employees arrived at the scene of the accident, the lifts on the machine defendant had attempted to operate were two or three feet high instead of the six inches required for safe operation.

The Deputy Commissioner's findings of fact include the following:

> "7. The deceased employee was employed with the defendant employer as a cull brick stacker at the Number 6 building.
>
> 8. On the evening of June 5, 1978 the deceased employee was operating a small forklift and a fellow employee, Wilkins, was operating a large forklift. They were together. The fellow employee unloaded his bricks. The deceased employee and the fellow employee talked together about the deceased employee spending the night with the fellow employee. This area was not the place to put the cull bricks. After the fellow employee unloaded his load of good bricks he went after another load and when he came back he saw the deceased employee under the forklift that he was operating. The forklift was turned over on top of him. It was not the deceased employee's job to operate a forklift.
>
> 9. The defendant employer had rules and regulations about who was to operate the forklifts and only those who were approved and authorized to operate the forklifts were permitted to do so. The deceased employee was not authorized nor approved to operate a forklift. Wilkins, the fellow employee, was authorized to operate forklifts. There were other employees who were not authorized to operate forklifts who did so on occasions but this was not known to the defendant employer's supervisors.
>
> 10. Rollins, another fellow employee, was authorized to operate forklifts and on the evening in question he let the deceased employee borrow his forklift to take some cull

bricks out. Rollins was helping a fellow employee to transfer cars at that time. Rollins had let the deceased employee borrow his forklift the night before to take out cull bricks. Rollins had no authority to let the deceased employee use his forklift.

11. It was the deceased employee's job to take cull bricks off the machine and stack them in a cull stack and put a steel band around them. There was a rule stating that no untrained employee was to operate any machinery including forklifts. This rule was known to the defendants' employees.

12. Two weeks prior to the accident giving rise to this claim the defendant's supervisor, Hamilton, took the deceased employee off the forklift because he was not authorized to operate it. Hamilton talked with the deceased employee about the rules and regulations about the use of the forklifts and was told that he was not authorized to operate a forklift and that in the event he was caught again he would have to take disciplinary action which would be suspension to termination. The deceased employee's supervisor was not aware that the deceased employee had operated a forklift before.

13. Wofford, a plant maintenance supervisor for the defendant employer, had seen the deceased employee operating a forklift about three or four months before June 9, 1978. The deceased employee was stopped and taken off the forklift because he was not a forklift operator. The deceased employee was told if he was caught again disciplinary action would be taken and that he could be terminated.

14. Contrary to instructions of the defendant employer's supervisor, the deceased employee was operating a forklift on the occasion when it turned over on him resulting in his death. The deceased employee was not at the place he was employed to work when the accident occurred.

15. A forklift is a dangerous piece of machinery and for that reason defendants' untrained employees were forbidden to operate them.

16. The accident giving rise to this claim did not arise out of and in the course of the deceased employee's employment."

Based on the foregoing, the Deputy Commissioner denied plaintiff's claim for benefits. The full Commission affirmed.

Leonard, Austin, McNeely and MacMillan, by Thomas A. McNeely, for plaintiff appellant.

Hedrick, Feerick, Eatman, Gardner and Kincheloe, by J. A. Gardner III, for defendant appellees.

VAUGHN, Judge.

Plaintiff does not bring forward or argue any exceptions to the Commission's findings except No. 16 which, he argues, is not supported by the evidence. He further argues that the Commission should have found that deceased's actions were required in order for him to perform his usual job and were calculated to further his employer's business. We overrule plaintiff's assignments of error and affirm.

The question of whether the accident arose out of and in the course of employment is a mixed question of fact and law. When the Commission finds that the accident did not arise out of and in the course of the employment, such conclusion must stand unless under no view of the facts found by the Commission such conclusion is warranted. *Davis v. Mecklenburg Co.*, 214 N.C. 469, 199 S.E. 604 (1938); *Lockey v. Cohen, Goldman & Co.*, 213 N.C. 356, 196 S.E. 342 (1938). The burden of proof, of course, is on plaintiff to prove that the accident arose out of and in the course of the employment.

Since plaintiff does not bring forward and argue any exceptions to the other findings made by the Commission, the question on appeal is whether, *under any view of the facts found*, the finding that the accident did not arise out of and in the course of decedent's employment is warranted.

Plaintiff argues that the only evidence on which the Commission could deny the claim is the evidence of the violation of a safety rule. Citing *Hensley v. Caswell Action Committee*, 296 N.C. 527, 251 S.E. 2d 399 (1979), and *Hartley v. Prison Department*, 258 N.C. 287, 128 S.E. 2d 598 (1962), plaintiff contends the Commission should have found that decedent's accident arose out of and in the course of his employment. We disagree.

To be compensable, an accident must arise out of and in the course of employment. G.S. 97-2(6). "The words 'in the course of the employment' . . . refer to the time, place and circumstances under which an accidental injury occurs; the phrase 'arising out of the employment' refers to the origin or cause of the accidental injury." *Robbins v. Nicholson*, 281 N.C. 234, 238, 188 S.E. 2d 350, 353 (1972).

Hensley v. Caswell Action Committee, supra, and *Hartley v. Prison Department, supra*, are distinguishable from the case at hand. In *Hensley*, the claimant was employed to cut weeds along the banks of a reservoir. Although he had received general instructions not to go into the water, the employee attempted to wade across the reservoir in order to reach some weeds on the opposite bank. He drowned. The claimant in *Hartley* was employed as a prison guard. His duties included checking around the prison fence and relieving the tower guards. Rather than walk through the gate to reach the tower guards, he tried to climb over the "nonclimbable" barbed fence and was injured. In both cases, the Supreme Court affirmed an award of compensation.

Ordinarily, violation of an employer's safety rule, standing alone, is an insufficient basis upon which to deny compensation. The significant finding in those cases relied on by plaintiff was that the violations occurred while the employees were attempting to perform their *assigned* jobs. 296 N.C. at 531, 251 S.E. 2d at 401; 258 N.C. at 290, 128 S.E. 2d at 600. The Commission, therefore, found that the accidents arose out of and in the course of employment.

The present cause more closely resembles *Taylor v. Dixon*, 251 N.C. 304, 111 S.E. 2d 181 (1959). In *Taylor*, the employee's regular job was to saw down trees. He was injured, however, while driving a tractor pulling logs. The employer argued at the hearing that the employee had stepped outside the boundaries of his work: "The reason I told him not to drive the tractor was because that was not his job. He was employed to run the chain saw. . . . I didn't hire him as a tractor driver." The Supreme Court held that the employer was entitled to a specific finding on this defense. In remanding the case to the Industrial Commission, the Court cited with approval the following language from Larson:

> "[I]f the unrelated job is positively forbidden, all connection with the claimant's own employment disappears, for he has stepped outside the boundaries defining, not his method of working, but the ultimate work for which he is employed."

1A A. Larson, The Law of Workmen's Compensation § 31.14 (1979) [hereinafter cited as Larson].

Morrow v. Highway Commission, 214 N.C. 835, 199 S.E. 265 (1938), and *Teague v. Atlantic Co.*, 213 N.C. 546, 196 S.E. 875 (1938), are also instructive. In *Morrow*, an employee dropped his paintbrush in the river while painting a bridge. Despite instructions not to do so, he jumped in to retrieve the brush and was drowned. Obviously retrieval of the paintbrush could be said to have been in furtherance of his employer's business. The Commission concluded, however, that deceased had left the usual scope of his employment and denied compensation. The Court affirmed. In *Teague*, the employee was killed while riding a crate elevator from the basement to the first floor instead of taking the stairs as directed by his employer. There, as here, the employee had been previously reprimanded for riding the elevator because of its danger and had been forbidden to do so again. The Commission found that no duty of the employee required or contemplated that he should ride the empty crate elevator. Compensation was denied, and the Court affirmed.

As in *Taylor*, *Morrow* and *Teague*, in the present cause, the decedent did more than simply violate a rule as to the *method* of his assigned work. Indeed, by operating a forklift in violation of his employer's instructions, he actually assumed the duties of another job. *See* 1A Larson § 31.00. *See, e.g., Cohen v. Birmingham Fabricating Co.*, 224 Ala. 67, 139 So. 97 (Ala. 1932) (sales manager killed while unloading a car of steel with a crane); *Burch v. Ramapo Iron Works*, 210 A.D. 506, 206 N.Y.S. 868 (1924) (operator of an air hammer killed while helping at the furnace); *Shoffler v. Lehigh Valley Coal Co.*, 290 Pa. 480, 139 A. 192 (1927) (brakemen killed while driving the locomotive).

The recognition of the right of employers to establish job descriptions and employment boundaries becomes increasingly important as industrial operations become more complex with more sophisticated and dangerous equipment. Specialized jobs not only promote efficiency but also allow employers to guard against accidents caused by unskilled labor. For that reason, the modern

trend is to deny compensation when an employee steps outside his regular duties and performs an unrelated job which has been positively forbidden. 1A Larson §§ 27.14, 31.14. *See, e.g., Cohen v. Birmingham Fabricating Co.*, 224 Ala. 67, 139 So. 97 (1932).

We recognize that there are cases where employees injured while reasonably acting in good faith to assist a coemployee in the latter's work have received compensation. In those cases, however, the injured employee's activity did not amount to the *expressly prohibited* assumption of another's job at great risk. *See* 1A Larson § 27.11. Here the employee's act was expressly prohibited and there is nothing to indicate it was done in good faith. Instead, it was done in open defiance of his employer's earlier censure.

Plaintiff also argues that the Commission erred in failing to make a finding on whether decedent was performing a service calculated to further the business of the employer at the time of his injury. In the first place, the other findings of the Commission to which no exceptions are preserved would negate a positive finding on that question. Secondly, there was no evidence that would have supported a positive finding. The evidence was that it was decedent's duty to stack the culled bricks and then band them "like a box." Although the "box" decedent removed was full, "[t]here was not really any limit as to how many culls he could stack out there before I [the forklift operator] moved the culls." The forklift operator had not been gone more than about 30 minutes before the accident. Decedent's abandonment of his duty station, his attempt to drive the forklift against direct orders and in face of the threat of being fired and his unauthorized removal of the culled bricks to an area where they were not supposed to be, would compel the conclusion that his conduct was not calculated to further the business of his employer.

Moreover, not every act which is calculated to further an employer's interest is considered within the course of employment. In *Cohen v. Birmingham Fabricating Co., supra*, a sales manager was killed while assisting laborers unload a car of steel by use of a crane. Plaintiff argued that the manager's acts were designed to help fill his employer's orders promptly. The court held that the manager's intentions were insufficient to impose liability on the company:

> "However interested Lambert may have been in seeing that the orders he procured were promptly and correctly filled, the evidence is ample to the effect that his assisting the laborers in unloading steel with the crane was not only *not reasonably related to the service he was employed to render,* but was also in direct violation of the instructions given him by the defendant's manager."

224 Ala. at 69, 139 So. at 98.

In summary, we distinguish the present case from those involving an employee's violation of his instructed *method* of work in performing his own job or those cases where the employer routinely or carelessly tolerates violations of its rules. We also distinguish it from cases involving an employee's innocent or inconsequential departure from his line of duty. The cases involving "reasonable activity" apply only if the employee is *where* he is supposed to be to perform what he is employed to do. The findings of the Commission, uncontested on appeal, establish that decedent left the job for which he was employed and attempted to perform another job in the face of direct orders not to do so after being warned of the dangers involved.

The accident, as are all, is of course regrettable. The Commission, however, found that it did not arise out of and in the course of the employment. That conclusion must stand unless there is no view of the facts found by the Commission that would warrant the conclusion. For the reasons stated, we conclude that the facts found, now uncontested, warrant the conclusion reached for several reasons.

Affirmed.

Judge WELLS concurs.

Judge MARTIN (Harry C.) dissents.

Judge MARTIN (Harry C.) dissenting.

In my opinion, the conclusion by the Commission that Gerald Hoyle's death did not arise out of and in the course of his employment was erroneous. The facts of this case are closely analogous to *Hensley v. Carswell Action Committee,* 296 N.C. 527, 251 S.E.

2d 399 (1979), and *Hartley v. Prison Department*, 258 N.C. 287, 128 S.E. 2d 598 (1962). In *Hartley*, the claimant was injured when, in the performance of his duty to go to a guard tower outside a high wire fence, he elected to climb over the fence rather than take the route around by the gate. In *Hensley*, the employee drowned while attempting to wade across a reservoir to complete his work of cutting weeds. In the present case, the employee undertook to remove the brick in an effort to get his own work done, thereby furthering his employer's business.

Larson states the question as follows:

> It frequently happens that an employee will have his work stopped by some clogging, lack of oil, or disrepair of his machine. Quite commonly, also, there will be a company rule forbidding the operator to attempt to deal with the situation, and requiring him to wait until the specialists—whether oilers, electricians, or other repairmen—arrive on the scene. Sometimes the operator decides he can make the repair without the delay involved in calling the experts, and sometimes he gets hurt because he underestimated the expertness required or overestimated his own versatility. Now, the question is: has he departed from the course of his employment? He has attempted another person's job in violation of instructions. Yet the fact remains that he is attempting to get his own work done, although in forbidden fashion. Cases presenting these facts have gone both ways, depending on whether attention was focused on the fact that the job belonged to another or the fact that the action was a method of advancing the employer's work. . . .
>
> As a matter of compensation theory, it is quite permissible to treat the incidental invasion of another employee's province as merely a forbidden route on the main journey to the ultimate objective, the performance of claimant's work.

1A A. Larson, The Law of Workmen's Compensation § 31.14(b) (1979).

Certainly, Hoyle's death was an accident within the meaning of the Act. *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 124 S.E. 2d 109 (1962). Likewise, his death occurred in the course of his employment: he was on the job and moving brick from his sta-

tion so that he could continue stacking cull brick from the conveyor, his primary duty. The question remains whether his death arose out of his employment. His primary duty was to stack cull brick from the conveyor. Another employee was to remove the stacked brick by the use of a forklift truck so that Hoyle could continue his work. This fellow employee was engaged in other duties at a time when it was necessary to move the brick. Upon Hoyle's request, the forklift operator gave Hoyle permission to use the forklift to remove the brick. Though it is true that Hoyle's supervisor had told Hoyle on other occasions that he was not to operate the forklift, he and other employees had done so thereafter without incident. His actions were not for his own personal convenience or for the thrill of performing a hazardous feat, as in *Teague v. Atlantic Co.*, 213 N.C. 546, 196 S.E. 875 (1938). Nor did Hoyle disobey a direct order by a supervisor then present as in *Morrow v. Highway Commission*, 214 N.C. 835, 199 S.E. 265 (1938). *Morrow* also involved the deceased's attempting to perform an obviously dangerous act, swimming in the Catawba River.

As Justice Higgins concluded in *Hartley, supra:*

> The essence of the story in this case may be told in few words: Usually the idea of a short cut is attractive. Sometimes it is dangerous. To follow the [defendant's] contention would require us to hold that contributory negligence in this case is a complete defense. Our cases construing the Act hold to the contrary.

258 N.C. at 291, 128 S.E. 2d at 601.

I find that Hoyle's actions in removing the brick for the benefit of his employer by operating the forklift, although in violation of his previous instructions, are not so extreme as to break the causal connection between his employment and his death. *Hensley, supra.* Hoyle's death arose out of his employment. Accordingly, I vote to reverse the Commission's decision.

GWENDOLYN HOFFMAN LAMB, EXECUTRIX OF THE ESTATE OF THOMAS WADE LAMB v. WEDGEWOOD SOUTH CORPORATION, STATLER HILTON, INC., HILTON INNS, INC., W. H. WEAVER, W. H. WEAVER CONSTRUCTION COMPANY, INC., HARRY R. DUDLEY, JR., INDIVIDUALLY, LOUIS RIGHTMIER, INDIVIDUALLY, THOMAS H. B. MORRISETTE, INDIVIDUALLY, DUDLEY, RIGHTMIER, MORRISETTE AND ASSOCIATES, A PROFESSIONAL ASSOCIATION, DARYL TEAGUE, W. E. GRIFFIN AND TED CRADDOCK

No. 8115SC234

(Filed 16 February 1982)

1. **Negligence § 30.1—wrongful death—insufficient evidence of negligence**

In an action to recover for the wrongful death of a motel guest, the evidence on a motion for summary judgment was insufficient to show negligence on the part of defendant night manager where it showed that defendant went to the sixth floor of the motel to check on a disturbance; he twice stopped a fight between decedent and another person; and the fight resumed a third time and decedent was killed when he fell through a motel window.

2. **Negligence § 52.1— motel guest—room on one floor—invitee while on another floor**

A motel guest who had a room on the seventh floor was still an invitee of the motel while he was in the hall on the sixth floor.

3. **Negligence § 19— negligence of off-duty employee not imputed to motel**

Any negligence by a motel bartender in the death of a motel guest was not imputed to the motel owner where the bartender was attending a private party in a motel room at the time he began an altercation with the guest which led to the guest's death, and he was not engaged in any duty for the motel at the time of the guest's death.

4. **Negligence § 57.10— fall through motel window—absence of guardrail or tempered glass—negligence by motel**

In an action to recover for the wrongful death of a motel guest who fell through a sixth floor window in the hall of the motel, the evidence on motion for summary judgment presented a genuine issue of material fact as to the negligence of the motel in maintaining the window with plate glass rather than tempered glass and without any guardrail or other safety devices.

5. **Negligence § 50.1— death of motel guest—liability of motel franchisor**

In an action to recover for the wrongful death of a motel guest who fell through a window on the sixth floor of the motel, the jury could find that the franchisor of the motel had such a right to direct the motel owner in the operation of the motel that the owner was an agent of the franchisor at the time of the accident or that the franchisor had enough control over the maintenance of the motel that it was negligent in failing to see that the proper type of windows were in place where the franchise agreement provided that the owner would operate the motel in accordance with the franchisor's operating manual

and that the franchisor had the right to inspect the premises of the motel to see that it was so operated.

6. **Architects § 3; Courts § 1; Limitation of Actions § 4.2— actions against contractor or architect—statute of limitations—constitutionality**

The statute requiring an action against contractors and architects arising out of a defective condition of an improvement to realty to be brought within six years after the performance or furnishing of services and construction, G.S. 1-50(5), does not violate the Fourteenth Amendment to the U.S. Constitution or the law of the land clause of Article I, Section 19 of the N.C. Constitution, does not grant an exclusive or separate emolument or privilege in contravention of Article I, Section 32 of the N.C. Constitution, and does not violate provisions of Article I, Section 18 of the N.C. Constitution guaranteeing access to the courts for redress of injuries. Therefore, the statute barred a wrongful death action against defendant architects for negligence in the design of a motel where the duties of the architects in the design and construction of the motel were completed more than eleven years prior to the death of plaintiff's intestate.

Judge WELLS dissenting in part.

APPEAL by plaintiff and defendants Wedgewood South Corporation; Statler Hilton, Inc.; Hilton Inns, Inc.; Harry R. Dudley, Jr., Individually; Louis Rightmier, Individually; Thomas H. B. Morrisette, Individually; Dudley, Rightmier, Morrisette and Associates, a Professional Association; and Ted Craddock from *Cornelius, Judge.* Judgment entered 3 November 1980 in Superior Court, ORANGE County. Heard in the Court of Appeals 14 October 1981.

This is an action for wrongful death. Dr. Thomas Wade Lamb died as the result of injuries received on the premises of the Hilton Inn in Greensboro on 25 August 1977. Wedgewood South Corporation owned and operated the motel at the time of Dr. Lamb's death. Wedgewood South Corporation was licensed by Hilton Inns, Inc., which corporation was formerly known as Statler Hilton, Inc., to operate the motel as a Hilton Inn. Ted Craddock was on duty as night manager of the Hilton Inn when Dr. Lamb was involved in the incident which caused his death. W. H. Weaver is the principal stockholder and chief executive officer of Weaver Construction Company, Inc. which in 1965 constructed the building which was operated as the Hilton Inn in Greensboro. Harry R. Dudley, Jr., Louis Rightmier, and Thomas H. B. Morrisette are licensed architects who were working either as a partnership or through a professional association in Richmond, Vir-

ginia, when the building was planned and constructed. W. E. Griffin operated a bar known as the Underground Lounge in the Hilton Inn on 25 August 1977. Darrel Teague worked for Mr. Griffin at that time as a bartender and in the performance of other duties.

The pleadings and other papers filed in this case established that Dr. Thomas Wade Lamb was a paying guest of the Hilton Inn in Greensboro on 25 August 1977. He had a room on the seventh floor of the motel. At approximately 2:30 a.m., he went to the sixth floor and attempted to gain entrance to a room in which there were several people including members of a band known as The Spiral Staircase which had played earlier in the evening at the Underground Lounge located in the Hilton Inn. Dr. Lamb wanted to talk to Debbie Ryan, a female performer with the band. He was told she did not want to talk to him and the door was closed. Dr. Lamb again knocked on the door and Darrel Teague, who was in the room, told Dr. Lamb that Miss Ryan did not wish to speak to him. Dr. Lamb attempted to force his way into the room and there was a struggle. Darrel Teague and the manager of the band forced Dr. Lamb out of the room and the three of them proceeded down the hall toward the elevator, followed by other persons who had been in the room.

There is some conflict as to what happened next. Darrel Teague and Ted Craddock testified by deposition that Dr. Lamb and Darrel Teague struggled in front of the elevator just as Ted Craddock stepped from the elevator upon which he had come to the sixth floor in response to a call. Ted Craddock separated the two men and asked them to leave the sixth floor with him. They struggled again and Ted Craddock separated them for the second time. Ted Craddock then asked them to leave the sixth floor and started into the elevator. As Mr. Craddock was entering the elevator, Dr. Lamb lunged at Darrel Teague, missed him, and fell through a window to his death. The plaintiff filed affidavits by Russell Livingston and Thomas A. Berry which contradict the account of Dr. Lamb's death as stated by Darrel Teague and Ted Craddock. Mr. Livingston and Mr. Berry both stated they were in the room when Dr. Lamb tried to gain entrance and each stated they followed Dr. Lamb and Darrel Teague down the hall. Mr. Livingston stated: "When Dr. Lamb and the bartender reached the elevator, the bartender pushed Dr. Lamb towards the wall

beside the elevator. In one motion, the doctor turned. The two men seemed to exchange places, and as Dr. Lamb turned, the bartender pushed, the doctor went through the window backwards." Mr. Berry stated: "At that point, the bartender was pushing Dr. Lamb up against the wall. It looked as though Dr. Lamb was trying to twist out of the way to keep from being pinned against the wall. It looked to me as if in one fluid motion, the bartender pushed, Dr. Lamb twisted and the momentum of the push sent Dr. Lamb through the window backwards."

The plaintiff first sued Wedgewood South Corporation, the owner of the Hilton Inn in Greensboro, alleging it was negligent in maintaining a window without sufficient strength or protective devices to prevent a person from falling through it. Wedgewood South Corporation answered the complaint and filed a third party complaint against W. H. Weaver, W. H. Weaver Construction Company, Inc., Harry R. Dudley, and Louis Rightmier. In the third party complaint the original defendant alleged that if it were negligent in maintaining the window as the plaintiff contended, Weaver and W. H. Weaver Construction Company, Inc. were negligent in the construction of the building and that Dudley and Rightmier were negligent as architects who designed the building. Weaver and W. H. Weaver Construction Company, Inc. cross claimed against Dudley and Rightmier. The third party complaint against Dudley and Rightmier and the cross claim against them by Weaver were then dismissed on the ground that Dudley and Rightmier were residents of Virginia and the Superior Court of Orange County did not have jurisdiction over them. No appeal was taken from the order dismissing the complaint. The plaintiff then filed an amended complaint in which all the defendants in this case were made parties. Hilton Inns, Inc. filed an answer and cross claimed against Weaver and the architects and their professional association for contribution. The architects moved to dismiss as to them the claim of the plaintiff and the cross claim of Hilton Inns, Inc. This motion to dismiss was denied.

After all defendants had filed answers, they made motions for summary judgments. On 16 September 1980, Judge Bailey denied the motions for summary judgment by Wedgewood South Corporation, Statler Hilton, Hilton Inns, Inc., Darrel Teague, Ted Craddock, and W. E. Griffin. On 3 November 1980, Judge Cor-

nelius entered an order allowing the motion for summary judgment by the architect defendants as to the plaintiffs and denied it as the claim of Hilton Inns, Inc. for contribution. The plaintiff, the architects, Hilton Inns, Inc., Wedgewood South Corporation, and Ted Craddock appealed.

Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, by James G. Billings, for plaintiff appellant.

Spears, Barnes, Baker and Hoof, by Alexander H. Barnes, for defendant appellants Wedgewood South Corporation, Statler Hilton, Inc., Hilton Inns, Inc., and Ted Craddock.

Emanuel and Thompson, by Robert L. Emanuel, for defendant appellants Harry R. Dudley, Jr., Louis Rightmier, Thomas H. B. Morrisette, and Dudley, Rightmier, and Morrisette Associates.

WEBB, Judge.

At the outset we note that this action involves multiple parties. Judge Cornelius, in his order allowing the architects' motion for summary judgment as to the plaintiff and denying it as to Hilton Inns, Inc., found there was no just reason for delay in entering the order. The judgment as to the architects is appealable pursuant to G.S. 1A-1, Rule 54(b). *See Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979). In our discretion we shall consider the other appeals.

TED CRADDOCK'S APPEAL

[1] We consider first the appeal of Ted Craddock. The pleadings, affidavits, and depositions filed in support and opposition to the motions for summary judgment show that Mr. Craddock was on duty as night manager of the Hilton Inn on 25 August 1977. In response to a call he went to the sixth floor to check on a disturbance. As he got off the elevator, a struggle was in progress between Mr. Teague and Dr. Lamb. Mr. Craddock stopped this fight. Mr. Teague and Dr. Lamb resumed the fight and Mr. Craddock separated them again. The fight was started for the third time and Dr. Lamb was killed. There is no forecast of evidence which shows Ted Craddock was doing what a reasonably prudent man should not have done under the circumstances or that he did not do what a reasonably prudent man should have done under

the circumstances. *See* 9 Strong's N.C. Index 3d, *Negligence* § 1 (1977) for a definition of negligence. Mr. Craddock's motion for summary judgment should have been granted. *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

WEDGEWOOD SOUTH CORPORATION'S APPEAL

[2] Wedgewood South Corporation, relying on *Jones v. Bland*, 182 N.C. 70, 108 S.E. 344 (1921) and 62 Am. Jur. 2d, *Premises Liability* § 54 (1972) argues first that when Dr. Lamb, who had a room on the seventh floor, went to the sixth floor and engaged in an altercation, he lost his status as an invitee and became a trespasser. For that reason Wedgewood South argues it owed no duty to Dr. Lamb except not to injure him willfully or wantonly and there being no evidence of willful or wanton negligence, its motion for summary judgment should have been allowed. In the instant case whatever Dr. Lamb's status may have been when he was attempting to enter the room all the evidence shows he was not attempting to enter the room when he went through the window. He was an invitee when he was in the hall on the sixth floor of the Hilton Inn.

Wedgewood South also argues that all the evidence shows that Dr. Lamb's own willful and wanton negligence was a proximate cause of his death. It contends that the evidence shows Dr. Lamb, by his own action in engaging in a fight, caused his own death. We do not believe this is the only conclusion the jury could make from the evidence. The evidence shows the fight was not continuous as the participants moved down the hall. If the jury should believe the version as stated by Mr. Livingston and Mr. Berry, they could find that Dr. Lamb's conduct was not a proximate cause of his death.

[3] We agree with Wedgewood South that any negligence of Darrel Teague may not be imputed to it. All the evidence shows that Mr. Teague had left the Underground Lounge and would not return until the next working day. If he was employed by Wedgewood South Corporation he was not engaged in any duty for it at the time of Dr. Lamb's death. He was attending a party given by some members of The Spiral Staircase at the time the altercation began. He testified in his deposition that in his job he felt some responsibility to protect members of the band. We do

not believe this duty extended to a party on the sixth floor of the motel after Mr. Teague had left his work in the Underground Lounge.

[4] Wedgewood South also contends the evidence negates a finding that it maintained the window in such a manner that it would not withstand the force of a person falling against it. The plaintiff filed affidavits by Joseph T. Pentecost, Director of the School of Ceramic Engineering at the Georgia Institute of Technology; Dale A. Blosser, an architect; and Ronald E. Kirk, a licensed professional engineer. Each of them stated that if the jury should find the window had been maintained from the time the building was constructed in its original condition with plate glass rather than tempered glass and without any guardrail or other safety devices that in his opinion this would not be in accordance with acceptable construction design criteria for such a window. We hold that the jury could find from this testimony that a reasonable and prudent man would have known that this window was hazardous and Wedgewood South Corporation's failure to replace the glass or construct a protective device was a proximate cause of Dr. Lamb's death.

HILTON INNS, INC. APPEAL

[5] Hilton Inns, Inc. contends its motion for summary judgment should have been allowed because its only connection with the Hilton Inn in Greensboro was through an agreement under the terms of which it gave Wedgewood South a franchise to operate the motel in Greensboro as a Hilton Inn. We can find no cases in North Carolina dealing with the tort liability of a franchisor to a third person. There have been cases in other jurisdictions dealing with this subject. *See* Comment, *Liability of a Franchisor for the Acts of the Franchisee*, 41 So. Cal. L. Rev. 143 (1967) and Stuart, *A Franchisor's Liability for the Torts of His Franchisee*, 5 Univ. of San Francisco L. Rev. 118 (1970). The franchise agreement states specifically that Wedgewood South is not an agent of Hilton Inns, Inc. However, we do not believe this is determinative. Under the agreement, Wedgewood South agreed to operate the Inn in accordance with Hilton's operating manual and Hilton Inns, Inc. had the right to inspect the premises of the Inn to see that it was so operated. The operating manual sets out "the policies, practices, and standards of the System for hotel and

motel operation." Wedgewood South's duties under the agreement required it to "operate, furnish, maintain and equip the Hotel and related facilities . . . in accordance with the provisions . . . of the Operating Manual." We believe from this evidence a jury could find that either Hilton Inns, Inc. had such a right to direct Wedgewood South Corporation in the operation of the motel that Wedgewood South was an agent of Hilton Inns, Inc. at the time of the accident, or that Hilton Inns, Inc. had enough control over the maintenance of the Inn that it was negligent in not seeing that the proper type of windows were in place.

HARRY R. DUDLEY, JR., LOUIS A. RIGHTMIER, THOMAS H. B. MORRISETTE, AND DUDLEY, RIGHTMIER, MORRISETTE AND ASSOCIATES, A PROFESSIONAL CORPORATION, APPEAL

[6] The duties of the architects in the construction of the building were completed more than 11 years prior to 25 August 1977. This motion for summary judgment was granted as to the plaintiff's claim against them on the ground it was barred by the statute of limitations. G.S. 1-50(5). The motion was denied as to the claim of Hilton Inns, Inc. against them for contribution. At the time this action was instituted, G.S. 1-50(5) provided in part:

> "No action to recover damages for . . . wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than six (6) years after the performance or furnishing of such services and construction. This limitation shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action."

The plaintiff contends she should not be barred by this statute from proceeding against the architects. She argues that it violates the equal protection clause of the Fourteenth Amendment to the

United States Constitution as well as Article I, Sections 18, 19, and 32 of the Constitution of North Carolina. We can find no North Carolina cases applying the due process clause of the Fourteenth Amendment or the law of the land clause of Article I, Section 19 of the Constitution of North Carolina to G.S. 1-50(5). There have been many cases from other jurisdictions applying the Fourteenth Amendment to statutes similar to G.S. 1-50(5). *See Kallas Mill Work Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W. 2d 454 (1975); *Yakima Fruit and Cold Storage Co. v. Central Heating and Plumbing Co.*, 81 Wash. 2d 528, 503 P. 2d 108 (1973); *Fujioka v. Kam*, 55 Hawaii 7, 514 P. 2d 568 (1973); *Rosenburg v. Town of North Bergen*, 61 N.J. 190, 293 A. 2d 662 (1972); *Josephs v. Burns*, 260 Or. 493, 491 P. 2d 203 (1971); *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E. 2d 588 (1967).

The plaintiff contends that by allowing contractors and architects to be subject to this six year statute of limitations while not including manufacturers, materialmen, and suppliers in the class, the General Assembly has created a class with no rational basis. The plaintiff argues that there is also no rational basis for excluding from the class persons in possession and control of the property. The plaintiff concedes that architects perform different functions in the construction industry than manufacturers, materialmen, and suppliers and the proof of the violation of a reasonable standard of care is different for each of these professions and trades. Plaintiff argues this is a distinction without a difference. We believe that in determining whether a class has a rational basis that if there is a substantial difference between those who are to be classified, the legislature may create a class based on this difference. A court may not hold the classification to be unconstitutional because it disagrees with the wisdom of adopting the statute. We believe the differences between architects and manufacturers, materialmen, and suppliers so far as functions in the construction industry and the proof of negligence provides a rational basis for the creation of this class. We also believe there is enough difference between those in possession and control of the property and those who are not so that there is a rational basis for excluding those in possession and control from the class. Those in possession and control are in a better position to know the condition of the property and are able to exercise a continuing control over the property than those who are not. *See*

Sellers v. Refrigerators, Inc., 283 N.C. 79, 194 S.E. 2d 817 (1973) for a case which holds the landowner plaintiff was excluded from the class created by G.S. 1-50(5). *Sellers* did not deal with the constitutional question. We hold the class created by G.S. 1-50(5) has a rational basis and it does not violate the Fourteenth Amendment to the United States Constitution or the law of the land clause of Article I, Section 19 of the Constitution of North Carolina. For the same reasons it does not grant an exclusive or separate emolument or privilege in contravention of Article I, Section 32 of the Constitution of North Carolina.

The plaintiff also contends G.S. 1-50(5) violates Article I, Section 18 of the Constitution of North Carolina which provides:

> "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."

We realize another panel of this Court has held G.S. 1-50(6), which is a statute of limitations dealing with product liability and very similar to G.S. 1-50(5), to be unconstitutional under the above section. *See Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 284 S.E. 2d 188 (1981). In that case the injury did not occur until more than six years after the product was sold. This Court reasoned that the above section of our constitution guaranteed a remedy for injuries. This Court said that by barring this claim before it arose the plaintiff had been denied his access to the courts in contravention of Article I, Section 18 of the Constitution of North Carolina. We do not believe our Constitution so restricts the General Assembly. We believe our Constitution guarantees access to the courts to those who have claims but it does not in all cases forbid the General Assembly from defining or abolishing claims which arise under the common law. In this case the General Assembly has barred a claim which arose more than six years after the last act of the architects against whom the claim is asserted. We hold the legislature had a right to do this. There was a dissent in *Bolick* and the case has now been appealed to our Supreme Court. We would be more hesitant in not following a precedent of this Court if the case had been finally determined.

The court did not grant the architects' motion for summary judgment as to the claim of Hilton Inns, Inc. for contribution

against the architects. We hold this was error. In excluding persons from the provisions of G.S. 1-50(5) the statute is in the conjunctive. It requires that to be excluded a party must be in "actual possession and control" of the property. We can find no evidence that Hilton Inns, Inc. was in actual possession. As we read the licensing agreement it does not give Hilton Inns, Inc. any right to possess the property. We hold that Hilton Inns, Inc. is not excluded from the coverage of G.S. 1-50(5) and is barred by this statute in its claim against the architects.

We hold that the claim against Ted Craddock and the claim for contribution by Hilton Inns, Inc. against the architects should have been dismissed. We affirm the order allowing summary judgment for the architects on plaintiff's claim against them and the orders denying the motions for summary judgment by Wedgewood South Corporation and Hilton Inns, Inc. on the plaintiff's claim against them.

Affirmed in part; reversed and remanded in part.

Judge MARTIN (Robert M.) concurs.

Judge WELLS dissents in part and concurs in part.

Judge WELLS dissenting in part.

I dissent from the portions of the majority opinion which (1) affirm summary judgment for defendant architects and their professional association as to plaintiff's cause against them and (2) hold that defendant Hilton Inns, Inc.'s cross-claim against them is barred by the provisions of G.S. 1-50(5). Following the reasoning of this Court in *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 284 S.E. 2d 188 (1981), dealing with a similar statute of limitations, G.S. 1-50(6), I am persuaded that the provisions of G.S. 1-50(5) violate the provisions of Article I, Section 18 of the North Carolina Constitution.

I also dissent from that portion of the majority opinion which holds that defendant Craddock's motion for summary judgment should have been allowed. Under the forecast of evidence before the trial court, this issue is for the jury. *See generally, Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980).

I concur in all other portions of the majority opinion.

First National Bank of Catawba County v. Edens

FIRST NATIONAL BANK OF CATAWBA COUNTY, IN ITS CAPACITY AS GUARDIAN OF DAVID ROYER GEITNER, AN INCOMPETENT, APPELLANT v. JOSEPH P. EDENS, JR., TRUSTEE AND HARVEY A. JONAS, JR., TRUSTEE, CO-TRUSTEES UNDER THE CHRISTINE M. GEITNER TESTAMENTARY TRUST, AND JOSEPH P. EDENS, JR., MRS. DOUGLAS M. EDENS, GRACE M. HARTIS GIBSON, GLADYS PONDER MITCHELL, VIRGINIA M. ROGERS, ANITA MITCHELL, GUARDIAN FOR ROBERT L. MITCHELL, JR., AND ANITA MITCHELL, GUARDIAN FOR DAVID C. MITCHELL, BENEFICIARIES, APPELLEES

No. 8125SC529

(Filed 16 February 1982)

1. **Trusts § 6.1— distribution of trust income—discretionary with trustees**

The trial court did not err in ruling that the terms of a testamentary trust gave defendant trustee sole discretion, and the right to exercise such discretion, in determining whether to contribute to the support of a beneficiary.

2. **Trusts § 6.1— refusal of trustees to contribute to a beneficiary's support—no abuse of discretion**

There was no error in the court's ruling that the trustees did not abuse their discretion in refusing to contribute to the support of an incompetent beneficiary. There was evidence the trustees considered the beneficiary's needs and the size of a guardianship account and concluded that the guardianship account was still sufficient to provide for the beneficiary's support.

3. **Trusts § 5— ruling concerning future contributions to support of beneficiary error**

In an action seeking injunctive relief and seeking a declaratory judgment to determine the rights, status, and legal relations existing among various beneficiaries of a testamentary trust, a part of a ruling which determined the trustees would not be required to contribute to a beneficiary's support until the income and corpus of a guardianship account were insufficient for the support of the beneficiary were mere surplusage and must be stricken from the judgment. The record was blank as to the issue of any future abuse of discretion in distributing the trust's income and could not support the ruling.

APPEAL by plaintiff from *Grist, Judge.* Judgment entered 12 March 1981 in Superior Court, CATAWBA County. Heard in the Court of Appeals on 14 January 1982.

This appeal arises from plaintiff's action seeking injunctive relief to compel defendant trustees to pay over to plaintiff, as guardian and for the benefit of its incompetent ward, certain incomes accruing from the corpus of a testamentary trust, and seeking a declaratory judgment to determine the rights, status, and

legal relations existing among various beneficiaries of the testamentary trust.

Evidence presented in the case tended to show, *inter alia*, the following:

Plaintiff is the guardian of David R. Geitner, a forty-nine year old incompetent who was the adopted son of the now deceased John G. H. Geitner and Christine M. Geitner. By virtue of a court-approved family settlement agreement entered on 27 June 1960 after Christine M. Geitner dissented to the will of her husband John G. H. Geitner, the incompetent David R. Geitner received a share in his father's estate. Also, upon the death of Christine M. Geitner in 1961, her duly probated will established in "*Item Ten*" a testamentary trust

for the following uses and purposes:

(A) To use any part of the income from and/or corpus of said Trust which, in the sole discretion of said Trustees, may be necessary or proper for the support, maintenance, and comfort of my son DAVID R. GEITNER, so long as he lives. In making such determinations from time to time, I direct my said Trustees to take into consideration my said son's needs and the amount of income from his share in the estate of his father, the late John G. H. Geitner. I believe the income from his share in the John G. H. Geitner estate will be more than adequate for his every need and comfort, but if it is not then I decree that my said trustees shall have the power and authority, in their sole discretion, to use any part or all of the income from the trust and/or any part or all of the corpus of the trust for such purposes.

(B) During December of every calendar year following the establishment of the trust and continuing until said trust is closed as hereinafter directed, I direct my said Trustees to distribute any part or all of the income from said trust, or from the remainder thereof if any part of the corpus or income is used for the purposes set forth in sub-paragraph (A) above, which they do not use for the purposes authorized in sub-paragraph (A) above, as follows:

One equal share thereof to my sister, MRS. DOUGLAS M. EDENS, during her life and, following her death, in equal

shares to such persons as she may appoint to receive the same in her last will and testament;

One equal share thereof to my sister, DOROTHY MITCHELL, during her life and, following her death, to such persons as she may appoint to receive the same in her last will and testament;

One equal share to my sister, MARY MITCHELL, during her life and, and after her death, to such persons as she may appoint to receive the same in her last will and testament;

One equal share thereof to my brother, J. H. MITCHELL, during his life, and, after his death, to such persons as he may appoint to receive the same in his last will and testament; and

One equal share thereof in equal shares to the heirs at law of my deceased brother, EARL MITCHELL, per stirpes, as determined by the laws of North Carolina, during their respective lives and, after death, to those who may be appointed to receive the same in the last wills and testaments of said heirs at law; and

One equal share thereof to my nephew, JOSEPH P. EDENS, JR. during his life and, after his death, to such persons as he may appoint to receive the same in his last will and testament.

Item Eleven: Upon the death of my son DAVID R. GEITNER, I direct my said Trustees to close the trust and to disburse any undistributed income and any remaining corpus thereof to those designated in sub-paragraph (B) of Item Ten of this my will as beneficiaries of the income of the trust, in the proportions stipulated in said sub-paragraph (B).

Since the inception of the Christine M. Geitner Testamentary Trust, all of the income which has accrued from the corpus of the trust, with the exception of the costs of trust administration, has been paid to the individuals or their appointees as is set forth in Item Ten, sub-paragraph (B) of the trust. No monies have ever been paid from the Christine M. Geitner Testamentary Trust for the support, maintenance, and comfort of David R. Geitner.

Plaintiff, as guardian for David R. Geitner, held the assets he received as his share in the estate of John G. H. Geitner. From the inception of the guardianship on 19 May 1961 through 19 June 1975, the assets held by plaintiff as guardian generated more income than was necessary for the proper upkeep of its ward. All income not used for the support of David R. Geitner was transferred by the plaintiff guardian to the corpus of the guardianship account for investment. Approximately $172,459.53 of excess income was added to the principal account between 1961 and 1976.

Since 1975, the cost of David R. Geitner's upkeep increased substantially, causing annual income deficits and encroachments into the assets of the guardianship estate. In 1976, plaintiff had to invade the corpus in the amount of $15,762.18 in order to provide its ward with sufficient maintenance and support, and plaintiff has invaded the corpus each year since 1976 as follows: $8202.75, for 1977; $9323.93, for 1978; $29,438.48, for 1979; and $28,124.57, for 1980. In 1981, the anticipated encroachment would be $56,365.63, of which $44,015.63 had already been taken from the corpus. An encroachment of approximately $35,000 was anticipated for the 1982 reporting period, assuming that plaintiff received no payment from the Christine M. Geitner Testamentary Trust.

The approximate fair market value of the guardianship account at the end of the May 31, 1980 reporting period was $953,270.82, generating an income that year of $65,228.21. The approximate fair market value of the Christine M. Geitner trust as of 31 December 1980 was $605,234.20, generating an income that year of approximately $36,453.47.

In each year since 1975, the year of the guardianship account's first income deficit and encroachment, defendant cotrustees of the Christine M. Geitner testamentary trust have determined not to make any distribution of trust income for the support, maintenance, or comfort of David R. Geitner. These yearly decisions have been made by the defendant trustees after they have examined the accounting records reporting the costs for David R. Geitner's care filed each year by the plaintiff guardian with the clerk of court, considered the size of the estate under the guardianship and the income therefrom and the amounts spent for his welfare, and concluded that the guardianship account was still sufficient to provide for David R. Geitner's support.

The trial judge made findings of fact consistent with the evidence recounted, and entered conclusions of law and a judgment, *inter alia*, that under the Christine M. Geitner trust, defendants were given sole discretion in determining whether to contribute to David R. Geitner's support and that they have a right to exercise their discretion; that defendants had not abused their discretion in refusing to contribute to the support of David R. Geitner; and that, as of the date of the hearing, defendants were not required to contribute to the support of David R. Geitner and could distribute the trust income in accordance with Item 10(B) of Christine M. Geitner's will. From such judgment, plaintiff appealed.

Sigmon, Clark and Mackie, by E. Fielding Clark, II, for plaintiff appellant.

Williams & Pannell, by Richard A. Williams and Richard A. Williams, Jr., for defendant appellees.

HEDRICK, Judge.

[1] Plaintiff assigns as error the court's ruling that the terms of the Christine M. Geitner testamentary trust gave defendant trustees sole discretion, and the right to exercise such discretion, in determining whether to contribute to the support of David R. Geitner. Plaintiff argues that the trust's terms require defendants to make a contribution from the testamentary trust whenever the income from the guardianship account is not sufficient to pay for David R. Geitner's support for the relevant year.

> The powers of a trustee are either mandatory or discretionary. A power is mandatory when it authorizes *and commands* the trustee to perform some positive act. . . . A power is discretionary when the trustee may either exercise it or refrain from exercising it, . . . or when the time, or manner, or extent of its exercise is left to his discretion.

Woodard v. Mordecai, 234 N.C. 463, 471, 67 S.E. 2d 639, 644 (1951). [Emphasis added.]

The language of the testamentary trust in the present case charges the trustees "[t]o use any part of the income from and/or corpus of said Trust which, *in the sole discretion of said Trustees*, may be necessary or proper for the support, maintenance and

comfort of my son DAVID R. GEITNER, so long as he lives." [Emphasis added.] The trust's language also states that if the income from David's share in the John G. H. Geitner estate is not adequate for David's every need and comfort, "then . . . said trustees shall have the *power and authority, in their sole discretion,* to use any part or all of the income from the trust and/or any part or all of the corpus of the trust for such purposes." [Emphasis added.] It is significant that the settlor twice referred to the "sole discretion" of the trustees. Furthermore, the trust instrument addresses the situation of the income from the guardianship account being insufficient for David's support; upon such contingency, the language does not say that the trustees *shall* distribute from the trust, but only that the trustees shall have the power and authority, in their sole discretion, to so distribute. The language, therefore, is permissive, not mandatory. *Compare Kuykendall v. Proctor,* 270 N.C. 510, 155 S.E. 2d 293 (1967). Upon an income deficit in the guardianship account, the trustees are not commanded to distribute, but are merely empowered to do so; they may either exercise their power to distribute or refrain from doing so, in their discretion. The power to distribute is discretionary and this assignment of error is overruled.

[2] Plaintiff also assigns error to the court's ruling that the trustees did not abuse their discretion in refusing to contribute to David R. Geitner's support.

> The court will always compel the trustee to exercise a mandatory power. . . . It is otherwise, however, with respect to a discretionary power. The court will not undertake to control the trustee with respect to the exercise of a discretionary power, except to prevent an abuse by him of his discretion. The trustee abuses his discretion in exercising or failing to exercise a discretionary power if he acts dishonestly, or if he acts with an improper even though not a dishonest motive, or if he fails to use his judgment, or if he acts beyond the bounds of a reasonable judgment.

Woodard v. Mordecai, supra at 471, 67 S.E. 2d at 644.

In the present case, evidence was presented that defendant trustees, in exercising their discretion as to whether to distribute to David R. Geitner, annually examined the plaintiff's reports on the costs for David's care, considered the size of the guardianship

account and the income therefrom, and concluded that the guardianship account was still sufficient to provide for David's support; there was also evidence that the guardianship account had a value of $953,270.82. The court made findings of fact consistent with such evidence and this Court is therefore bound by such findings of fact. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979). These findings of fact indicate that defendants, in exercising their discretion, considered the costs for David R. Geitner's upkeep and considered whether there were funds available to cover those costs. We therefore are not prepared to say that defendants' determination, as of 1981, not to make a distribution from the Christine M. Geitner testamentary trust was beyond the bounds of reasonable judgment. The findings of fact support the ruling that there was no abuse of discretion, and this assignment of error is overruled.

Plaintiff also assigns as error the court's "establishing the plaintiff's burden of proof to be such that the plaintiff was under a duty to produce the maximum income possible," and the court's "imposing its investmental philosophies upon the guardian." There is nothing, however, in the record or in the judgment to indicate that the court considered plaintiff's investmental policy or that it based its decision on any failure by plaintiff to produce the maximum income possible. Rather, the court's judgment that defendants are not presently required to contribute was amply supported by conclusions of law, which were supported by findings of fact, which in turn were supported by competent evidence that defendants had not abused their discretionary powers. These assignments of error are without merit.

Plaintiff further assigns error to the following finding of fact made by the court:

> 15. From the inception of the guardianship on May 19, 1961, through June 19, 1975, when David R. Geitner was conditionally released from Broughton Hospital, the assets held by the Bank as guardian for David R. Geitner generated more income than was necessary for his proper upkeep. After reviewing the final account filed by the guardian each year, the trustees under the Christine M. Geitner Trust determined that David R. Geitner had suffficient income from his personal assets. (EXCEPTION NO. 4)

Plaintiff takes this finding to apply to those years in which the guardianship estate had an income deficit and therefore argues that the finding that the trustees determined that there was sufficient income was unsupported by the evidence.

"When findings that 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. rev. denied*, 290 N.C. 551, 226 S.E. 2d 509 (1976). As previously stated, the court's judgment that defendants are not presently required to contribute to the maintenance of David R. Geitner is sufficiently supported by the evidence, findings and conclusions. The finding of fact challenged by this assignment of error is not critical in providing such support. Nevertheless, the challenged finding is supported by the evidence. The finding pertains only to those years in which there was no income deficit, *i.e.*, 1961-75, and there was evidence that defendants determined the income to be sufficient for those years. The assignment of error is overruled.

[3] Finally, plaintiff assigns error to the following ruling made by the trial court:

> Under the testamentary trust created in the Will of Christine M. Geitner, the trustees may consider the entire personal estate of David R. Geitner in determining whether to contribute to his support in any given year. Until the principal of the guardianship account of Plaintiff's ward and the income earned by said guardianship account are diminished to the point to where the income and corpus of the guardianship estate will no longer sufficiently supply the proper sums for the support, maintenance and comfort of the Plaintiff's ward, the Defendant-Trustees shall not be required to contribute to the support of the Plaintiff's ward.

Necessarily included within the second sentence of the challenged ruling is a subsidiary ruling that defendant trustees shall not presently be required to contribute to the support of plaintiff's ward. Since a court will not compel a trustee to exercise a discretionary power absent an abuse of discretion by the trustee, *Woodard v. Mordecai, supra*, and since we have held that

defendants in the present case have not abused their discretion, the court's subsidiary ruling that defendants are not presently required to contribute to the support of David R. Geitner was proper. The challenged ruling also deals with when defendants shall be required to make a contribution in the future. With respect to that issue, the trial court could do no more than say that the defendant trustees will be required to contribute only when failure to do so would constitute an abuse of discretion. A ruling that went beyond that would be improper, since the record is blank as to the issue of any future abuse of discretion. Judicial power does not extend to abstract questions, but only to concrete, justiciable, and actual controversies properly brought before the court; each decision of law must be based on specific determinative facts established by stipulation or by appropriate legal procedure. *Boswell v. Boswell*, 241 N.C. 515, 85 S.E. 2d 899 (1955); *Cox v. City of Kinston*, 217 N.C. 391, 8 S.E. 2d 252 (1940); *Green v. Eure*, 27 N.C. App. 605, 220 S.E. 2d 102 (1975), *disc. rev. denied and appeal dismissed*, 289 N.C. 297, 222 S.E. 2d 696 (1976). As of now, there can be no findings of fact as to when, if ever, defendants will commit a future abuse of discretion, and therefore the court's ruling on when defendants will be required to contribute in the future is mere surplusage and must be stricken from the judgment.

The result is as follows: That part of the judgment ruling that defendants are not presently required to contribute to David R. Geitner's support is affirmed; that part of the judgment ruling that defendants shall not be so required until the income and corpus of the guardianship account are insufficient for the support of plaintiff's ward is vacated.

Affirmed in part and vacated in part.

Judges MARTIN (Harry C.) and BECTON concur.

HELEN W. WHITMAN, BY HER GUARDIAN AD LITEM HARRY WILSON, PLAINTIFF v. HARVEY S. FORBES AND WIFE JOAN P. FORBES; J. ALLEN HARRINGTON, TRUSTEE, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF SANFORD, DEFENDANTS

No. 8111SC393

(Filed 16 February 1982)

1. **Evidence § 43— lay testimony as to mental condition**

Lay witnesses were competent to state their opinions of plaintiff's mental condition as of the time they had the opportunity to observe her.

2. **Evidence §§ 43, 45— lay opinion as to value—evidence of state of mind—basis for opinion as to mental condition**

In an action to set aside the sale of a house by plaintiff to defendant on the ground of fraud, affidavits of lay witnesses stating opinions as to the value of the house were competent for consideration on a motion for summary judgment where the affidavits indicated that the witnesses had knowledge of the property and some basis for their opinions; furthermore, the fact that one affidavit also contained statements that the affiant was told by plaintiff that defendant had appraised the property at $37,500 and that plaintiff expected to clear $20,000 from the sale did not render the affidavit inadmissible as hearsay since it could be introduced to show plaintiff's state of mind or to serve as a foundation for the witness's opinion as to plaintiff's mental condition.

3. **Trusts § 19— constructive trust—fraud—breach of fiduciary duty—mental incompetency to execute deed**

Plaintiff's forecast of evidence on motion for summary judgment presented genuine issues of material fact for the jury as to whether a constructive trust should be imposed in favor of plaintiff on real property conveyed by plaintiff to defendant real estate broker on one or more of the following grounds: (1) that defendant broker, with actual or constructive knowledge that plaintiff was mentally incompetent, fraudulently induced her to transfer her property to him for a grossly inadequate price; (2) that defendant violated a fiduciary duty to plaintiff when he purchased the property in a business capacity; or (3) that plaintiff did not possess the requisite mental capacity to execute the deed to defendant.

4. **Unfair Competition § 1— broker's fraudulent purchase of house—unfair and deceptive trade practice**

A real estate broker's alleged fraudulent purchase of a house from plaintiff at a grossly inadequate price when he knew plaintiff was mentally incompetent would constitute an unfair and deceptive trade practice within the purview of G.S. 75-1.1.

APPEAL by plaintiff from *Lane, Judge.* Judgment entered 5 February 1981 in Superior Court, LEE County. Heard in the Court of Appeals 19 November 1981.

Plaintiff, Helen Whitman, appeals from summary judgment granted to the defendants. In her Complaint, plaintiff, through her Guardian ad Litem, alleged that defendants engaged in fraudulent and unfair and deceptive trade practices in purchasing her home. She sought the imposition of a constructive trust and damages for unfair and deceptive trade practices. The defendants Forbes responded, denying the allegations and seeking summary judgment. Defendants Harrington and First Federal Savings and Loan Association responded, maintaining that they had no duty to protect plaintiff even if she were mentally ill, since her attorney was present at all times that they had dealings with her. These defendants also sought summary judgment.

Paul Stam, Jr. for plaintiff appellant.

Harrington, Shaw & Gilleland, by J. Allen Harrington, for J. Allen Harrington and First Federal Savings and Loan of Sanford.

F. Jefferson Ward, Jr. for defendants Forbes.

BECTON, Judge.

ISSUES RELATING TO DEFENDANTS FORBES

The plaintiff presents two arguments on this appeal relating to defendants Forbes. First, she argues that the court erred in refusing to allow her to call two witnesses to give supplemental oral testimony in opposition to defendants' motion for summary judgment. Second, she argues that the court erred in granting summary judgment for the defendants because genuine issues of material fact existed on plaintiff's constructive trust and unfair and deceptive trade practice claims. Because we agree that summary judgment should not have been granted, it is unnecessary to reach the first argument.

PROCEDURAL AND FACTUAL HISTORY

The plaintiff tendered evidence, affidavits and products of discovery, which would have shown the following. Plaintiff, a 64-year-old widow, obtained title to her home, the property in dispute here, after her husband died. She has a history of mental illness dating back several years prior to the date of the sale of her house in 1977. This illness or condition was described in affidavits from lay persons, her attorney, and a rehabilitation

therapist at a mental health center. Evidence was presented showing that the plaintiff had been committed to Dorothea Dix Hospital and that the Hospital had placed a lien on her property for payment of the indebtedness.

The plaintiff was unable to manage her affairs because of her mental condition. As a result, she became delinquent on a note owed to First Federal Savings and Loan Association of Sanford and she was behind in tax payments on the property. Because of her delinquency on the note, the Savings & Loan Association began foreclosure proceedings. Plaintiff was represented by an attorney at the statutory hearing before the Clerk of Superior Court. A public sale was set for 2 May 1977.

After the hearing, and before the date of the sale, plaintiff met with defendant Harvey Forbes (Forbes), a real estate broker, in an attempt to have her house sold. She consulted Forbes because they were members of the same church. Forbes appraised the plaintiff's house at $37,000. Other lay persons valued the property between $33,000 and $40,000. On 29 April 1977, the last business day before the foreclosure sale, the plaintiff conveyed the house to Forbes and his wife Joan Forbes for consideration of $19,332.65, such consideration included the assumption by Forbes of a loan in the amount of $16,332.65 and additional consideration of $3,000.00. Prior to the conveyance, Forbes conducted, or had conducted, a title search on the property. The check for $3,000.00 was drawn on Forbes' business account, not on his joint checking account with his wife. Further, all rentals collected from the property, some $10,250.00, have been paid to the Forbes business account.

In addition, plaintiff's evidence would show that there was no complete closing statement. Instead, there is a disbursement list. It is not signed by the parties or the attorney, and it omits the purchase price.

The defendants denied the plaintiff's allegations and attempted to show, through affidavits and records, that the plaintiff was mentally competent to execute the deed on 29 April 1977, that the fair market value of the house was closer to $18,000.00, and that Forbes did not know that plaintiff was a member of his church. Additionally, defendants maintained that any defects in

the "closing statement" were cured by the fact that plaintiff's attorney was paid to prepare the deed.

SUMMARY JUDGMENT

Law

"Summary judgment is a drastic remedy and there must be a cautious observance of its requirements in order that no person might be deprived of a trial on a genuine disputed factual issue." *Miller v. Snipes*, 12 N.C. App. 342, 347, 183 S.E. 2d 270, 273 (1971), *cert. denied* 279 N.C. 619, 184 S.E. 2d 883 (1971). "[T]he party moving for summary judgment has the burden of positively and clearly showing that there is no genuine issue as to any material fact and any doubt as to whether such an issue exists must be resolved in the favor of the party opposing the motion." *Id.* at 344, 183 S.E. 2d at 272.

> The threshold inquiry in reviewing the propriety of the entry of summary judgment concerns whether genuine issues of material fact are raised by the pleadings and papers filed in conjunction with the motion. The burden is upon the party moving for summary judgment to show, in order to be entitled to judgment, that no such questions of fact remain to be resolved. [Citations omitted.] The movant's papers must be carefully scrutinized, while those of the opposing party are to be indulgently regarded. [Citations omitted.]

Bank v. Belk, 41 N.C. App. 328, 337, 255 S.E. 2d 430, 436 (1979), *disc. review denied* 298 N.C. 293, 259 S.E. 2d 299 (1979).

Rule 56(e) provides that parties may file affidavits in support of or in opposition to motions for summary judgment. In relevant part, it states that "[t]he court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." G.S. 1A-1, Rule 56(e). Further,

> [e]vidence which may be considered [upon motion for summary judgment] includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file whether obtained under Rule 36 or in any other way, affidavits, *and any other material which would be admissible in evidence* or of which judicial notice may properly be taken.

Kessing v. Mortgage Corp., 278 N.C. 523, 533, 180 S.E. 2d 823, 829 (1971) (emphasis added).

Trial Court's Evidentiary Rulings

We now turn to the trial court's evidentiary rulings which formed the bases for its decision to grant summary judgment for defendants Forbes. Most of the plaintiff's evidence is in the form of affidavits which describe her mental condition, give estimates of the value of her property, an state that Forbes had offered to buy or sell the property for approximately $37,000. Plaintiff may only rebut a motion for summary judgment with evidence or material which would be admissible at trial. Consequently, we must look at the evidence tendered to see if it would be admissible at trial.

[1] A. The affidavits of the lay witnesses—Mrs. Kurz, Mrs. Mooneyham, Mrs. Partington and Mrs. Warner—regarding the plaintiff's mental condition would be admissible to the extent that these witnesses were able to observe the plaintiff. It does not matter that they did not see her on the day of the execution of the deed. *In re Will of Rose*, 28 N.C. App. 38, 220 S.E. 2d 425 (1975), *disc. review denied* 289 N.C. 614, 223 S.E. 2d 396 (1976). In *Rose* this Court stated that witnesses could state their opinions of the decedent's condition as of the time they had the opportunity to observe him. Further, this Court stated that the fact that the witnesses had seen decedent a month before the date of the execution of his will was not too long a lapse in time to prevent the witnesses from testifying. The Court said further that "[t]he jury . . . could infer that decedent was competent on the day in question from testimony that he was competent a month before or after. We believe, however, that this is an inference for the jury and not for the lay witness." *Id.* at 42, 220 S.E. 2d at 427. The affidavits of the lay witnesses contain evidence which could be admitted at trial. Even though the lay witnesses give conclusions in their affidavits, they do give some basis for their opinions.

The affidavit of Mrs. Warner, the therapist, is accompanied by the plaintiff's records from the Lee-Harnett Mental Health Center. These medical records contain notes by Warner summarizing plaintiff's visits to the clinic. They are admissible to show a basis for Warner's opinion. These affidavits and records

raise a genuine issue of material fact which should be submitted to the jury.

[2] B. In attempting to show fraud on the part of Forbes, plaintiff tendered opinions as to the value of the property by lay witnesses to demonstrate the gross disparity between the fair market value and the consideration actually given. Lay opinions as to the value of the property are admissible if the witness can show that he has knowledge of the property and some basis for his opinion. *Wyatt v. Railroad,* 156 N.C. 307, 315, 72 S.E. 383 (1911); *Power & Light Co. v. Merritt,* 50 N.C. App. 269, 273, 273 S.E. 2d 727, 731, *disc. review denied* 302 N.C. 220, 276 S.E. 2d 914 (1981). Again, although the affaints made conclusory statements, they did give some basis for their opinions.

Forbes maintains that the affidavits submitted by plaintiff contain hearsay evidence and are inadmissible. We disagree. One of plaintiff's affidavits indicates that the affiant therein not only has an independent basis for her opinion as to the value of plaintiff's property but that she also was told by plaintiff that Forbes had appraised the property at $37,500 and that plaintiff expected to "clear $20,000 from the sale." Whether a given piece of evidence is inadmissible as hearsay depends upon the use to which the evidence is put. We believe that the affidavit in question may withstand the hearsay rule. That the affidavit contains statements made by plaintiff concerning the value of the house would not necessarily make it inadmissible. It may be introduced to show plaintiff's state of mind, or to serve as a foundation for the witness' opinion as to plaintiff's mental condition.

Having determined that the tendered evidence was admissible and that it should have been considered under Rule 56(e), we must now determine whether the tendered evidence was sufficient to raise a genuine issue of material fact regarding plaintiff's constructive trust or unfair and deceptive trade practice claims.

Constructive Trusts

[3] The plaintiff has alleged that a constructive trust should be imposed in her favor on at least one of three grounds: (1) that Forbes, with either actual or constructive knowledge of her mental condition, fraudulently induced her to transfer her property; (2) that Forbes violated a fiduciary duty when he purchased the

property in a business rather than personal capacity; or (3) that plaintiff did not possess the requisite mental capacity to execute the deed. We agree with plaintiff.

Constructive trusts are created by law to prevent unjust enrichment, fraud or duress. They "[arise] independent of any actual or presumed intention of the parties. . . ." *Bowen v. Darden*, 241 N.C. 11, 14, 84 S.E. 2d 289, 292 (1954). It has also been said that

> constructive trusts, which are such as are raised by equity in respect to property which has been acquired by fraud, or where though acquired originally without fraud, it is against equity that it should be retained by him who holds it. This type of trust likewise arises purely by construction of equity independently of any contract or of any actual or presumed intention of the parties to create a trust and is generally thrust on the trustee for the purpose of working out the remedy. The relief in such cases is predicated on fraud and not on trust.

Teachey v. Gurley, 214 N.C. 288, 292, 199 S.E. 83, 87 (1938); *see also Electric Co. v. Construction Co.*, 267 N.C. 714, 719, 148 S.E. 2d 856, 860 (1966). Through her complaint and the affidavits presented on her behalf, the plaintiff's evidence tends to show that she was led to believe that her property would be bought by Forbes for $37,000 or in the alternative, sold by him for that amount when, in fact, Forbes had no intention of securing that amount for her benefit. These allegations the defendants deny.

In order to succeed on a theory of fraud, the plaintiff must show:

> (a) that defendant made a representation relating to some material past or existing fact;
> (b) that the representation was false;
> (c) that defendant knew the representation was false when it was made or made it recklessly without any knowledge of its truth and as a positive assertion;
> (d) that defendant made the false representation with the intention that it should be relied upon by [plaintiff];
> (e) that [plaintiff] reasonably relied upon the representation and acted upon it; and
> (f) that [plaintiff] suffered injury. [Citations omitted.]

Johnson v. Insurance Co., 300 N.C. 247, 253, 266 S.E. 2d 610, 615 (1980); *see also Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E. 2d 494, 500 (1974).

> Allegations of fraud do not readily lend themselves to resolution by way of summary judgment because a cause of action based on fraud usually requires the determination of a litigant's state of mind. [Citations omitted.] A litigant's state of mind is seldom provable by direct evidence but must ordinarily be proven by circumstances from which it may be inferred. [Citation omitted.] This renders summary judgment inappropriate in a fraud case where the court is called upon to draw a factual inference in favor of the moving party, [citations omitted] or where the court is called upon to resolve a genuine issue of credibility. [Citations omitted.]

300 N.C. at 260, 266 S.E. 2d at 619.

Forbes relies upon his own affidavit, and other affidavits filed upon his behalf, to support his motion for summary judgment. The credibility of Forbes is a key issue in this case and, as this Court noted in *Bank v. Belk*, "where credibility is a key issue, summary judgment is seldom an appropriate procedure for resolution of the matter." 41 N.C. App. at 339, 225 S.E. 2d at 437.

Since there are allegations of fraud and denials of fraud, we agree with plaintiff that there exists a genuine issue of material fact regarding Forbes' intent. On this basis, we find that summary judgment was improvidently granted. If a trier of fact finds that the plaintiff was fraudulently induced to transfer her property to Forbes for the consideration she received, plaintiff would be entitled to have a constructive trust declared on the property.

We also find merit in plaintiff's second basis for imposing a constructive trust. A constructive trust may be imposed upon property gained as a violation of some duty. Recently, this Court held that a real estate broker stands in a fiduciary relationship with the seller. *Real Estate Licensing Bd. v. Gallman*, 52 N.C. App. 118, 123-25, 277 S.E. 2d 853, 855-56 (1981). In *Gallman*, a realtor purchased property listed with his firm for his own account and later resold it at a substantial profit, all without keeping the seller informed of offers that had been made on the property. We find the facts, as presented by plaintiff, to be strik-

ingly similar to *Gallman*. These facts are disputed or denied by the defendant. The resolution of the dispute should be made by a trier of fact.

The plaintiff also maintains that she lacked the requisite mental capacity to execute the deed on 29 April 1977. Whether she possessed the mental capacity to execute the deed is a question for the jury. There is conflicting evidence in the record regarding her mental condition. In addition, Forbes denies knowledge of plaintiff's alleged condition. The plaintiff asserts that Forbes had either actual or constructive knowledge of her mental condition as a title search would have revealed the Dorothea Dix lien on the property. If the plaintiff were to prevail on either theory, she would be entitled to have a constructive trust raised in her favor.

Unfair and Deceptive Trade Practices

[4] Plaintiff argues that the fraudulent acts and practices committed by the defendant amount to an unfair and deceptive trade practice for which she is entitled to damages. Because we hold that the issue of fraud in this case is one which must be resolved by a trier of fact, we do not believe that summary judgment was properly granted on the claim under G.S. 75-1.1.

Unfair competition and deceptive trade practices are terms which initially were not given precise definitions. However, our Supreme Court has given an indication of the scope of the terms.

> The concept of "unfairness" is broader than and includes the concept of "deception." [1974] 2 Trade Reg. Rep. (CCH) § 7521. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. [Citation omitted.]

300 N.C. at 263, 266 S.E. 2d at 621.

> An act or practice is deceptive . . . if it has the capacity or tendency to deceive. [Citation omitted.] Proof of actual deception is unnecessary. [Citation omitted.] Though words and sentences may be framed so that they are literally true, they may still be deceptive. [Citations omitted.] In determining whether a representation is deceptive, its effect on the average consumer is considered. [Citation omitted.]

Id. at 265-66, 266 S.E. 2d at 622.

In an action under G.S. 75-1.1, the jury determines the facts and the court takes the facts as determined and decides whether there has been an unfair or deceptive trade practice. *Hardy v. Toler*, 288 N.C. 303, 310, 218 S.E. 2d 342, 346-47 (1975). "Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts. . . ." *Id.* at 309, 218 S.E. 2d at 346. Consequently, if the plaintiff succeeds in establishing fraud, she would be entitled to have her case considered under G.S. 75-1.1.

We believe the acts here, if proven, would constitute a deceptive trade practice. That is, if fraud existed and if the defendant knew of the mental condition of plaintiff, his acts would fall within the purview of the statute.

In conclusion, we hold that summary judgment was improvidently granted to the defendants Forbes since the plaintiff has shown, through a forecast of her evidence, that a genuine issue of material fact existed.

ISSUES RELATING TO DEFENDANT HARRINGTON AND DEFENDANT SAVINGS & LOAN ASSOCIATION

Plaintiff contends that defendant Savings & Loan Association and defendant Harrington, as trustee for the Savings & Loan Association, were negligent (1) in not having a guardian ad litem appointed to represent her at the foreclosure hearing; (2) in notifying her that she could be evicted immediately after delivery of the deed; and (3) in notifying her that she would have to pay attorney's fees to the bank to stop the foreclosure, when nothing so demanded. We summarily reject these contentions as we find no duty running from these defendants to plaintiff. Further, even if it were true that defendant Harrington advised plaintiff that she could be evicted immediately, we perceive no injury to the plaintiff.

For the foregoing reasons, the judgment below is

Reversed as to defendants Forbes and

Affirmed as to defendant Harrington and defendant Savings and Loan Association.

Judge CLARK and Judge WHICHARD concur.

J. R. CARVER, ADMINISTRATOR OF THE ESTATE OF BENJAMIN SCOTT CARVER v. PHYLLIS CARVER

No. 8127SC449

(Filed 16 February 1982)

Death § 3; Parent and Child § 2.1— wrongful death action against mother of decedent proper—parent-child immunity abolished

As children who survive motor vehicle related injuries may maintain an action for those injuries against a negligent parent, the provisions of G.S. 1-539.21 also allow the personal representative of a deceased minor child to maintain an action for the wrongful death of the child against a parent of the child. G.S. 28A-18-2.

APPEAL by plaintiff from *Friday, Judge.* Judgment entered 13 April 1981 in Superior Court, GASTON County. Heard in the Court of Appeals 11 December 1981.

This wrongful death action was initiated by the administrator of decedent's estate against defendant, mother of the decedent. On 8 April 1980, defendant was driving her automobile in which her two month old son was a passenger when defendant hit a bridge abutment. Defendant's son was killed in the collision. The complaint alleges that defendant's negligence proximately caused the infant's death. The trial court granted defendant's 12(b)(6) motion to dismiss, from which plaintiff-administrator appeals.

Ronald Williams, for plaintiff-appellant.

Golding, Crews, Meekins, Gordon & Gray, by James P. Crews, for defendant-appellee.

WELLS, Judge.

This appeal presents the question of the effect of the enactment of G.S. 1-539.21 on the right of the personal representative of a deceased minor child to maintain an action for the wrongful death of the child against a parent of the child.

G.S. 28A-18-2 (successor to G.S. 28-173 and 28-174) provides in pertinent part:

> Death by wrongful act of another; recovery not assets.
>
> (a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding one thousand five hundred dollars ($1,500) incident to the injury resulting in death; provided that all claims filed for such services shall be approved by the clerk of the superior court and any party adversely affected by any decision of said clerk as to said claim may appeal to the superior court in term time, but shall be disposed of as provided in the Intestate Succession Act.

G.S. 1-539.21 is as follows:

> *Abolition of parent-child immunity in motor vehicle cases.* The relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent.

Prior to the enactment of G.S. 1-539.21, our Supreme Court considered the issue of parent-child immunity in negligence actions in *Skinner v. Whitley,* 281 N.C. 476, 189 S.E. 2d 230 (1972). In *Skinner,* the personal representatives of two deceased minor children brought an action against the administrator of the estate of their deceased father in which the plaintiff alleged that the negligent operation of a motor vehicle by the deceased father proximately caused the deaths of the children. Justice Huskins, writing for a unanimous court, stated the issue in that case as follows:

A right of action for wrongful death did not exist at common law. *Broadnax v. Broadnax*, 160 N.C. 432, 76 S.E. 216 (1912). In North Carolina such right of action is conferred by statute and exists only by virtue of G.S. 28-173 and G.S. 28-174. *Horney v. Pool Co.*, 267 N.C. 521, 148 S.E. 2d 554 (1966); *Graves v. Welborn*, 260 N.C. 688, 133 S.E. 2d 761 (1963). Under these statutes the personal representative of a deceased person has a right of action only when the death of his intestate is caused by the wrongful act, neglect or default of another, "such as would, if the injured party had lived, have entitled him to an action for damages therefor." G.S. 28-173; *Lewis v. Insurance Co.*, 243 N.C. 55, 89 S.E. 2d 788 (1955).

In North Carolina and the great majority of other states, the rule is that "an unemancipated minor child cannot maintain a tort action against his parent for personal injuries, even though the parent's liability is covered by liability insurance. This rule implements a public policy protecting family unity, domestic serenity, and parental discipline. . . . Upon the same theory, an overwhelming majority of jurisdictions likewise hold that neither a parent nor his personal representative can sue an unemancipated minor child for a personal tort. . . . 'The child's immunity is said to be reciprocal of the parent's immunity.'" *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753 (1965).

Therefore, under the foregoing legal principles, the unemancipated minor daughters of Clyde Wesley Skinner, had they lived, could not have maintained an action against their father to recover damages for injuries caused by his ordinary negligence. *Watson v. Nichols*, 270 N.C. 733, 155 S.E. 2d 154 (1967); *Redding v. Redding*, 235 N.C. 638, 70 S.E. 2d 676 (1952); *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923); Annot., 19 A.L.R. 2d 423. Having died as a result of their injuries, their personal representative could not have maintained an action for their wrongful death against their father had he survived the accident. *Capps v. Smith*, 263 N.C. 120, 139 S.E. 2d 19 (1964); *Lewis v. Insurance Co.*, supra, *Goldsmith v. Samet*, 201 N.C. 574, 160 S.E. 835 (1931). Their father having also died as a result of the accident, the personal representative of these children cannot maintain this

> wrongful death action against their father's personal representative. *Cox v. Shaw*, 263 N.C. 361, 139 S.E. 2d 676 (1965). This conclusion follows as a matter of law unless the reciprocal immunity rule between parent and unemancipated minor child is repudiated or modified in this jurisdiction.

In resolving the issue against the plaintiff in *Skinner*, the Court summed up its position as follows:

> If the immunity rule in ordinary negligence cases is no longer suited to the times, as some decisions suggest, we think innovations upon the established law in this field should be accomplished *prospectively* by legislation rather than *retroactively* by judicial decree. Such changes may be accomplished more appropriately by legislation defining the areas of nonimmunity and imposing such safeguards as may be deemed proper. Certainly that course is much preferred over judicial piecemeal changes in a case-by-case approach. A similar conclusion has been reached by others. "The simplest way to effectuate a change in the law is to enact a statute doing so. The courts have frequently said that the question of public policy is to be determined by the legislature and not by the court." 3 Lee, North Carolina Family Law, § 248. *Accord, Downs v. Poulin*, 216 A. 2d 29 (Me. 1966); *Castellucci v. Castellucci*, 94 R.I. 34, 188 A. 2d 467 (1963).

Subsequent to the court's decision in *Skinner*, the General Assembly enacted G.S. 1-539.21, which became effective 1 October 1975. *See* 1975 Sessions Laws, Ch. 685, s. 2. Since the effective date of the statute, our appellate courts have not passed upon the issue presented in this case. Both our Supreme Court and this Court have, however, commented on the effect of the statute in cases such as the one now before us.

The issue was discussed by this Court in *Christenbury v. Hedrick*, 32 N.C. App. 708, 234 S.E. 2d 3 (1977). In *Christenbury*, plaintiff mother brought an action in her personal capacity against the administrator of her deceased husband's estate to recover medical and funeral expenses for and the value of the lives of her two deceased children, alleging that they died as a result of their deceased father's negligent operation of an automobile. It appeared from the pleadings in the case that the plaintiff had previously brought a wrongful death action, as the

personal representative of her deceased children against the administrator of their father's estate, which action had been dismissed pursuant to a motion under G.S. 1A-1, Rule 12(b)(6). In discussing that aspect of the case, this Court made the following comments:

> We note the allegation in defendant's motion for dismissal that plaintiff, as administratrix of the estates of her two children, had previously brought an action for their wrongful deaths and that the action was dismissed. No doubt the trial court followed *Skinner v. Whitley,* 281 N.C. 476, 189 S.E. 2d 230 (1972), in which case the Supreme Court held that the administrator of an unemancipated child cannot bring an action against the administrator of his father for wrongful death caused by the ordinary negligence of the deceased father in the operation of an automobile.
>
> Since that time, the General Assembly has seen fit to abolish the parent-child immunity in motor vehicle cases by enacting G.S. 1-539.21, effective 1 October 1975, which provides: "The relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent." Obviously, the provisions of this new statute were not available to plaintiff.

Raftery v. Construction Co., 291 N.C. 180, 230 S.E. 2d 405 (1976) was a wrongful death action based on the negligent design and manufacture of a construction crane. The opinion of the Court dealt primarily with the effect of the statute of limitations on such action. In discussing wrongful death actions generally, the court made the following comments:

> We are thus brought to the question of whether the uncontroverted facts (for the purpose of this appeal) gave rise to a cause of action in the plaintiff for the wrongful death of her intestate. G.S. 28A-18-2, above quoted, makes it a condition precedent to such right of action in this plaintiff that the death of her intestate was caused by a wrongful act, neglect or default of the manufacturer of this crane "such as would, if the injured person had lived, have entitled him to an action for damages therefor."

> It will be observed that this condition precedent to the maintenance of this action does not, by its express terms, include a time limitation but, upon its face, relates to the nature of the "wrongful act, neglect or default" which caused the death and to the legal capacity of the decedent to sue therefor had he lived. For example, the administrator of an employee within the Workmen's Compensation Act cannot sue the employer for the wrongful death of the employee since the employee could not have sued the employer for his injury had he lived. *Horney v. Pool Co.*, 267 N.C. 521, 148 S.E. 2d 554 (1966). Likewise, except as G.S. 1-539.21 now provides, the administrator of an unemancipated minor child cannot bring an action for wrongful death against the child's negligent parent.

The issue having been clearly drawn by the court in *Skinner*, and the General Assembly by enacting G.S. 1-539.21 having made a basic change in the public policy of this state with respect to the rights of family members injured by motor vehicles, it would appear from the dicta in both *Christenbury* and *Raftery* that our appellate courts have implicity recognized that the provisions of G.S. 1-539.21 would operate to abolish parent-child immunity in motor vehicle wrongful death actions. Defendant strongly contends that such dicta should not be construed to enlarge the literal wording of the statute which does not *explicitly* refer to or include wrongful death actions. In support of her argument, defendant cites our decision in *Simmons v. Wilder*, 6 N.C. App. 179, 169 S.E. 2d 480 (1969). *Simmons* involved an interpretation of G.S. 1-540.1[1] the dispositive question being whether the provisions of that statute should be construed to include actions for wrongful death. This court responded in the negative. The following statement is most pertinent to the issue in this case.

> G.S. 1-540.1, on its face applies only to actions for personal injury. The statute says nothing about actions for wrongful

1. G.S. 1-540.1. Effect of release of original wrongdoer on liability of physicians and surgeons for malpractice.—The compromise settlement or release of a cause of action against a person responsible for a personal injury to another shall not operate as a bar to an action by the injured party against a physician or surgeon or other professional practitioner treating such injury for the negligent treatment thereof, unless the express terms of the compromise, settlement or release agreement given by the injured party to the person responsible for the initial injury provide otherwise.

death. Statutes in derogation of the common law must be strictly construed. *Ellington v. Bradford*, 242 N.C. 159, 86 S.E. 2d 925. This Court may not, under the guise of judicial interpretation, interpolate provisions which are wanting in the statute and thereupon adjudicate the rights of the parties thereunder. *Board of Education v. Wilson*, 215 N.C. 216, 1 S.E. 2d 544.

We find, however, that at least three decisions of our appellate courts appear to be contrary to the implications of *Simmons* with respect to wrongful death actions growing out of torts between members of the same family. In *Bank v. Hackney*, 266 N.C. 17, 145 S.E. 2d 352 (1965), the personal representative of the deceased wife brought an action for wrongful death against the personal representative of the wife's deceased husband, both killed when the car being driven by the husband ran off the road and hit a tree. Defendant asserted a defense that the deceased parents' surviving children were the real parties in interest. The court, in holding that such a defense was not available to the representative of the husband, based its decision on the provisions of G.S. 52-10.1, now codified as G.S. 52-5[2]. The following quote is pertinent to our decision here.

> Our wrongful death statute, G.S. 28-173, in pertinent part provides: "When the death of a person is caused by a wrongful act, neglect or default of another, *such as would, if the injured party had lived, have entitled him to an action for damages therefor*, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought by the executor, administrator, or collector of the decedent; . . .

The decisions in *Cox v. Shaw*, 263 N.C. 361, 139 S.E. 2d 676 (1964) and *Cummings v. Locklear*, 12 N.C. App. 572, 183 S.E. 2d 832 (1971) *cert. denied*, 279 N.C. 726, 184 S.E. 2d 883 (1971), are of the same import. We quote the succinct statement by Brock, Judge in *Cummings*.

2. § 52-5. Torts between husband and wife.—A husband and wife have a cause of action against each other to recover damages sustained to their person or property as if they were unmarried.

> If the wife had survived, she would have had a cause of action against her husband for damages for personal injury. G.S. 52-5. Therefore, under the provisions of G.S. 28-173 the administrator of her estate may maintain an action for wrongful death.

We note that G.S. 52-5, did not then and does not now contain any reference to wrongful death. The clear emphasis supplied and relied on by our courts in these three cases is that our wrongful death statute is geared to the right of the deceased person to bring an action for personal injury *had he lived.*

In support of her position, defendant argues that the assessment of damages in this case would be an anomalous process; that the jury would be called upon to consider the loss of the comfort and companionship of the deceased child to the person whose negligence caused his death. We disagree. G.S. 28A-18-2(b) and (c) are as follows:

> Death by wrongful act of another; recovery not assets.
>
> (b) Damages recoverable for death by wrongful act include:
>
> (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
>
> (2) Compensation for pain and suffering of the decedent;
>
> (3) The reasonable funeral expenses of the decedent;
>
> (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:
>
> a. Net income of the decedent,
>
> b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
>
> c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;
>
> (5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for

wrongfully causing the death of the decedent through maliciousness, willful or wanton injury, or gross negligence;

(6) Nominal damages when the jury so finds.

(c) All evidence which reasonably tends to establish any of the elements of damages included in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

Defendant would not be entitled to receive any damages the jury might award in this case. *Cox v. Shaw*, supra, *Cummings v. Locklear*, supra. Defendant would not, therefore, be competent to testify on the elements of damages included in subsection (b)(4) and (c) of G.S. 28A-18-2.

There being no question that children who survive motor vehicle related injuries may maintain an action for those injuries against a negligent parent, we find the reasoning of our courts in *Bank*, *Cox* and *Cummings* both persuasive and controlling here and hold that the provisions of G.S. 1-539.21 allow plaintiff to maintain his action in this case. Accordingly, the judgment of the trial court allowing defendant's motion to dismiss under G.S. 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure is

Reversed.

Judges ARNOLD and MARTIN (H. C.) concur.

PAUL E. CHURCH, JR. v. BART MICKLER AND WIFE, ELAINE MICKLER

No. 8023DC592

(Filed 16 February 1982)

1. Chattel Mortgages and Conditional Sales § 19; Uniform Commercial Code § 47— private sale of collateral—effect of failure to notify debtor

A creditor's failure to notify the debtor of the time after which disposition of the collateral was to be made by private sale as required by G.S. 25-9-504(3)

does not absolutely bar the creditor's right to a deficiency judgment against the debtor. Rather, the debt will be credited with the amount that reasonably could have been obtained by a commercially reasonable sale of the collateral, and lack of notice raises a presumption that the collateral was worth at least the amount of the debt, thus placing upon the creditor the burden of proving that the collateral was sold at market value.

2. **Uniform Commercial Code § 45— sale of collateral—failure to comply with statutes—applicability of sanction**

The ten percent sanction provided by G.S. 25-9-507(1) against a creditor who disposes of collateral without complying with the statutory requirements applies only when the collateral is consumer goods and does not apply to farm equipment.

3. **Uniform Commercial Code § 47— private sale of collateral—failure to give notice to debtor—overcoming presumption that collateral was worth amount of debt**

In an action to recover a deficiency judgment in which plaintiff creditor admitted that he did not give notice to the debtor of the private sale of the collateral, plaintiff's evidence at the hearing on a motion for summary judgment was sufficient to overcome the presumption that the collateral was worth the amount of the debt and to present a material issue of fact as to whether the collateral was sold at market value.

4. **Uniform Commercial Code § 47— private sale of collateral—failure to give notice to debtor—absence of conclusion in court's order**

In an action to recover a deficiency judgment against the debtor after a private sale of the collateral, it was irrelevant that the trial court failed to make a conclusion of the law regarding the immediate legal consequence of plaintiff creditor's failure to notify the debtor of the time after which disposition of the collateral was to be made.

5. **Uniform Commercial Code § 46— private sale of collateral—commercial reasonableness—creditor's buying back of some items**

A creditor's private sale of collateral (farm equipment) was not commercially unreasonable because the creditor immediately bought back some of the equipment from the purchaser where the court found that, at the time the purchaser made an offer on the equipment, he did not know that the creditor desired to buy back some of the equipment.

APPEAL by defendant from *Osborne, Judge.* Judgment signed 21 March 1980 in District Court, ALLEGHANY County. Heard in the Court of Appeals 16 November 1981.

This was an action for deficiency judgment on a lease-purchase contract describing certain farm machinery which upon default by defendants plaintiff sold at private sale. The case was filed in Wilkes County and moved to Alleghany.

The sale and security agreement, designated by the parties as an equipment lease, was executed by plaintiff, his wife, and defendants on 28 December 1976. Defendants were to make annual rental payments of $1,348 for a period of ten years, for a total due of $13,480. Defendants made only one payment before defaulting. Plaintiff, who had retained possession of the equipment, offered to take bids from three machinery dealers and an individual. Plaintiff sold the equipment under the terms of the agreement, to equipment dealer Loton Tharpe on 9 February 1978 at private sale. The equipment sold included a post driver, front-end loader, farm trailer, tractor, blade, fuel oil tank and stand, mowing machine, tillage tool, spray rig and section harrow. Plaintiff received $6,300 for the collateral and immediately bought back several of the items from Tharpe.

Plaintiff thus received a total of $7,648 on the indebtedness, leaving a balance due of $5,832 plus his reasonable expenses in retaking and selling, estimated to be $500. Plaintiff requested recovery of $6,332 plus costs of the action and attorneys fees.

Defendants answered that plaintiff's sale was not conducted in a commercially reasonable manner and that plaintiff gave defendants no notice of intent to repossess or sell the collateral and no opportunity for redemption. Defendants further alleged that the lack of notice caused them to suffer loss because they were unable to attend the sale and protect their rights, that the fact that the sale was not conducted in a commercially reasonable manner caused the sale to produce a low sum, and that the collateral was worth at least $13,480. Defendants counterclaimed for $1,348 plus interest from the date of repossession by plaintiff, and costs.

Both parties moved for summary judgment and both motions were denied. Judgment was entered for plaintiff for $5,757 and counsel fees. Defendants appeal.

McElwee, Hall, McElwee and Cannon, by William H. McElwee, III, for plaintiff appellee.

Edmund I. Adams for defendant appellants.

MORRIS, Chief Judge.

Both plaintiff and defendants violate Rule 28(b)(3) of the Rules of Appellate Procedure by failing to refer, after each question presented in their briefs, to the pertinent assignments of error and exceptions, by number and by the pages of the printed record at which they appear. Although exceptions in the record not set out in a party's brief are to be taken as abandoned, we choose to suspend the requirement, pursuant to Rule 2, in order to discuss the case on its merits.

[1] Defendants allege in their first, third and fourth assignments of error that the court erred in (1) failing to grant summary judgment in favor of defendants on the ground that plaintiff's failure to give them notice of sale pursuant to G.S. 25-9-504(3) barred plaintiff's right to a deficiency judgment, (2) in failing to include in its judgment a conclusion of law regarding the legal consequences of plaintiff's failure to give defendants notification of the time after which disposition of the collateral was to be made, and (3) in failing to find facts and make conclusions of law upon the right of defendants to a dismissal because of plaintiff's failure to give notice. Defendants' second assignment of error was abandoned. We choose to consider these assignments together, because they all turn on the question whether, in North Carolina, failure of notice to a debtor of sale of collateral bars a creditor's right to a deficiency judgment.

We said in *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E. 2d 848 (1976), that

> absolutely precluding recovery of a deficiency judgment would in some cases (i.e. where the collateral has been so used by the debtor before the creditor could take possession its market value was substantially below the debt) result in injustice and contravene the U.C.C. spirit of commercial reasonableness. Further, in our view the provision of U.C.C. § 9-507(1) that a debtor has a right to recover from the creditor any loss caused by failure to comply with the code contemplates the right to deficiency judgment by the creditor who fails to comply with the U.C.C. provisions in disposing of the collateral.
>
> We hold that the debt is to be credited with the amount that reasonably should have been obtained through a sale con-

> ducted in a reasonably commercial manner according to the U.C.C., and that the creditor's failure to dispose of the collateral as required by the Code raises a presumption that the collateral was worth at least the amount of the debt, which places upon the creditor the burden of overcoming such presumption by proving the market value of the collateral by evidence other than the resale price.

Id. at 198-99, 223 S.E. 2d at 851-52. The U.C.C. provision said to have been violated was G.S. 25-9-504(3), which reads in pertinent part:

> Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, . . .

The *Hodges* opinion clearly states that a creditor's failure to give the required notice does not absolutely bar a deficiency judgment. Rather, the debt will be credited with the amount that reasonably could have been obtained via a commercially reasonable sale of the collateral. Lack of notice raises a presumption that the collateral was worth at least the amount of the debt. This is not a conclusive presumption, however. It may be overcome by the creditor by proving that the collateral was sold at market value, and that the market value was less than the amount of the debt.

[2] Plaintiff concedes that he failed to notify appellants of the sale. Defendants, relying on G.S. 25-9-504(3) and G.S. 25-9-507(1), allege that because notice was not given, they are entitled to a sanction of $1,348, which they have sought by way of counterclaim. Although $1,348 reflects the downpayment amount and is validly set forth by defendants in their motion for summary judgment as damages for that reason, we deem the argument in defendants' brief untenable. G.S. 25-9-507(1), as referred to in *Hodges v. Norton*, supra, states:

> If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any per-

> son entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. *If the collateral is consumer goods,* the debtor has a right to recover in any event an amount not less than the credit service plus 10 percent (10%) or the principal amount of the debt or the time price differential plus 10 percent (10%) of the cash price.

(Emphasis ours.) Defendants in their brief argue beyond recovery for loss caused by plaintiff's failure to comply, as set out in their original motion, and espouse entitlement to the ten percent sanction, which also happens to be the amount of the down payment made by them to plaintiff. Their argument is unavailing, however, as the absolute right to recovery of ten percent of the principal indebtedness only attaches when the collateral in question is consumer goods rather than farm equipment, as here. G.S. 25-9-109 explains that goods are

> (1) "consumer goods" if they are used or bought for use primarily for personal, family or household purposes;
>
> (2) "equipment" if they are used or bought for use primarily in business (including farming or a profession . . .)

The collateral sold by plaintiff and upon which the deficiency judgment was sought is clearly farm equipment, in no way classifiable as consumer goods.

[3] We find no error in the trial court's refusal to grant summary judgment in favor of defendants, because the rule in North Carolina, enunciated in *Hodges,* is that a creditor's failure to give the debtor notice of the sale of the collateral does not bar the creditor from obtaining a deficiency judgment against the debtor, provided that the creditor can prove that the sale resulted in the collateral's bringing its market value. *Id.* The basis for entry of summary judgment is a determination by the court that based upon the pleadings, depositions, answers to interrogatories, admissions and affidavits, there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. The affidavit of plaintiff indicates that he talked with Mr. Tommy Andrews, an equipment dealer in Great Glade

Valley, North Carolina, concerning the collateral and that Mr. Andrews submitted a bid for the equipment in the amount of $6,050, somewhat less than the $6,300 eventually paid by Loton Tharpe for the equipment. By his affidavit, plaintiff also says he consulted with another potential buyer, Surry Tractor and Implement Company, but that the Company was not interested in purchasing the equipment. Tharpe, a buyer and seller of tractors, farm equipment and implements, by his affidavit stated that he was familiar with the value of such equipment and that the price he paid, $6,300, was the fair and reasonable market value of all the equipment. Plaintiff thus showed the presence of a material issue of fact with regard to the presumption in favor of defendant that the collateral was worth at least the amount of the debt, which presumption arose due to lack of notice. Summary judgment for defendants was not, therefore, appropriate.

[4] Defendant contends that the trial court erred in failing to include in its final judgment a conclusion of law regarding the legal consequences of plaintiff's failure to give notice. Rule 52(a)(1) requires that "(i)n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." The trial judge's second conclusion of law was that "the plaintiff was authorized to take possession of said equipment and sell the equipment in a commercially reasonable manner, and thereafter apply the proceeds to the indebtedness due under the agreement." His third conclusion stated that "(t)he manner of sale of said equipment by the Plaintiff was done in a commercially reasonable manner." Because we have held that where there is failure of notice, the debt is to be credited with the amount that reasonably should have been obtained through a sale conducted in a reasonably commercial manner, *Hodges v. Norton*, supra, it is irrelevant that the court did not make a conclusion of law regarding the immediate legal consequences of plaintiff's failure to give notification of the time after which disposition was to be made. Clearly, failure of notice raised a presumption that the collateral was worth at least the amount of the debt, placing upon plaintiff the burden of overcoming the presumption by proving the market value of the collateral. The judge evidently felt that plaintiff carried his burden and found as a fact that "there was no evidence that any other manner of sale of said

equipment would have produced a greater price for the equipment." What is important, therefore, is whether the sale was conducted in a commercially reasonable manner, a conclusion the formulation of which necessarily subsumes the consideration of failure of notice and the presumption attaching thereto.

Defendants also contend that the court erred in failing to find facts and make conclusions of law upon the right of defendants to a dismissal of plaintiff's action because of the failure to give notice. We stated above that failure to give notice alone is not enough to defeat an action for a deficiency judgment. Furthermore, the judge's failure to find facts and make conclusions of law is irrelevant, as Rule 41(b) requires that if the court renders judgment on the merits against the plaintiff, it shall make those findings as provided in Rule 52(a). Judgment was not, of course, rendered against plaintiff below. Indeed, the record fails to reveal that defendant even moved to dismiss after plaintiff completed the presentation of his evidence.

[5] Defendants, having abandoned their sixth assignment, attach the court's finding of commercial reasonableness in their fifth and seventh assignments of error. In order to recover a deficiency, the creditor must prove that the disposition of the collateral was commercially reasonable. *Credit Co. v. Concrete Co.*, 31 N.C. App. 450, 229 S.E. 2d 814 (1976). It is our opinion that the court was correct in concluding that the sale of the equipment by the plaintiff was accomplished in a commercially reasonable manner.

> A secured party seeking a deficiency judgment under G.S. 25-9-502 (Cum. Supp. 1977) has the burden of establishing compliance with the twin duties of reasonable notification and commercially reasonable disposition. (Citations omitted.)

Bank v. Burnette, 297 N.C. 524, 529, 256 S.E. 2d 388, 391 (1979). Both requirements are included in G.S. 25-9-504(3), which embodies the mandate that "every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable." G.S. 25-9-504(3). Defendants do not question the practical aspects of method, manner, time, place, terms, or even price, but charge self-dealing, referring to the sale as a mere "straw" transaction in that plaintiff sold the collateral, then immediately bought back some of the equipment from Tharpe.

The trial was by the judge without a jury. He found as trier of the facts that "[a]t the time Mr. Tharpe arrived to pick up said equipment, the Plaintiff decided to repurchase some of the equipment back from Mr. Tharpe, which Mr. Tharpe agreed to, and these items of equipment were resold to the Plaintiff for the sum of $3300.00, which the Plaintiff paid Mr. Tharpe by check on the same day." It is a well-established rule in North Carolina that the court's findings of fact are conclusive if there is evidence to support them, *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975), and judgment supported by such findings will be upheld. *Brooks v. Brooks*, 12 N.C. App. 626, 184 S.E. 2d 417 (1971). Both plaintiff and Mr. Tharpe testified as to the transaction. Mr. Tharpe testified that "[a]t the time I made the offer, Mr. Church and I had not discussed the part about him purchasing part of the property back. I did not know he was going to take some of it back." The credibility of a witness is to be resolved by the fact finder. *Laughter v. Lambert*, 11 N.C. App. 133, 180 S.E. 2d 450 (1971). Since there was competent evidence to support the judge's findings of fact, and these in turn support his conclusions that the sale was commercially reasonable, the judgment is conclusive on appeal.

Defendants contend, without benefit of stated authority, that a "straw" sale may not be commercially reasonable as a matter of law. We do not share this view. The trier of fact must consider all the elements of the sale together in deciding the issue of reasonableness. *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 245 S.E. 2d 566 (1978). It is not manifest that the transaction between plaintiff and Tharpe amounted to self-dealing by the secured party. The court must be allowed to plumb the circumstances surrounding the sale and reach its own determination of commercial reasonableness or lack thereof.

In their final two assignments of error, defendants contend that the court erred in failing to find facts and make conclusions of law on their counterclaim and in failing to grant judgment thereon. They also reiterate the mistaken belief that they are absolutely entitled to recover ten percent of the original principal amount of the debt. We repeat that the ten percent provision relates to consumer goods but is inapplicable to farm equipment, and refer appellants to our discussion herein regarding commercial reasonableness and the circumstances under which a debtor

has a right to recover from a secured party who fails to comply with Part 5, Article 9, Chapter 25 of the General Statutes.

The judgment rendered below is

Affirmed.

Judges HEDRICK and MARTIN (Robert M.) concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 FEBRUARY 1982

BROWN v. BROWN No. 8121DC503	Forsyth (76CVD325) (77CVC139)	Affirmed
CLINE v. CLINE No. 8122DC348	Iredell (78CVD1238)	Affirmed in Part, Vacated in Part, & Remanded
CPG v. KLEIN No. 8110SC531	Wake (80CVS1777)	Reversed, & Cause is Remanded to Superior Court for further Proceedings
HANTON v. UNC No. 8110IC496	Industrial Commission (G-8058)	Affirmed
IN RE JOHNSTON No. 815DC768	New Hanover (81J35)	No Error
IN RE WHITE No. 8112DC758	Cumberland (78J256)	No Error
N.C. EX REL v. RATE BUREAU No. 8110INS327	Insurance Commission (329)	Orders Vacated
STATE v. AVERY No. 816SC846	Bertie (81CRS573) (81CRS574)	No Error
STATE v. BALLANCE No. 811SC736	Camden (81CRS65)	No Error
STATE v. CURRIE No. 813SC690	Craven (80CRS17375)	No Error
STATE v. HENDERSON No. 817SC815	Wilson (80CRS7844) (80CRS7845) (80CRS7843)	No Error
STATE v. HOLDEN No. 817SC741	Wilson (80CRS7747)	No Error
STATE v. JONES No. 8123SC522	Wilkes (80CRS6006)	No Error
STATE v. LOCKLEAR No. 8116SC767	Robeson (80CRS24767)	No Error

STATE v. OLIVER No. 8121SC836	Forsyth (76CR12112)	Modified & Affirmed
STATE v. POOLE No. 8120SC796	Moore (80CRS9984)	No Error
STATE v. RICH No. 813SC801	Craven (80CRS14835)	No Error
STATE v. RUSH No. 815SC748	New Hanover (80CRS19536)	Dismissed
STATE v. SIMMS No. 818SC659	Wayne (80CR4099) (80CR4100)	No Error
STATE v. SLOAN No. 8110SC817	Wake (80CRS7111)	Affirmed

APPENDIX

AMENDMENT TO RULES OF
APPELLATE PROCEDURE

AMENDMENT TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 29(a)(1) of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, 746 is hereby amended to read as follows:

RULE 29

SESSIONS OF COURTS; CALENDAR FOR HEARINGS

(a) Sessions of Court

(1) Supreme Court. The Supreme Court shall be in continuous session for the transaction of business. Hearings in appeals will be held generally during the week beginning the Monday following the first Tuesday in the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.

Adopted by the Court in Conference this 3rd day of March, 1982, to become effective upon adoption. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

MITCHELL, 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

ADMINISTRATIVE LAW

§ 5. Availability of Review by Statutory Appeal

In a civil action to recover a penalty imposed for violation of the Sedimentation Pollution Control Act, the trial court erred in granting the attorney general's motion in limine to limit the issue to such judicial review of the agency decision which denied remission of the penalty as that to which defendant would have been entitled had he appealed the agency decision. *Lee v. Williams*, 80.

A letter from the Department of Human Resources informing respondent that it could proceed with construction of a health care facility without meeting the requirements of the Certificate of Need Law was a final agency decision in a contested case as required for judicial review, and a prospective competitor of respondent was a "person aggrieved" who could seek judicial review of such decision. *In re Construction of Health Care Facility*, 313.

§ 8. Scope and Effect of Judicial Review of Administrative Orders

In reviewing a decision of the A.B.C. Board revoking permits issued to petitioner, the court properly struck from the petition for judicial review allegations relating to the Board's decisions in other similar cases. *Pie in the Sky v. Board of Alcoholic Control*, 655.

ADVERSE POSSESSION

§ 10. Exclusive and Hostile Character of Possession as Against Remaindermen

Defendants' possession of property was not adverse to any remaindermen and they acquired title by adverse possession. *Kennedy v. Whaley*, 321.

§ 17.2. Color of Title, Commissioners' Deeds

A commissioner's deed contained a description capable of being made certain by testimony at the trial so that it was sufficient to constitute color of title. *Willis v. Johns*, 621.

§ 18. Presumptive Possession to Outermost Boundaries of Deed

Where one enters land and asserts ownership of the whole under an instrument constituting color of title, the law will extend his occupation of a portion thereof to the outer bounds of his deed. *Willis v. Johns*, 621.

APPEAL AND ERROR

§ 6.2. Premature Appeals

Appeal from an order in a case concerning a reformation of a deed which allowed plaintiffs to employ a surveyor was interlocutory in nature and premature. *Ball v. Ball*, 98.

Plaintiff had no right to appeal from a temporary injunction restraining plaintiff, its tenants and customers from trespassing upon the disputed lands. *GLYK and Assoc. v. Railway Co.*, 165.

Orders and awards pendente lite are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to G.S. 7A-27(d). *Stephenson v. Stephenson*, 250.

§ 6.6. Appeals Based on Motions to Dismiss

Defendant had no right of immediate appeal from the denial of his motion to dismiss plaintiff's claim for permanent alimony. *Rokes v. Rokes*, 397.

APPEAL AND ERROR — Continued

§ 40. Necessary Parts of Record Proper

Appeal is subject to dismissal because of appellant's failure to include the complete judgment appealed from in the record on appeal. *Lee v. Williams*, 80.

ARCHITECTS

§ 3. Liability for Defective Conditions

Statute requiring an action against contractors and architects arising out of a defective condition of an improvement to realty to be brought within six years after the performance or furnishing of services and construction does not violate constitutional provisions guaranteeing access to the courts for redress of injuries. *Lamb v. Wedgewood South Corp.*, 686.

ARREST AND BAIL

§ 3. Right of Officers to Arrest Without Warrant in General

G.S. 15A-401(e)(1), which prevents entry into private premises or vehicles for the purpose of effecting an arrest without a warrant, is not applicable where an officer does not enter a defendant's vehicle in order to effect an arrest. *S. v. Cromartie*, 221.

§ 3.4. Legality of Warrantless Arrest for Sale or Possession of Narcotics

An officer was justified in making an investigatory stop and detention of defendant based upon information that defendant was driving a vehicle with expired license tags, and the officer then had probable cause to arrest defendant when he observed that the tags on defendant's vehicle were expired. *S. v. Gray*, 568.

ARSON

§ 3. Competency of Evidence

In a prosecution concerning the burning of defendant's own dwelling house, testimony of the fire insurance that was on the house was admissible to show motive on the part of defendant. *S. v. Brackett*, 410.

Evidence was sufficient to qualify two fire investigators as experts in the origin and cause of fires, and they were properly allowed to state opinions that the fire was not caused by electricity and that a burn pattern on a rug was caused by gasoline. *Ibid.*

In an action concerning an unlawful burning, the trial court did not err in excluding testimony that a neighbor had made threats to defendant and her family and had fired a gun at her property, testimony that defendant liked her home, children and neighborhood, testimony that there had been other recent fires in the neighborhood, or testimony concerning cost of repairs to the home. *Ibid.*

§ 4.1. Sufficiency of Evidence

The evidence was sufficient to be submitted to the jury on the charge of willfully and wantonly setting fire to and burning defendant's own dwelling house. *S. v. Brackett*, 410.

§ 5. Instructions

The trial court did not err in instructing the jury that it was not necessary to prove motive in order to prove a willful and wanton burning. *S. v. Brackett*, 410.

ASSAULT AND BATTERY

ATTORNEYS AT LAW

AUTOMOBILES

AUTOMOBILES — Continued

§ 88. Sufficiency of Evidence of Contributory Negligence Generally

In an automobile accident case where plaintiff's motorcycle hit the rear of defendant's car as defendant's car was turning into a driveway, the evidence was sufficient to require submission of the issue of plaintiff's contributory negligence to the jury. *White v. Greer*, 450.

§ 88.1. Sufficiency of Evidence of Contributory Negligence; Passing Maneuvers

Trial court properly denied defendants' motions for directed verdict where the evidence permitted an inference that plaintiff did all that the law required in the exercise of due care for his own safety and that of others when he passed a farm tractor with trailer which was turning left and which had not given a left turn signal. *Davis v. Gamble*, 617.

§ 90. Failure of Instructions to Apply Law to Facts

Defendant was entitled to have the jury instructed with respect to contributory negligence in passing a vehicle on the right. *Duncan v. Ayers*, 40.

§ 90.14. Erroneous Instructions on Negligence

An instruction in an automobile accident case which suggested that a farm tractor and trailer on a highway presents a special hazard per se was erroneous as the Motor Vehicles Act expressly defines a "farm tractor" as a "motor vehicle." *Davis v. Gamble*, 617.

§ 113.1. Evidence Held Sufficient in Homicide Case

The charge of involuntary manslaughter was properly submitted to the jury in an automobile accident case. *S. v. Crabb*, 172.

§ 114. Homicide; Instructions

In a prosecution for involuntary manslaughter, wherein defendant police officer collided with a car at an intersection while on duty, a jury instruction which would have allowed the jury to convict defendant of involuntary manslaughter on the basis of simple negligence was error. *S. v. Flaherty*, 14.

In a criminal case in which defendant was charged with involuntary manslaughter and failure to stop the vehicle he was driving at the scene of an accident, the trial court erred in its summary of evidence placing before the jury a defense to excuse any wrongful driving by defendant when he had alleged that he was never behind the wheel of the car; however, the error was not prejudicial. *S. v. Crabb*, 172.

§ 126.1. Driving Under the Influence; Opinion of Witness as to Defendant's Condition at Time of Offense

Trial court properly allowed the investigating patrolman and the breathalyzer operator to state opinions that defendant had consumed alcoholic beverages in sufficient quantity to impair appreciably his mental and physical faculties. *S. v. Bishop*, 211.

§ 127.1. Sufficiency of Evidence of Driving Under the Influence

The State's evidence was sufficient for the jury in a prosecution for driving under the influence of intoxicants. *S. v. Bishop*, 211.

§ 129. Driving Under the Influence; Instructions

In a prosecution for driving under the influence, the trial court did not err in refusing to answer a question submitted by a juror as to what percent of alcohol in the blood is considered intoxicating. *S. v. Bishop*, 211.

AUTOMOBILES — Continued

§ 131.1. Failing to Stop After Accident; Sufficiency of Evidence

The trial court properly denied defendant's motion to dismiss the charge of failure to render assistance after an automobile accident. *S. v. Crabb*, 172.

BASTARDS

§ 3.2. Constitutional Rights of Defendant

The right of an indigent putative father in a paternity suit brought by the State to have counsel appointed to represent him is individual to the father and cannot be asserted by his estate after his death. *In re Lucas v. Jarrett*, 185.

§ 5. Competency of Evidence

Testimony by the child's mother that the child's forehead and side views resembled those of defendant, if improper, did not constitute prejudicial error. *S. v. Green*, 255.

§ 5.1. Competency of Evidence of Blood Tests

The director of paternity testing in the immunology lab of Bowman-Gray School of Medicine was qualified to testify as to the results of paternity tests although he did not personally perform the tests. *S. v. Green*, 255.

BILLS AND NOTES

§ 4. Consideration

Where plaintiff presented evidence that a promissory note executed to plaintiff by defendants contained the seal of its two makers, plaintiff's evidence was sufficient to take the case to the jury on the issue of consideration. *Wells v. Barefoot*, 562.

§ 17. Limitation of Actions

A payment on a note by one defendant was authorized or ratified by the other defendant so as to begin the statute of limitations anew as to both defendants. *Wells v. Barefoot*, 562.

BROKERS AND FACTORS

§ 6.2. Commissions Where Contract Has Terminated

Plaintiff real estate broker was not entitled to a commission upon defendant owner's sale of property within three months after the expiration of an exclusive listing contract providing for payment of a commission if the listed property was sold during the life of the agreement or within three months thereafter to any party with whom plaintiff had "negotiated." *Cooper v. Henderson*, 234.

BURGLARY AND UNLAWFUL BREAKINGS

§ 1. Definition

A 40 or 50 foot trailer which was "blocked up" and used for the storage of tools and equipment at a construction site constituted a "building" within the meaning of the statute prohibiting breaking and entering of buildings. *S. v. Bost*, 612.

§ 5.5. Sufficiency of Evidence of Breaking and Entering Generally

The evidence was sufficient to convict each of three defendants of breaking or entering where two defendants reached through a screen and the third defendant was present and participated as an aider and abettor. *S. v. Yarborough*, 52.

BURGLARY AND UNLAWFUL BREAKINGS – Continued

§ 5.8. Sufficiency of Evidence of Breaking and Entering and Larceny of Residential Premises

In a felonious breaking and entering and felonious larceny case, the trial court did not err in submitting an instruction on the doctrine of possession of recently stolen property and did not err in its failure to grant defendants' motions to dismiss on the basis that the testimony identifying the stolen property was contradictory. *S. v. Herring*, 230.

The evidence was sufficient to raise a reasonable inference that defendant broke and entered two premises with intent to commit larceny. *S. v. Quilliams*, 349.

§ 7. Instructions on Lesser Included Offenses

The evidence in a prosecution for felonious breaking or entering and larceny did not require the court to instruct the jury on the lesser included offense of misdemeanor breaking or entering on the ground that the jury could find that defendant did not have the intent to commit the felony of larceny at the time of the entry. *S. v. Hannah*, 583.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 3. Cancellation for Mental Incapacity

Plaintiff ratified a separation agreement and was thus foreclosed from attempting to set it aside on the ground of undue influence. *Ridings v. Ridings*, 630.

§ 3.1. Cancellation for Undue Influence

Although plaintiff presented some evidence that he was incompetent at the time he signed a separation agreement, he could not set it aside where he failed to offer evidence that he continued to suffer from the alleged mental illness when his acts ratifying the agreement occurred. *Ridings v. Ridings*, 630.

CHATTEL MORTGAGES AND CONDITIONAL SALES

§ 19. Deficiency

A creditor's failure to notify the debtor of the time after which disposition of the collateral was to be made by private sale did not absolutely bar the creditor's right to a deficiency judgment, but the debt will be credited with the amount that reasonably could have been obtained by a commercially reasonable sale. *Church v. Mickler*, 724.

CONSPIRACY

§ 2.1. Sufficiency of Evidence of Civil Conspiracy

Summary judgment was properly entered for defendants in plaintiff's action to recover damages for conspiracy to violate federal and state odometer statutes. *Miller v. Triangle Volkswagen*, 593.

§ 5.1. Admissibility of Statements of Coconspirators

Admission of a statement of a coconspirator which was not made in furtherance of the conspiracy was not sufficiently prejudicial as to require the granting of a new trial. *S. v. Powell*, 328.

§ 6. Sufficiency of Evidence

Evidence was sufficient to establish conspiracy to commit larceny. *S. v. Powell*, 328.

CONSTITUTIONAL LAW

§ 24.7. Service of Process and Jurisdiction; Foreign Corporations

Evidence in a contract case was insufficient to establish the requisite substantial connection between the transaction and this State to confer in personam jurisdiction. *Russell v. Tenore*, 84.

§ 30. Discovery

The trial court did not abuse its discretion in failing to order a mistrial when an officer's testimony concerning the content of defendant's oral statement following arrest differed from the written report of that statement given to defendant's counsel. *S. v. Carter*, 192.

There was no abuse of the trial court's discretion in admitting certain evidence even though there were allegations that the State had failed to comply with a court order compelling discovery. *S. v. Jeffries*, 269.

The trial court did not abuse its discretion in admitting testimony concerning tests which indicated that the fire that defendant was accused of starting did not originate in the building's electrical system even though the State failed to furnish copies of the tests. *Ibid.*

In a prosecution concerning the burning of defendant's dwelling house, the trial court did not abuse its discretion by allowing two fire investigators to testify when one investigator's report was furnished defendant approximately one month prior to trial and the other investigator's report was not furnished until the time of trial. *S. v. Brackett*, 410.

§ 33. Ex Post Facto Laws

A defendant convicted of trafficking in heroin was not the victim of an ex post facto law or punishment. *S. v. Cherry*, 603.

§ 34. Double Jeopardy

Defendant's conviction of involuntary manslaughter and unlawful burning arising out of the same transaction did not constitute double jeopardy. *S. v. Jeffries*, 269.

§ 67. Identity of Informants

In a prosecution for five different drug related charges, the trial court did not err in failing to disclose the identity of a confidential informer whose information led to the issuance of a search warrant. *S. v. Roseboro*, 205.

The trial court did not err in refusing to order the State to reveal the identity of a confidential informant. *S. v. Cherry*, 603.

CONTEMPT OF COURT

§ 6.3. Hearings on Orders to Show Cause; Findings

A finding that defendant is an able-bodied man under no legal, mental or physical disabilities is insufficient to support an order that defendant be imprisoned for contempt until he pays an alimony arrearage. *Henderson v. Henderson*, 506.

CONTRACTS

§ 6.1. Contracts by Unlicensed Contractors

In an action by plaintiff to recover the balance allegedly due on an oral construction contract, summary judgment for defendant property owners was proper where defendants' pleadings and affidavits indicated that plaintiff falsely represented himself to be a general contractor. *Key v. Floyd*, 467.

COSTS

§ 4.2. Attorney's Fees

Plaintiffs' action to enjoin defendant board of education from expending school funds for an extended day program does not fall within the equity exception to the rule that attorney fees are not allowable as part of the costs in the absence of contractual or statutory authority. *Kiddie Korner v. Board of Education*, 134.

COUNTIES

§ 4. County Officers and Boards

The Wake County Hospital System, Inc. is an "agency" of Wake County within the purview of the public records statute. *Publishing Co. v. Hospital System, Inc.*, 1.

COURTS

§ 1. Nature and Function in General

Statute requiring an action against contractors and architects arising out of a defective condition of an improvement to realty to be brought within six years after the performance or furnishing of services and construction does not violate constitutional provisions guaranteeing access to the courts for redress of injuries. *Lamb v. Wedgewood South Corp.*, 686.

CRIMINAL LAW

§ 15. Venue

Where defendant was indicted in Cleveland County and a judge ordered the matter transferred to another county, defendant was not prejudiced when he was thereafter tried on the indictment in Cleveland County without an order transferring the case back to Cleveland County. *S. v. Benfield*, 380.

§ 16.1. Jurisdiction of Superior and District Courts

A fifteen-year-old defendant's murder case was properly transferred to superior court. *S. v. Conard*, 63.

§ 22. Arraignment and Pleas Generally

The record sufficiently showed that defendant was properly arraigned where it stated that defendant appeared with his counsel in open court and was duly arraigned by the assistant district attorney reading the charges to him, whereupon he pled not guilty. *S. v. Benfield*, 380.

§ 26. Plea of Former Jeopardy

By relying exclusively on the doctrine of possession of recently stolen property the State depended upon the same evidence to prove both the charge of felonious larceny and the charge of felonious possession of stolen property, and the State cannot punish defendant separately for each offense. *S. v. Carter*, 192.

§ 26.5. Former Jeopardy; Same Acts Violating Different Statutes

Defendant's conviction of involuntary manslaughter and unlawful burning arising out of the same transaction did not constitute double jeopardy. *S. v. Jeffries*, 269.

CRIMINAL LAW — Continued

§ 29.1. Procedure for Raising and Determining Issue of Mental Capacity

Trial court properly excluded testimony by a psychiatrist that defendant was incapable of standing trial when he was admitted to a hospital for evaluation six days after decedent's death and eleven months before trial. *S. v. Cass*, 291.

§ 34.8. Admissibility of Evidence of Other Offenses to Show Common Plan, Scheme or Design

Testimony that a State's witness had purchased marijuana from defendant prior to the date in question was competent to show a plan or scheme to deal in drugs, but the trial court erred in instructing that the jury could consider such testimony to show defendant's disposition to deal in drugs. *S. v. Bean*, 247.

Testimony that defendant, who was charged with conspiracy to commit larceny, dealt regularly in the purchase and resale of stolen goods was admissible to show intent to commit a conspiracy to effect larceny and to show a common plan or scheme for the commission of the crime. *S. v. Powell*, 328.

§ 43.2. Photographs; Authentication and Verification

A proper foundation was laid for the admission of photographs of damage to a riot victim's house. *S. v. Yarborough*, 52.

§ 43.4. Gruesome or Inflammatory Photographs

Testimony about the appearance of firemen who died fighting a fire defendant was accused of starting was in no way incompetent or irrelevant to the issues being tried. *S. v. Jeffries*, 269.

§ 43.5. Videotapes

Admission of a witness's videotaped testimony in a criminal case does not constitute an inherent violation of a defendant's right to confront witnesses against him; however, the conditions under which such testimony is allowed must be carefully controlled. *S. v. Jeffries*, 269.

§ 50. Expert and Opinion Testimony in General

In a prosecution for felonious setting of a fire it was not error to allow a fireman to testify the steam he observed was "an indication that they had hit the seat of the fire" and for another fireman to testify that smoke smelled like "burning oil or some type of petroleum product." *S. v. Jeffries*, 269.

Evidence was sufficient to qualify two fire investigators as experts in the origin and cause of fires. *S. v. Brackett*, 410.

§ 50.1. Admissibility of Expert's Opinion Testimony

It was not error to allow two witnesses who were qualified as experts in the cause and origin of fires to testify that first, in their opinions the fire in question was not caused by electricity, and second that each had observed a burn pattern on a rug and in their opinion it had been caused by gasoline on the rug. *S. v. Brackett*, 410.

It was not error to allow an employee of the tax supervisor's office to testify concerning the appraised value of the property several years prior to the trial. *Ibid.*

§ 63.1. Sanity of Defendant; Nature, Competency and Effect of Evidence

Testimony regarding defendant's previous hospitalizations for mentally related problems between 1958 and 1967 was too remote to be relevant to defendant's mental condition at the time of decedent's death. *S. v. Cass*, 291.

CRIMINAL LAW — Continued

Trial court did not err in refusing to permit a psychiatrist who testified as to the result of an I.Q. test he administered to defendant to give further testimony as to the results of other I.Q. tests previously administered to defendant. *Ibid.*

Testimony by a psychiatrist that "in the general sense" defendant knew the difference between right and wrong was relevant on the issue of whether defendant was legally insane. *Ibid.*

§ 66.18. Voir Dire to Determine Competency and Admissibility of In-Court Identification

There was no error in the court's failure to exclude identification testimony of a witness ex mero motu at the end of a voir dire where the defense counsel chose to withdraw his objection to the testimony at the end of the voir dire. *S. v. Jeffries*, 269.

§ 67. Evidence of Identity by Voice

The State was not required to reveal the identity of a confidential informant who did not participate in the transaction in question. *S. v. Cherry*, 603.

§ 70. Tape Recordings

Trial court erred in admitting tape recordings without conducting a voir dire hearing to determine whether the recordings met the applicable standards for admission. *S. v. Shook*, 364.

§ 73. Hearsay Testimony in General

The trial court did not err in overruling an objection where it was impossible to discern whether the answer expressed information within a witness's personal knowledge or depended on the competency and credibility of someone else. *S. v. Herring*, 230.

§ 73.3. Statements Showing State of Mind Not Within Hearsay Rule

An officer's voir dire testimony that he was told by another officer that defendant was driving a vehicle with expired license tags was not inadmissible hearsay. *S. v. Gray*, 568.

§ 74.3. When Codefendant's Confession Is Competent

Questions posed to a codefendant concerning his guilty plea were not improper as he testified for the State concerning facts tending to establish his own guilt and his guilty plea was not used as evidence of defendant's guilt. *S. v. Powell*, 328.

§ 75. Admissibility of Confession in General

The evidence supported the court's findings and conclusions that defendant freely, knowingly and voluntarily waived his right to remain silent. *S. v. Wade*, 258.

The trial court did not err in admitting into evidence three separate statements made by defendant, who was indicted for feloniously and willfully setting fire to his store, where the statements were made voluntarily and while the defendant was not in custody. *S. v. Jeffries*, 269.

§ 75.1. Admissibility of Confession; Effect of Fact that Defendant Is in Custody

Defendant was never "seized" within the meaning of the Fourth Amendment, and his incriminating statement to officers at the sheriff's office prior to his formal arrest was thus not rendered inadmissible by Fourth Amendment exclusionary principles. *S. v. Cass*, 291.

CRIMINAL LAW — Continued

§ 75.7. Confession; What Constitutes Custodial Interrogation

Where a police officer searched defendant as an incident to his lawful arrest and discovered a plastic bag containing pills in defendant's coat pocket, there was no custodial interrogation requiring the officer to give defendant the Miranda warnings when the officer asked what the pills were and defendant stated that they were LSD. *S. v. Gray*, 568.

§ 75.11. Confession; Sufficiency of Waiver of Constitutional Rights

The evidence on voir dire supported the trial court's determination that defendant was competent to waive his constitutional rights prior to making in-custody statements. *S. v. Cass*, 291.

§ 75.13. Confessions Made to Persons Other than Police Officers

Statements by defendant to a county magistrate were properly admissible in the absence of Miranda warnings. *S. v. Conard*, 63.

§ 76.4. Determination of Admissibility of Confession; Conduct of Voir Dire Hearing

Trial court did not abuse its discretion in permitting the State to reopen the voir dire examination of a deputy sheriff during a hearing on defendant's motion to suppress incriminating statements. *S. v. Cass*, 291.

§ 86.5. Credibility of Defendant; Particular Questions

In a prosecution for larceny from the person, defendant failed to show questions by the district attorney on cross-examination asking defendant whether he had sold drugs and stolen a diamond ring were asked in bad faith. *S. v. Robertson*, 659.

§ 87.1. Leading Questions

The trial court did not err in permitting the district attorney to ask one of the State's witnesses to call his attention to the date of 13 July 1979 and to ask him if he saw the victim that day. *S. v. Froneberger*, 148.

The trial court did not abuse its discretion by refusing to hold a State's witness as hostile. *S. v. Brackett*, 410.

§ 88.2. Questions and Conduct Impermissible on Cross-examination

The trial court did not err in failing to allow defendant to replay a recording of a witness's prior testimony while the witness was being cross-examined. *S. v. Brackett*, 410.

§ 89.2. Corroboration of Witnesses

Trial court's instruction that a prior written statement by a rape victim could be considered to the extent that it corroborated "a previous witness" was erroneous in failing to limit consideration of the statement to corroboration of the victim who made it. *S. v. McMillan*, 25.

Defendant waived objection to a witness's hearsay testimony, and other evidence corroborating such testimony was properly admitted. *S. v. Burgess*, 443.

§ 89.3. Prior Statements of Witness

The trial court did not err in admitting a prior written statement given to an officer by a witness for the State. *S. v. Brackett*, 410.

CRIMINAL LAW — Continued

§ 89.5. Slight Variances in Corroborating Testimony

A rape victim's prior statement was properly admitted to corroborate the victim's in-court testimony although it contained a more explicit description of the rape than the in-court testimony. *S. v. McMillan*, 25.

§ 91. Nature and Time of Trial; Speedy Trial

Defendant was entitled to a continuance as a matter of right when the trial judge informed the parties prior to jury selection that he was rejecting a plea bargain arrangement. *S. v. Tyndall*, 57.

The trial court did not err in continuing defendant's case for one month and in excluding that period for speedy trial purposes. *S. v. Brackett*, 410.

§ 91.6. Continuance on Ground that Certain Evidence Has Not Been Provided by State

There was no abuse of discretion in the denial of defendant's motion for continuance on grounds that a codefendant's decision to plead guilty and testify for the State, made shortly after the case was called for trial, came as a surprise and hindered his ability to impeach the codefendant's testimony. *S. v. Powell*, 328.

§ 91.7. Continuance on Ground of Absence of Witness

The trial court did not err in denying defendant a continuance when one of his subpoenaed witnesses failed to appear. *In re Lail*, 238.

§ 95.2. Form of Instructions

Trial court adequately instructed on corroborative evidence, and defendant was not prejudiced when the court later shortened its explanation of corroborative evidence. *S. v. Wooten*, 530.

§ 96. Withdrawal of Evidence

Defendant was not prejudiced by trial court's failure to instruct the jury to disregard a question to which defendant's objection had been sustained when defendant's counsel said, "Request instruction." *S. v. Cherry*, 603.

§ 99.7. Court's Admonitions to Witnesses

Defendant failed to show prejudice in the trial court's admonition of one of defendant's witnesses with regard to the penalty for perjury. *S. v. Parker*, 643.

§ 101. Conduct or Misconduct Affecting Jurors

The trial court did not abuse its discretion in denying defendant's motion for a mistrial after one witness's father talked to jurors on two occasions during recesses. *S. v. Carter*, 192.

§ 101.4. Conduct Affecting or During Jury Deliberation

Trial court in a second degree murder case did not err in allowing the jury to examine exhibits in the jury box while a guilty plea was taken for an unrelated traffic offense. *S. v. Ingram*, 265.

§ 102.6. Particular Conduct and Comments in Jury Argument

Where the record was not clear as to what a district attorney said in his challenged argument, any error in the argument was found to be nonprejudicial. *S. v. Quilliams*, 349.

CRIMINAL LAW — Continued

§ 111.1. Particular Miscellaneous Jury Instructions

Defendant was not denied a fair trial when the trial court erroneously stated to the jury pool that defendant was charged with two drug counts occurring on 25 September when the correct date was 12 September. *S. v. Wooten*, 530.

§ 112.1. Instructions on Reasonable Doubt

Trial court's instructions sufficiently tied the definition of reasonable doubt to the State's evidence. *S. v. Wooten*, 530.

§ 114.3. No Expression of Opinion in Instructions

Repetition of the conspiracy charge portion of instructions to the jury did not constitute an expression of opinion by the court upon the evidence. *S. v. Murray*, 94.

Trial court's instruction that the indictment against defendant should not be considered as evidence of guilt "in and of itself" did not constitute an improper expression of opinion. *S. v. Burgess*, 443; *S. v. Herring*, 230.

§ 114.5. Prejudicial Statement of Opinion in Instructions

The trial court expressed an opinion on the evidence in instructing that "you must find" from the evidence beyond a reasonable doubt that defendant engaged in sexual intercourse with the victim by committing certain acts. *S. v. McMillan*, 25.

§ 120. Instructions on Consequences of Verdict and Punishment

In charging the jury upon the law and evidence and instructing that a verdict must be unanimous, the trial judge is not required to anticipate that the jury may be unable to reach a verdict. *S. v. McBryde*, 473.

§ 124. Sufficiency and Effect of Verdict

Judgments against defendant were not invalid because the verdict form failed to specify with what offense defendant was charged in each count. *S. v. Perez*, 92.

§ 126. Polling Jury

A motion by defense counsel to poll the jury after the jury had returned its verdict, had been discharged and recessed for lunch was not timely made. *S. v. Froneberger*, 148.

§ 126.3. Impeachment of Verdict

The trial court did not err in failing to allow a juror, who called defense counsel's secretary indicating that she did not feel the defendant was guilty and that three of the jurors had been "coerced" into their decision by the other jurors, to impeach her verdict. *S. v. Froneberger*, 148.

The court properly denied defendant's motion for appropriate relief where a juror called the defense counsel the morning after the jury rendered its verdict to tell him she was not satisfied with the verdict. *S. v. Carter*, 192.

§ 128.2. Particular Grounds for Mistrial

Trial court did not err in the denial of defendant's motion for mistrial when an officer testified that the person who sold stolen tractors to defendant told him it cost him $1500 for the people to steal the tractors. *S. v. Burgess*, 443.

Trial court did not abuse its discretion in denying defendant's motion for a mistrial when a law officer testified that cigarettes handed to him by defendant "contained marijuana." *S. v. Cherry*, 603.

CRIMINAL LAW — Continued

§ 132. Setting Aside Verdict as Contrary to Weight of Evidence

The district court had authority on its own motion to set aside guilty verdicts it had previously rendered as being contrary to the weight of the evidence where the court had continued prayer for judgment and no judgment had been entered on the verdicts. *S. v. Surles*, 179.

§ 138. Severity of Sentence

The trial court rendered sentences for murder and robbery which fell within the appropriate statutory limits. *S. v. Conard*, 63.

§ 142.3. Conditions of Probation Proper

Where defendant was convicted of unlawfully, willfully and wantonly injuring personal property, a condition of his probation that he refrain from possessing a firearm was one of sixteen "appropriate conditions" of probation specifically authorized by the legislature, and it was unnecessary to find its "relatedness" to the crime. *S. v. Parker*, 643.

§ 144. Modification of Judgment in Trial Court

The authority of a trial judge to modify a defendant's sentence ends at the conclusion of the session of court in which a sentence is imposed. *S. v. Cameron*, 263.

§ 149.1. Appeal by State Not Permitted

The State had no right to appeal from a verdict of not guilty of a misdemeanor charge in the district court, but the actions of the district judge in setting aside guilty verdicts and entering verdicts of not guilty some five months after the guilty verdicts were entered were reviewable in the appellate court by way of petition for writ of mandamus. *S. v. Surles*, 179.

The State had no right to appeal an order granting defendant's motion to suppress evidence where the record failed to show that the prosecutor gave the required certificate to the judge. *S. v. McDonald*, 393.

§ 154.1. Unavailability of Transcript

Defendant failed to show prejudice where his juvenile proceeding was recorded pursuant to G.S. 7A-636 and several remarks were inaudible. *In re Lail*, 238.

§ 158. Presumptions as to Matters Omitted from Record

Failure to include excepted-to photographs and film footage in the record is a violation of App. R. 9(b)(3) and makes it impossible for the Court to rule on the admissibility of the evidence. *S. v. Jeffries*, 269.

§ 162. Necessity for Objections to Evidence

Where the record on appeal reveals that no objection was made during the trial to certain questions which elicited testimony assigned as error, the testimony, even if incompetent, is not a proper basis for appeal. *S. v. Froneberger*, 148.

Where defendant failed to object or move to strike testimony that a magistrate had found probable cause to arrest defendant and had issued a warrant for his arrest, he waived his right to assert its admission as grounds for a new trial. *S. v. McBryde*, 473.

§ 162.2. Time for Objection

By failing to object to a question and answer eliciting evidence concerning defendant's post-Miranda silence, defendant waived his objection and right to assert its submission as grounds for a new trial. *S. v. McBryde*, 473.

CRIMINAL LAW — Continued

§ 162.3. Objection by Motion to Strike When Inadmissibility of Evidence Later Becomes Apparent

When a defendant objects to an alleged improper response to a proper question, he must also move to strike said response in order to raise the question of admissibility on appeal. *S. v. Froneberger*, 148.

§ 164. Exceptions to Refusal of Motion for Nonsuit

Where the defendant put on evidence after the denial of his motion to dismiss at the close of the State's evidence, he waived his right to except on appeal. *S. v. Brackett*, 410.

DAMAGES

§ 3.4. Compensatory Damages for Pain, Suffering and Mental Anguish

It was proper for plaintiff's attorney to argue a per diem formula for determining damages for injuries received in an automobile accident. *Weeks v. Holsclaw*, 335.

§ 5. Damages for Injury to Real Property

In an action to recover for flood damage to a home purchased by plaintiffs from defendants, the jury returned a verdict in excess of the amount to which plaintiffs may have been properly entitled, and the errors in the damages awarded stemmed from the court's instructions. *Clifford v. River Bend Plantation*, 514.

§ 13.6. Use of Mortuary Tables

Where there was testimony indicating that injuries received by plaintiff in an automobile accident were permanent in nature, it was not error to admit into evidence mortuary tables found in G.S. 8-46. *Mitchem v. Sims*, 459.

§ 17.4. Instructions on Future Damages

The trial court did not err in instructing the jury that it could assess damages for permanent injury to and future pain and suffering of plaintiff in a personal injury action. *Mitchem v. Sims*, 459.

§ 17.5. Instructions on Lost Earnings and Profits

Trial court properly instructed the jury that plaintiff's damages should not be reduced because plaintiff was reimbursed for sick leave which he took from his employment. *Weeks v. Holsclaw*, 335.

DEATH

§ 3. Nature and Grounds of Action for Wrongful Death

The provisions of G.S. 1-539.21 allow the personal representative of a deceased minor child to maintain an action for the wrongful death of the child against a parent of the child. *Carver v. Carver*, 716.

DECLARATORY JUDGMENT ACT

§ 3. Requirement of Actual Justiciable Controversy

A justiciable controversy determinable under the Declaratory Judgment Act was presented as to whether plaintiff is the widow of a deceased and entitled to share in his estate with defendant. *Bowlin v. Bowlin*, 100.

DEEDS

§ 20. Restrictive Covenants in Subdivisions

Covenants in deeds requiring subdivision lot owners to pay an annual fee to a property owners' association "for the maintenance and improvement of Snug Harbor Beach and its appearance, sanitation, easements, recreation areas and parks, and all utility expenses" or "for the maintenance of the recreation area and park" were not sufficiently certain and definite to be enforceable. *Property Owners Assoc. v. Curran*, 199.

DESCENT AND DISTRIBUTION

§ 8. Bastards

Plaintiffs' verified complaint alleging the basis of their claim of entitlement to inherit from decedent as decedent's illegitimate children satisfied the notice requirement of G.S. 29-19(b). *In re Lucas v. Jarrett*, 185.

The right of decedent's illegitimate children to take property by descent and distribution arose after the death of the intestate and not when decedent was adjudged to be the children's father; therefore, their rights vested after the enactment of G.S. 29-1(b). *Ibid.*

DIVORCE AND ALIMONY

§ 19.5. Effect of Separation Agreements on Alimony

The trial court did not err in finding a consent judgment to be a complete property settlement rather than separate alimony and property division provisions. *Barr v. Barr*, 217.

§ 20.1. Effect of Decree for Absolute Divorce on Right to Alimony

Defendant did not forfeit her right to receive alimony when she obtained a divorce based on separation prior to the sale of foreclosed property she owned by the entirety with plaintiff which secured a judgment lien she had obtained with the other defendants. *McCall v. Harris*, 390.

§ 21. Enforcement of Alimony Awards Generally

Trial court could properly enter summary judgment ordering specific performance by defendant of provisions of a separation agreement requiring defendant to pay $150 per month to plaintiff for support. *McDowell v. McDowell*, 261.

§ 21.5. Enforcement of Alimony Award; Punishment for Contempt

A finding that defendant is an able-bodied man under no legal, mental or physical disabilities is insufficient to support an order that defendant be imprisoned for contempt until he pays an alimony arrearage. *Henderson v. Henderson*, 506.

§ 21.6. Enforcement of Alimony Award; Effect of Separation Agreement

A consent judgment which provided that its property settlement and alimony provisions were not subject to modification could still be enforced by civil contempt. *Henderson v. Henderson*, 506.

§ 23.9. Evidence and Findings in Child Support Hearing

There was no competent evidence in a contempt proceeding to support the findings that (1) defendant had the ability to comply with a child support order, and (2) he had willfully failed to exercise his capacity to earn. *Self v. Self*, 651.

DIVORCE AND ALIMONY — Continued

A statement by defendant that financial information had been prepared but was not present in court was sufficient to support a conclusion that defendant was in contempt for failure to produce his financial records. *Ibid.*

§ 25.10. Modification of Child Custody Order Where Changed Circumstances Not Shown

The trial court did not err in dismissing plaintiff's motion for a change of custody of the parties' minor child from defendant father to plaintiff mother where plaintiff presented evidence of her changed circumstances, but made no showing that the child's welfare was being affected adversely by her present environment. *Barnes v. Barnes*, 670.

EJECTMENT

§ 12. Ejectment to Try Title; Competency of Evidence; Deeds and Judgments

In an action in which both plaintiffs and defendants claimed title through a common source, defendants could show foreclosure of a mortgage on the property and conveyance of the property to a third person pursuant to the foreclosure sale so as to divest the title of the person through whom plaintiffs claimed where the third person acquired his title after the common source. *Kennedy v. Whaley*, 321.

EMINENT DOMAIN

§ 7. Statutory Authority to Institute Condemnation Proceedings

Where a Housing Authority sought to purchase respondent's land as part of a series of purchases concerning the building of a low-rent housing project, whether the site petitioner sought to condemn was to be used for the construction of a street or for the construction of drainage and water and sewer lines was not a material fact in dispute. *In re Housing Authority v. Montgomery*, 422.

§ 7.3. Good Faith Negotiations

There was no failure of good faith negotiations by the Housing Authority. *In re Housing Authority v. Montgomery*, 422.

ESTOPPEL

§ 4.6. Conduct of Party Asserting Estoppel

A workers' compensation insurer's acceptance of premiums from the Employment Security Commission on behalf of a C.E.T.A. worker hired by the Commission and assigned to work for a subcontractor did not estop the insurer from denying that the worker was an employee of the Commission for workers' compensation purposes. *Barrington v. Employment Security Commission*, 638.

EVIDENCE

§ 31. Best and Secondary Evidence

The best evidence rule was not violated by the admission of photocopies of a note and deed of trust. *In re Foreclosure of Deed of Trust*, 68.

§ 36. Admissions and Declarations by Agents

The statement of a physician who treated plaintiff's collapsed lungs and who was a partner with an individual defendant in the defendant Private Diagnostic

EVIDENCE — Continued

Clinic that "I'm not the one that punched those . . . holes in your wife's lungs" was competent as an admission against such defendants. *Simons v. Georgiade*, 483.

§ 43. Nonexpert Opinion Evidence as to Sanity

Lay witnesses were competent to state their opinions of plaintiff's mental condition. *Whitman v. Forbes*, 706.

Affidavits of lay witnesses stating opinions as to the value of a house were competent for consideration on a motion for summary judgment. *Ibid.*

§ 49.3. Examination of Expert Through Use of Hypothetical Question; Form of Question

A medical witness's opinion testimony as to whether the cause of plaintiff's collapsed lungs was a deviation from standard medical practice could not be excluded on the ground that the questions did not employ "could or might" language. *Simons v. Georgiade*, 483.

§ 50. Testimony by Medical Experts in General

The exclusion of a plastic surgeon's answers to questions as to whether the cause of plaintiff's collapsed lungs was a deviation from standard medical practice cannot be upheld on the ground that the questions failed to ask whether the cause was a deviation from standard medical practice "in Durham, North Carolina or in similar communities in 1975 and 1976." *Simons v. Georgiade*, 483.

A plastic surgeon was qualified to give expert testimony in a medical malpractice case arising in Durham although he had not completed his training as a plastic surgeon at the time of the incident in question, he had not practiced in this State since 1967, and he had been practicing in hospitals in communities smaller than Durham. *Ibid.*

§ 50.1. Testimony by Medical Experts; Nature and Extent of Injury

Trial court properly permitted plaintiff's expert medical witness to state his opinion that "after this long a time" plaintiff's injuries would have some permanency. *Weeks v. Holsclaw*, 335.

Trial court properly permitted plaintiff's expert medical witness to state the experience he had had with injuries similar to those plaintiff sustained in an automobile accident and to explain to the jury how he determined the presence of pain in a person suffering such injuries. *Ibid.*

Where a proper foundation had been laid, asking a chiropractor's opinion of a plaintiff's disability based upon his personal examination and treatment of plaintiff called for an opinion based upon reasonable medical certainty and was proper. *Mitchem v. Sims*, 459.

§ 50.2. Testimony by Medical Experts; Cause of Injury or Disease

A hypothetical question which allowed a medical expert to base his opinion in part on the medical history obtained from the patient himself was proper. *Mitchem v. Sims*, 459.

An expert medical witness could state his opinion based on a hypothetical question that a surgical procedure caused plaintiff's collapsed lungs even though the witness must have inferred entry of needles into plaintiff's lungs to effect the collapse. *Simons v. Georgiade*, 483.

EXECUTORS AND ADMINISTRATORS

§ 5.5. Grounds for Revocation of Testamentary Letters

A finding that the administratrix of an estate had obtained her letters of administration by false representation or mistake was sufficient to support the conclusion that the administratrix should be removed under G.S. 28A-9-1. *In re Lucas v. Jarrett*, 185.

FALSE IMPRISONMENT

§ 1. Nature and Essentials of Right of Action

False imprisonment is a lesser included offense of kidnapping and could properly be submitted to the jury where kidnapping was charged. *S. v. Irwin*, 305.

FRAUD

§ 12. Sufficiency of Evidence

Plaintiff's evidence on motion for summary judgment presented an issue of fact for the jury on the issue of fraud by defendant car dealer in the sale of a used car to plaintiff. *Miller v. Triangle Volkswagen*, 593.

GUARDIAN AND WARD

§ 4. Sale of Ward's Lands

Although a commissioner's sale of land owned by minors was confirmed, title to the land did not pass to the purchaser where the purchaser did not tender the purchase price and the commissioner delivered no deed. *Lee v. Barefoot*, 242.

HOMICIDE

§ 20. Real and Demonstrative Evidence

A pistol was sufficiently identified as the weapon used in the murder of defendant's wife for its admission into evidence. *S. v. Cass*, 291.

§ 21.9. Sufficiency of Evidence of Manslaughter

The State's evidence, including incriminating statements made by defendant, was sufficient to support the conviction of defendant for involuntary manslaughter of his wife. *S. v. Cass*, 291.

§ 30.3. Submission of Lesser Offense of Involuntary Manslaughter

Submission to the jury of the offense of involuntary manslaughter was not prejudicial error where the evidence supported the State's theory that five deaths resulted from defendant's feloniously and deliberately setting fire to his store. *S. v. Jeffries*, 269.

HOSPITALS

§ 1. Definitions

The Wake County Hospital System, Inc. is an "agency" of Wake County within the purview of the public records statute. *Publishing Co. v. Hospital System, Inc.*, 1.

§ 2.1. Control and Regulation

A letter from the Department of Human Resources informing respondent that it could proceed with construction of a health care facility without meeting the re-

HOSPITALS — Continued

quirements of the Certificate of Need Law was a final agency decision in a contested case as required for judicial review, and a prospective competitor of respondent was a "person aggrieved" who could seek judicial review of such decision. *In re Construction of Health Care Facility*, 313.

§ 3.1. Liability of Charitable Hospital for Negligence of Employees; Cases Prior to 1967

The doctrine of corporate negligence adopted in Bost v. Riley, 44 N.C. App. 638, pursuant to which a charitable hospital may be found liable to a patient for violations of duties owed directly to the patient by the hospital, is to be applied prospectively only. *Jones v. New Hanover Hospital*, 545.

HUSBAND AND WIFE

§ 12.1. Revocation and Rescission of Separation Agreement

Plaintiff ratified a separation agreement and was thus foreclosed from attempting to set it aside on the ground of undue influence. *Ridings v. Ridings*, 630.

Although plaintiff presented some evidence that he was incompetent at the time he signed a separation agreement, he could not set it aside where he failed to offer evidence that he continued to suffer from the alleged mental illness when his acts ratifying the agreement occurred. *Ibid.*

§ 13. Separation Agreements; Enforcement

Trial court could properly enter summary judgment ordering specific performance by defendant of provisions of a separation agreement requiring defendant to pay $150 per month to plaintiff for support. *McDowell v. McDowell*, 261.

A consent judgment which provided that its property settlement and alimony provisions were not subject to modification could still be enforced by civil contempt. *Henderson v. Henderson*, 506.

INFANTS

§ 16. Delinquency Hearings Generally

A juvenile was not entitled to a new trial on the ground that the criminal record of a juvenile witness was not disclosed to respondent's counsel as required by statute. *In re Coleman*, 673.

§ 20. Judgments and Orders in Delinquency Hearings; Dispositional Alternatives

The trial court erred when it denied the juvenile defendant an opportunity, upon request, to have a dispositional hearing and to present evidence at that hearing. *In re Lail*, 238.

INSANE PERSONS

§ 2.2. Appointment of Guardian

The right of a trial de novo on appeal from the orders of the clerk relates only to the adjudication of incompetency and not the appointment of a guardian for an incompetent's estate. *In re Bidstrup*, 394.

Respondent failed to show (1) that the appointment of an individual as guardian by the clerk was "manifestly unsupported by reason" or (2) that the clerk abused her discretion in appointing the individual. *Ibid.*

INSURANCE

§ 44. Actions to Recover Benefits; Disability Insurance

Where the jury returned a verdict finding defendant to be eligible for disability benefits which had been discontinued by defendant insurance company, the trial judge exercised sound discretion when he directed the insurance company to pay the future installments for disability as they accrue. *Teague v. Springfield Life Insurance Co.*, 437.

§ 84.1. Vehicles Covered by Liability Insurance; "Substitution" Provision

An automobile owned by the wife and involved in a collision while being operated by the husband was a "temporary substitute automobile" within the meaning of a policy issued to the husband where the husband was using the automobile as a substitute for an owned automobile which was being repaired. *Nationwide Insurance Co. v. Taylor*, 76.

INTOXICATING LIQUOR

§ 2.4. Grounds for Revocation of Permits

The Board of Alcoholic Control could properly revoke permits previously issued to petitioner in Blowing Rock on the ground that the petitioner was not a "restaurant." *Pie in the Sky v. Board of Alcoholic Control*, 655.

§ 2.6. Procedure for Revocation of Permits

In reviewing a decision of the A.B.C. Board revoking permits issued to petitioner, the court properly struck from the petition for judicial review allegations relating to the Board's decisions in other similar cases. *Pie in the Sky v. Board of Alcoholic Control*, 655.

JUDGMENTS

§ 20. Setting Aside Particular Kinds of Judgments

Trial court did not abuse its discretion in setting aside only that portion of a judgment for which there was both excusable neglect and a meritorious defense. **Emdur Metal Products v. Super Dollar Stores**, 668.

§ 36.6. Conclusiveness of Judgments as Estoppel; Master and Servant

Plaintiff's claim against defendant physician for negligent treatment of plaintiff while he was an inmate of the Department of Corrections was barred by an award made to plaintiff by the Industrial Commission in an action under the Tort Claims Act against defendant's employer. *Brown v. Vance*, 387.

§ 37.4. Preclusion or Relitigation of Judgments in Particular Proceedings

Ruling of the Employment Security Commission that plaintiff was entitled to unemployment compensation benefits upon his discharge as golf coach at Wake Forest University was not res judicata in plaintiff's action for breach of his contract of employment. *Roberts v. Wake Forest University*, 430.

KIDNAPPING

§ 1. Definitions; Elements of Offense

An indictment charging the defendant with kidnapping was not fatally defective even though it failed to allege the element of lack of consent, the age of the victim, and failed to correctly spell the name of the defendant. *S. v. Froneberger*, 148.

KIDNAPPING — Continued

False imprisonment is a lesser included offense of kidnapping and could properly be submitted to the jury where kidnapping was charged in the indictment. *S. v. Irwin*, 305.

§ 1.1. Competency of Evidence

It was not error to admit evidence pertaining to the murder of a person whom defendant was to have aided in kidnapping. *S. v. Froneberger*, 148.

In a prosecution for kidnapping for the purpose of facilitating murder, it was not error for the court to admit evidence that on the date the victim's body was found a receipt and bag from a restaurant were found at the scene even though it was stipulated that the body found was the body of the victim. *Ibid.*

LANDLORD AND TENANT

§ 8.3. Liability of Landlord for Injuries; Sufficiency of Evidence to Show Negligence of Landlord

A violation of a section of the Residential Rental Agreement Act pertaining to common areas does not constitute negligence per se, rather a violation is only evidence of negligence. *Lenz v. Ridgewood Associates*, 115.

Evidence on motion for summary judgment presented a material issue of fact as to the negligence of defendant landlords in an action by plaintiff tenant to recover for injuries received when she fell on unlighted steps in an apartment complex. *O'Neal v. Kellett*, 225.

§ 8.4. Liability of Landlord for Injuries; Negligence on Part of Tenant; Knowledge of Dangerous Condition

In an action by tenant who was injured when he slipped and fell on an icy walkway in his apartment complex, it was a jury question whether plaintiff as an ordinary prudent person, exercising reasonable care for his safety, might attempt to leave his apartment on a reasonably necessary mission. *Lenz v. Ridgewood Associates*, 115.

§ 11.1. Covenant Against Assigning or Subletting

A covenant in a lease which allows the tenant to assign the lease or sublet the premises only if he receives the lessor's consent is valid and does not require that the lessor's withholding of consent be reasonable. *Isbey v. Crews*, 47.

§ 13.2. Renewals and Extensions

The right of first refusal of purchase provision in a lease was not an unreasonable restraint on alienation. *Snipes v. Snipes*, 498.

§ 18. Forfeiture for Nonpayment of Rent

Plaintiff's failure to make rental payments did not result in a lease between the parties becoming ineffective as defendant's demand for rent was not clear and unequivocal enough to constitute a demand. *Snipes v. Snipes*, 498.

§ 19. Rent and Actions Therefor

In an action to recove for breach of a lease of premises for use only as physicians' offices and for a dialysis unit, the trial court properly entered summary judgment for plaintiffs for the amount of rent due under terms of the lease. *Isbey v. Crews*, 47.

LARCENY

§ 6. Competency and Relevancy of Evidence

Testimony that defendant, who was charged with conspiracy to commit larceny, dealt regularly in the purchase and resale of stolen goods was admissible to show intent to commit a conspiracy to effect larceny and to show a common plan or scheme for the commission of the crime. *S. v. Powell*, 328.

§ 7.3. Sufficiency of Evidence of Ownership of Stolen Property

The evidence in a larceny case was sufficient to show that tools and equipment stolen from a trailer at a bridge construction site were owned by a construction company as alleged in the indictment. *S. v. Bost*, 612.

§ 7.4. Sufficiency of Evidence; Possession of Stolen Property

Based upon the doctrine of possession of recently stolen property, the State's evidence was sufficient to create a jury question as to defendant's guilt of larceny. *S. v. Carter*, 192.

§ 7.5. Larceny by Trick

In a prosecution for "larceny from the person," the trial court properly failed to instruct on "larceny by trick." *S. v. Robertson*, 659.

§ 7.8. Felonious Breaking and Entering and Larceny; Sufficiency of Evidence

The evidence was sufficient to raise a reasonable inference that defendant broke and entered two premises with intent to commit larceny. *S. v. Quilliams*, 349.

§ 8. Instructions Generally

There was no merit to defendant's argument that the judge failed to charge the jury on the application of the law to the particular allegations in the indictment which charged defendant with conspiracy to commit larceny. *S. v. Powell*, 328.

LIMITATION OF ACTIONS

§ 4.2. Accrual of Negligence Actions

Statute requiring an action against contractors and architects arising out of a defective condition of an improvement to realty to be brought within six years after the performance or furnishing of services and construction does not violate constitutional provisions guaranteeing access to the courts for redress of injuries. *Lamb v. Wedgewood South Corp.*, 686.

§ 8.2. Sufficiency of Notice of Facts Constituting Alleged Fraud

In an action in which plaintiff alleged defendant defrauded him by paying a grossly inadequate consideration for an invention used in defendant's mill and by obtaining a patent for that invention in defendant's name, summary judgment for defendant was proper as the suit was not filed within the three year statute of limitations. *Hiatt v. Burlington Industries*, 523.

§ 16.1. Allegation of Facts Constituting Bar

The trial court erred in entering judgment on the pleadings for defendants in a breach of contract action on the ground that the action was barred by the statute of limitations where it did not appear on the face of the complaint when the alleged breach occurred. *Flexolite Electrical v. Gilliam*, 86.

MANDAMUS

§ 1. Nature and Grounds of the Writ in General

The State had no right to appeal from a verdict of not guilty of a misdemeanor charge in the district court, but the actions of the district judge in setting aside guilty verdicts and entering verdicts of not guilty some five months after the guilty verdicts were entered were reviewable in the appellate court by way of petition for writ of mandamus. *S. v. Surles*, 179.

MARRIAGE

§ 2. Creation and Validity of Marriage

Plaintiff and deceased entered into a valid common law marriage in South Carolina, and plaintiff was the widow of deceased at the time of his death and was entitled to share in his estate. *Bowlin v. Bowlin*, 100.

MASTER AND SERVANT

§ 8.1. Compensation of Employee

Defendant's motion for a directed verdict was properly granted where plaintiff alleged an employment contract with defendant in which defendant was to give plaintiff certain stock in his company in consideration for plaintiff's refusal to accept a tentative offer of employment elsewhere. *Humphrey v. Hill*, 359.

§ 10. Termination of Employment Contract

Plaintiff's discharge as golf coach at Wake Forest University, with or without cause, 16 months after he was orally hired for that position did not constitute a breach of contract. *Roberts v. Wake Forest University*, 430.

§ 10.2. Actions for Wrongful Discharge

Ruling of the Employment Security Commission that plaintiff was entitled to unemployment compensation benefits upon his discharge as golf coach at Wake Forest University was not res judicata in plaintiff's action for breach of his contract of employment. *Roberts v. Wake Forest University*, 430.

§ 32. Employee's Liability for Injuries to Third Persons Generally

Plaintiff's claim against defendant physician for negligent treatment of plaintiff while he was an inmate of the Department of Corrections was barred by an award made to plaintiff by the Industrial Commission in an action under the Tort Claims Act against defendant's employer. *Brown v. Vance*, 387.

§ 49.1. Workers' Compensation; "Employees" within Meaning of Act; Particular Persons

Plaintiff was still an employee of defendant for workers' compensation purposes when she was allegedly assaulted by defendant's president immediately after she had tendered her resignation. *Daniels v. Swofford*, 555.

§ 55.1. Workers' Compensation; Necessity for and What Constitutes Accident

In a workers' compensation case plaintiff's claim for compensation for a lower back strain was properly denied. *Trudell v. Heating & Air Conditioning Co.*, 89.

§ 55.3. Workers' Compensation; Particular Injuries as Constituting Accident

Plaintiff ambulance attendant suffered an injury by accident to a disc of the lumbar spine at the time he lifted a woman patient and removed her from a car. *Locklear v. Robeson County*, 96.

MASTER AND SERVANT – Continued

An assault on plaintiff by her employer's president was an accident arising out of and in the course of her employment where the president and plaintiff were discussing plaintiff's job performance at the time it occurred. *Daniels v. Swofford*, 555.

§ 60. Workers' Compensation; Injuries Sustained While Performing Service Outside Regular Employment or Duties

The Industrial Commission did not err in determining decedent's accident while driving a forklift did not arise out of and in the course of employment. *Hoyle v. Isenhour Brick & Tile Co.*, 675.

§ 81. Workers' Compensation Insurance; Construction of Policy as to Coverage; Insurer's Liability Generally

A workers' compensation insurer's acceptance of premiums from the Employment Security Commission on behalf of a C.E.T.A. worker hired by the Commission and assigned to work for a subcontractor did not estop the insurer from denying that the worker was an employee of the Commission for workers' compensation purposes. *Barrington v. Employment Security Commission*, 638.

§ 83. Cancellation of Workers' Compensation Policies

The Industrial Commission erred in concluding that a financing company and an insurance company complied with N.C.G.S. § 58-60 and effectively cancelled defendant's workers' compensation policy. *Graves v. ABC Roofing Company*, 252.

§ 87. Claim Under Workers' Compensation Act as Precluding Common Law Action

The Workers' Compensation Act precluded plaintiff from asserting a common law action against her corporate employer for the alleged intentional assault on her by a supervisory employee but did not preclude plaintiff from pursuing a common law action against the employee. *Daniels v. Swofford*, 555.

§ 87.1. Claim Under Workers' Compensation Act as Precluding Common Law Action; Cases Not Within Purview of Statute

An employee injured by the intentional tort of a fellow employee may pursue both his workers' compensation and common law remedies, with the employer to be reimbursed to the extent sums recovered in the common law action duplicate sums paid under the Workers' Compensation Act. *Andrews v. Peters*, 124.

§ 93. Proceedings Before Industrial Commission; Parties

Where plaintiff filed one notice of the accident showing defendant as his employer and another notice showing a second individual as his employer, and plaintiff filed a request for hearing only as to defendant, the Industrial Commission erred in determining the claim against the second individual in the proceeding against defendant. *Samuel v. Claude Puckett/Lincoln Used Cars*, 463.

§ 94.2. Workers' Compensation; Award and Judgment of Industrial Commission

In a workers' compensation proceeding, the plaintiffs failed to show that a medical expert's testimony was either disregarded or discounted in arriving at the findings of fact and conclusion of law. *Bingham v. Smith's Transfer Corp.*, 538.

§ 96.4. Workers' Compensation; Review of Facts in Regard to Relation of Injury to Employment

In a workers' compensation proceeding, the Industrial Commission failed to make definitive findings as required by statute where it merely found: "Plaintiff

has not had any additional disability as a result of the injury giving rise hereto." *Barnes v. O'Berry Center*, 244.

The Industrial Commission properly applied the test of determining whether work related strain or exertion was the causing or precipitating factor of the decedent's heart failure and found that plaintiff failed to establish a causal link by finding that, when stricken, decedent "was performing his assigned duties in the customary fashion without interruption of unusualness." *Bingham v. Smith's Transfer Corp.*, 538.

§ 96.5. Workers' Compensation; Specific Instances Where Findings by Industrial Commission are Sufficient

The evidence in a workers' compensation proceeding supported a finding by the Industrial Commission that plaintiff was employed by a third party and not by defendant on the date of the accident. *Samuel v. Claude Puckett/Lincoln Used Cars*, 463.

In a workers' compensation proceeding, the evidence was sufficient to support the Commission's findings that decedent did not experience injury by accident arising out of and in the course of employment when he moved a trailer from a burning building and suffered a heart attack. *Bingham v. Smith's Transfer Corp.*, 538.

§ 99. Workers' Compensation; Attorney's Fees

The evidence did not support an award of attorney fees to plaintiff based on a finding that a workers' compensation claim was defended without reasonable grounds. *Sparks v. Mountain Breeze Restaurant*, 663.

§ 100. Construction and Operation of Employment Security Law in General

The doctrine of res judicata was inapplicable to an adjudication by an unemployment compensation agency. *Roberts v. Wake Forest University*, 430.

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

An employee's behavior constituted "misconduct" within the meaning of G.S. 96-14(2), and the employee was not thereafter entitled to unemployment compensation. *In re Chavis*, 635.

MORTGAGES AND DEEDS OF TRUST

§ 15. Transfer of Property Mortgaged; Right of Transferee

Provisions of a deed of trust on residential property permitting the lender to accelerate maturity of the debt upon a transfer of the property without the written consent of the lender could properly be used by the lender to require a transferee of the property to pay an increased rate of interest in order to assume the loan on the property. *In re Foreclosure of Deed of Trust*, 373.

§ 19. Injunction to Restrain Foreclosure Sale Generally

In an action filed to enjoin the exercise of a power of sale in a deed of trust, the trial court did not err in denying plaintiffs' motion for a preliminary injunction. *DuBose v. Gastonia Mutual Savings and Loan*, 574.

§ 25. Foreclosure by Exercise of Power of Sale in Instrument

In a hearing on the right to foreclose pursuant to the power of sale in a deed of trust, the clerk or judge on appeal could not properly consider the mortgagors' contention that the mortgagee had waived its right to foreclose. *In re Foreclosure of Deed of Trust*, 68.

MORTGAGES AND DEEDS OF TRUST — Continued

§ 31. Report of Foreclosure Sale and Confirmation

The completion of a foreclosure sale of the property in question rendered moot the questions presented on appeal. *DuBose v. Gastonia Mutual Savings and Loan*, 574; *In re Execution Sale of Burgess*, 581.

MUNICIPAL CORPORATIONS

§ 4.6. Housing and Urban Redevelopment; Power of Eminent Domain

Where a Housing Authority sought to purchase respondent's land as part of a series of purchases concerning the building of a low-rent housing project, whether the site petitioner sought to condemn was to be used for the construction of a street or for the construction of drainage and water and sewer lines was not a material fact in dispute. *In re Housing Authority v. Montgomery*, 422.

There was no failure of good faith negotiations by the Housing Authority. *Ibid.*

§ 30.3. Validity of Zoning Ordinances Generally

A zoning ordinance will be declared invalid only where the record demonstrates that it has no foundation in reason and bears no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense. *Graham v. City of Raleigh*, 107.

§ 30.9. Comprehensive Zoning Plan

The plaintiffs failed to prove unlawful contract zoning was involved in the adoption of a zoning ordinance. *Graham v. City of Raleigh*, 107.

The action of the City Council in rezoning an area fell within the purview of the city's comprehensive plan. *Ibid.*

§ 30.22. Procedure for Enactment of Zoning Ordinance; Judgment and Sufficiency of Evidence to Support Judgment

In a suit to determine the validity of a rezoning ordinance, the City Council, by inference at least, determined that the existing circumstances justified the rezoning so as to permit all uses permissible in the new district. *Graham v. City of Raleigh*, 107.

NARCOTICS

§ 1.3. Elements and Essentials of Statutory Offenses

Defendant could be convicted of trafficking in cocaine where the evidence tended to show that defendant sold an undercover agent a mixture of more than 28 grams containing cocaine although only 5.565 grams of the mixture were cocaine. *S. v. Tyndall*, 57.

§ 2. Indictment

There was no fatal variance between an indictment charging defendant with selling between 28 and 200 grams of cocaine and proof that defendant sold a mixture weighing 37.1 grams but containing only 5.565 grams of cocaine. *S. v. Tyndall*, 57.

§ 3.1. Competency and Relevancy of Evidence in General

Testimony that a State's witness had purchased marijuana from defendant prior to the date in question was competent to show a plan or scheme to deal in drugs, but the trial court erred in instructing that the jury could consider such testimony to show defendant's disposition to deal in drugs. *S. v. Bean*, 247.

NEGLIGENCE — Continued

§ 50.1. Negligence in Conditions or Uses of Buildings

In an action to recover for the wrongful death of a motel guest who fell through a window on the sixth floor, the jury could find that the motel owner was the agent of the franchisor or that the franchisor had enough control over the maintenance of the motel that it was negligent in failing to see that the proper type of windows was in place in the motel. *Lamb v. Wedgewood South Corp.*, 686.

§ 52.1. Particular Cases Where Person on Premises Is Invitee

A motel guest who had a room on the seventh floor was still an invitee of the motel while he was in the hall on the sixth floor. *Lamb v. Wedgewood South Corp.*, 686.

§ 57.10. Cases Involving Injuries Where Evidence Is Sufficient

Evidence presented a genuine issue of fact as to the negligence of defendant motel in maintaining a window through which a guest fell to his death with plate glass rather than tempered glass and without any guardrail or other safety devices. *Lamb v. Wedgewood South Corp.*, 686.

PARENT AND CHILD

§ 2.1. Liability of Parent for Death of Child Generally

The provisions of G.S. 1-539.21 allow the personal representative of a deceased minor child to maintain an action for the wrongful death of the child against a parent of the child. *Carver v. Carver*, 716.

§ 8. Liability of Parent for Torts of Child

Defendants were not liable in damages to plaintiff for their son's rape of plaintiff. *Moore v. Crumpton*, 398.

PARTIES

§ 3. Parties Defendant

Although the complaint named Junior Miller Roofing Company as defendant and failed to allege the legal capacity or status of defendant, the court had jurisdiction over the person of Junior Miller in this action. *Rollins v. Miller Roofing Co.*, 158.

PARTITION

§ 10. Title and Rights of Purchaser

Although a commissioner's sale of land owned by minors was confirmed, title to the land did not pass to the purchaser where the purchaser did not tender the purchase price and the commissioner delivered no deed. *Lee v. Barefoot*, 242.

PATENTS

§ 1. Generally

In an action in which plaintiff alleged defendant defrauded him by paying a grossly inadequate consideration for an invention used in defendant's mill and by obtaining a patent for that invention in defendant's name, summary judgment for defendant was proper as the suit was not filed within the three year statute of limitations. *Hiatt v. Burlington Industries*, 523.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 1. Licensing Generally

The State Board of Medical Examiners had authority to issue a temporary license to practice medicine in North Carolina to a physician who had been licensed in Florida and to condition the issuance of a permanent license on her passage of the Federal Licensing Examination, and the physician was not entitled to written notice and opportunity to be heard before the temporary license could be revoked. *Mebane v. Board of Medical Examiners*, 455.

§ 11.1. Malpractice; Standards as Determined by Particular Circumstances

The trial court properly instructed the jury in a medical malpractice action that plaintiff must prove that a reasonably prudent person in plaintiff's condition would reasonably have been expected to withhold her consent to the operation if she had been informed of the circumstances and risks of the procedure. *Simons v. Georgiade*, 483.

§ 15. Malpractice; Competency and Relevancy of Evidence Generally

Trial court properly excluded testimony by plaintiff that she would not have proceeded with the surgery in question had she been fully informed of the possible complications. *Simons v. Georgiade*, 483.

The statement of a physician who treated plaintiff's collapsed lungs and who was a partner with an individual defendant in the defendant Private Diagnostic Clinic that "I'm not the one that punched those . . . holes in your wife's lungs" was competent as an admission against such defendants. *Ibid.*

§ 15.2. Malpractice; Who May Testify as Experts

The exclusion of a plastic surgeon's answers to questions as to whether the cause of plaintiff's collapsed lungs was a deviation from standard medical practice cannot be upheld on the ground that the questions failed to ask whether the cause was a deviation from standard medical practice "in Durham, North Carolina or in similar communities in 1975 and 1976." *Simons v. Georgiade*, 483.

A plastic surgeon was qualified to give expert testimony in a medical malpractice case arising in Durham although he had not completed his training as a plastic surgeon at the time of the incident in question, he had not practiced in this State since 1967, and he had been practicing in hospitals in communities smaller than Durham. *Ibid.*

PLEADINGS

§ 38.3. Motion for Judgment on Pleadings by Defendant

The trial court erred in entering judgment on the pleadings for defendants in a breach of contract action on the ground that the action was barred by the statute of limitations where it did not appear on the face of the complaint when the alleged breach occurred. *Flexolite Electrical v. Gilliam*, 86.

PRINCIPAL AND AGENT

§ 5. Scope of Authority

The selection of a roofing company to install materials sold by defendant to plaintiff was beyond the scope of the authority of defendant's agent, and defendant could not be held liable to plaintiff for negligence of the agent in the selection of a roofing company. *Rollins v. Miller Roofing Co.*, 158.

PRINCIPAL AND SURETY

§ 1. Generally; Nature and Construction of Surety Contract

A provision in a bond noting "defendant desires to give bond to stay execution" did not make the bond a conditional one. *McMullan v. Gurganus*, 369.

PROCESS

§ 9.1. Personal Service on Nonresident Individuals in Another State; Minimum Contacts Test

Evidence in a contract case was insufficient to establish the requisite substantial connection between the transaction and this State to confer in personam jurisdiction. *Russell v. Tenore*, 84.

PUBLIC RECORDS

§ 1. Generally

Records of the Wake County Hospital System, Inc. pertaining to the terms of settlements reached in three actions against it and expense accounts submitted by its president and board of directors are public records which are required by statute to be disclosed. *Publishing Co. v. Hospital System, Inc.*, 1.

RECEIVING STOLEN GOODS

§ 5.1. Sufficiency of Evidence in Particular Cases

State's evidence was sufficient for the jury in a prosecution for receiving stolen tractors. *S. v. Burgess*, 443.

RETIREMENT SYSTEMS

§ 5. Claims of Members

At her death in 1974, a teacher was a public school teacher under a career contract and was a teacher in service as defined by statute; therefore, her beneficiary was entitled to receive statutory death benefits. *Stanley v. Retirement and Health Benefits Division*, 588.

RIOT AND INCITING TO RIOT

§ 2.1. Evidence

Evidence was sufficient to convict defendants of rioting. *S. v. Yarborough*, 52.

ROBBERY

§ 2. Indictment

The armed robbery statute does not require that the name of a person in attendance at a store during a robbery be set out in the bill of indictment. *S. v. Rankin*, 478.

§ 4.2. Common Law Robbery Cases Where Evidence Held Sufficient

Where there is evidence that the robber wielded a dangerous weapon, testimony by the victim that he was scared is sufficient to meet any requirement that the victim be endangered or threatened. *S. v. Irwin*, 305.

ROBBERY — Continued

§ 4.3. Armed Robbery Cases Where Evidence Held Sufficient

The trial court properly denied defendant's motion to dismiss a charge of armed robbery for insufficiency of the evidence. *S. v. Reid*, 72.

§ 5.3. Instructions Relating to Common Law Robbery

A defendant did not show prejudice in the court's giving a hypothetical example contrasting a temporary and permanent taking in response to a request by a juror. *S. v. Irwin*, 305.

§ 5.4. Instructions on Lesser Included Offenses

The trial court properly refused to submit instructions of larceny and of unauthorized use of a motor conveyance. *S. v. Reid*, 72.

The trial court erred in failing to submit to the jury the charge of assault, a lesser included offense of attempted common law robbery. *S. v. Whitaker*, 666.

§ 6.1. Sentence

The trial court rendered sentences for murder and robbery which fell within the appropriate statutory limits. *S. v. Conard*, 63.

RULES OF CIVIL PROCEDURE

§ 37. Failure to Make Discovery; Consequences

There was no abuse of discretion in the court's decision not to dismiss plaintiffs' actions for failure to comply with a discovery order. *Stilley v. Automobile Enterprises*, 33.

The court improperly granted defendant's motion in limine whereby it limited plaintiffs' expert witnesses. *Ibid.*

§ 41.1. Voluntary Dismissal

Where, after defendant filed motions to dismiss plaintiffs' cases with prejudice due to the plaintiffs' failure to comply with a court's order of compulsory reference, but before the judge ruled on defendant's motions for involuntary dismissal, plaintiffs filed a notice of voluntary dismissal of both actions pursuant to Rule 41(a), the trial court erred in refusing to recognize plaintiffs' notice of voluntary dismissal. *Lowe v. Bryant and Lowe v. Bryant*, 608.

§ 50.1. Motions for Directed Verdicts; Relation to Other Rules

Defendants waived their ability to object on appeal to plaintiff's failure to comply with Rule 50(a) when they failed to object at trial. *Snipes v. Snipes*, 498.

§ 50.3. Grounds for Directed Verdict

There was no merit to plaintiff's contention that defendant failed to state specific grounds for his motion for directed verdict as required by G.S. 1A-1, Rule 50(a). *Humphrey v. Hill*, 359.

§ 56. Summary Judgment

Unpleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment. *Ridings v. Ridings*, 630.

SEARCHES AND SEIZURES — Continued

fendant's statement in determining that there was probable cause to believe that the pills were contraband and could therefore lawfully seize the pills. *S. v. Gray*, 568.

§ 11. Search and Seizure of Vehicles on Probable Cause

An officer did not violate defendant's constitutional rights when he stopped and detained defendant, searched the car, and eventually arrested him. *S. v. Adams*, 599.

§ 12. Stop and Frisk Procedures

An officer was justified in making an investigatory stop and detention of defendant based upon information that defendant was driving a vehicle with expired license tags, and the officer then had probable cause to arrest defendant and could lawfully search defendant's person as an incident to the lawful arrest. *S. v. Gray*, 568.

§ 23. Affidavit Based on Tip from Informer; Sufficient Showing of Probable Cause

An affidavit based on information from a confidential informant was sufficient to sustain issuance of a warrant to search an apartment for marijuana, and an averment that defendant lived at this apartment, even if false, would not invalidate the warrant. *S. v. Reddick*, 646.

STATE

§ 9. Amount of Recovery Under Tort Claims Act; Recovery from Other Tortfeasors and Insurance Carriers

Plaintiff's claim against defendant physician for negligent treatment of plaintiff while he was an inmate of the Department of Corrections was barred by an award made to plaintiff by the Industrial Commission in an action under the Tort Claims Act against defendant's employer. *Brown v. Vance*, 387.

TAXATION

§ 7.2. Particular Purposes as Public

The expenditure of funds by a county board of education for fuel and electricity to heat, air condition and light a school building while it was used for an extended day program operated by a school sponsored committee was for a public purpose. *Kiddie Korner v. Board of Education*, 134.

TRESPASS TO TRY TITLE

§ 2.1. Title from Common Source

In an action in which both plaintiffs and defendants claimed title through a common source, defendants could show foreclosure of a mortgage on the property and conveyance of the property to a third person pursuant to the foreclosure sale so as to divest the title of the person through whom plaintiffs claimed where the third person acquired his title after the common source. *Kennedy v. Whaley*, 321.

TRIAL

§ 3.2. Particular Grounds for Motion for Continuance

Defendant failed to show the trial judge abused his discretion in denying his motion for continuance. *Self v. Self*, 651.

UNIFORM COMMERCIAL CODE — Continued

§ 8. The Sales Contract; Statute of Frauds

Where defendant did not qualify as a merchant under the commercial code and a sale involved an amount greater than $500, the contract was required to be in writing. *Cudahy Foods Company v. Holloway*, 626.

§ 45. Default and Enforcement of Security Interest

An alleged agreement that no deficiency judgment would be sought if defendant debtor would not contest the repossession of the secured chattel was not supported by consideration. *Arden Equipment Co. v. Rhodes*, 470.

The ten percent sanction against a creditor who disposes of collateral without complying with the statutory requirements applies only when the collateral is consumer goods. *Church v. Mickler*, 724.

§ 46. Public Sale of Collateral; Requirement of Commercial Reasonableness

In an action to recover a deficiency judgment, the evidence on motion for summary judgment presented a genuine issue of material fact as to whether the sale of the secured chattel, a backhoe, was commercially reasonable. *Arden Equipment Co. v. Rhodes*, 470.

A creditor's private sale of collateral was not commercially unreasonable because the creditor immediately bought back some of the items of collateral from the purchaser. *Church v. Mickler*, 724.

§ 47. Public Sale of Collateral; Notice

A creditor's failure to notify the debtor of the time after which disposition of the collateral was to be made by private sale did not absolutely bar the creditor's right to a deficiency judgment, but the debt will be credited with the amount that reasonably could have been obtained by a commercially reasonable sale. *Church v. Mickler*, 724.

In an action to recover a deficiency judgment after plaintiff creditor's failure to give notice to the debtor of the private sale of the collateral, plaintiff's evidence was sufficient to overcome the presumption that the collateral was worth the amount of the debt. *Ibid.*

VENDOR AND PURCHASER

§ 1. Requisites and Validity of Contracts to Convey and Options

The right of first refusal of purchase provision in a lease was not an unreasonable restraint on alienation. *Snipes v. Snipes*, 498.

WITNESSES

§ 1.1. Mental Capacity

The evidence was sufficient to support the trial court's determination that a rape victim had the requisite mental capacity to testify. *S. v. McMillan*, 25.

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina